

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 7

[Docket No. FR-4607-F-02]

RIN 2501-AC73

**Equal Employment Opportunity;
Updating of EEO Policies and
Procedures**

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations governing the Department's equal employment opportunity policies, procedures and programs. The amendments update the Department's current EEO regulations and make them consistent with recently issued regulations of the Equal Employment Opportunity Commission (EEOC). The final rule follows publication of an October 26, 2000 proposed rule, and takes into consideration the public comment received on the proposed rule.

DATES: *Effective Date:* May 23, 2001.

FOR FURTHER INFORMATION CONTACT: William C. King, Director, Office of Departmental Equal Employment Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, (202) 708-5921. (This telephone number is not toll-free.) Persons with hearing or speech impairments may access this number via TTY by contacting the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background—The October 26, 2000 Proposed Rule

On October 26, 2000 (65 FR 64320), HUD published a proposed rule for public comment proposing to update its regulations in 24 CFR part 7 pertaining to the Department's equal employment opportunity policies, procedures and programs. The amendments contained in the October 26, 2000 proposed rule would conform HUD's regulations to the recently amended EEOC regulations in 29 CFR part 1614. The revised part 1614 regulations became effective on November 9, 1999 (see final rule issued July 12, 1999, at 64 FR 37644). In addition, the October 26, 2000 proposed rule would provide HUD's current and former employees and applicants with a more complete guide to the processing of equal employment opportunity (EEO) complaints. The most significant change contained in the October 26, 2000 proposed rule was the establishment of an Alternative Dispute Resolution (ADR) program designed to promote

impartial, fair and early resolution of EEO complaints.

II. This Final Rule

This final rule makes effective the policies and procedures of the October 26, 2000 proposed rule, and takes into consideration the public comment received on the proposed rule. The amendments made by this final rule provide for regulations that supersede the last revision of 24 CFR part 7, issued on April 29, 1996. The final rule adopts the substance of the October 26, 2000 proposed rule without change, but makes a few non-substantive changes to the ADR provisions at § 7.5 for purposes of clarity.

III. Discussion of the Public Comment Received on the October 26, 2000 Proposed Rule

The public comment period for the proposed rule closed on November 27, 2000. By close of business on that date, HUD had received a single public comment from a private individual. The commenter recommended that the final rule expand the provision of equal employment opportunity and protection from discrimination to include sexual orientation. The commenter wrote that this change is necessary for HUD to achieve an environment where any employee may hope to advance based on merit and without fear of discrimination or harassment. After careful consideration, HUD has decided not to adopt the suggestion made by the public commenter.

This HUD rule is designed to implement EEOC's revised regulations at 29 CFR 1614 governing federal sector employment. The EEOC derives its authority and jurisdiction over federal sector employment discrimination from EEO statutes that prohibit discrimination based on race, color, national origin, religion, disability, age and sex. Sexual orientation is not currently covered by any federal statutory provision.

However, HUD is committed to providing a workplace that is free from all forms of discrimination, including discrimination based on sexual orientation. In keeping with this commitment, the Department, on January 18, 2000, promulgated and disseminated its most recent EEO Policy Statement which states, in part, that discrimination based on sexual orientation is not acceptable and will not be tolerated by anyone at HUD. This statement is consistent with Executive Order 13087.

IV. Findings and Certifications

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This final rule involves internal HUD operations and pertains only to current/former employees and applicants for employment at HUD.

Environmental Impact

In accordance with 24 CFR 50.19(c)(3) of HUD's regulations, this final rule provides for the enforcement of nondiscrimination within HUD, and therefore is categorically excluded from the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347).

Executive Order 13132, Federalism

This rule does not have Federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (Pub.L. 104-4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule would not impose any Federal mandates on any State, local, or tribal government, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 7

Administrative practice and procedure, Equal employment opportunity, Organization and functions (Government agencies).

Accordingly, 24 CFR part 7 is revised to read as follows:

PART 7—EQUAL EMPLOYMENT OPPORTUNITY; POLICY, PROCEDURES AND PROGRAMS

Subpart A—Equal Employment Opportunity Without Regard to Race, Color, Religion, Sex, National Origin, Age, Disability or Reprisal

General Provisions

Sec.

7.1 Policy.

7.2 Definitions.

7.3 Designations.

7.4 Affirmative employment programs.

7.5 EEO Alternative Dispute Resolution Program.

Responsibilities

- 7.10 Responsibilities of the Director of EEO.
- 7.11 Responsibilities of the EEO Officers.
- 7.12 Responsibilities of the EEO Counselors.
- 7.13 Responsibilities of the Assistant Secretary for Administration.
- 7.14 Responsibilities of the Office of Human Resources.
- 7.15 Responsibilities of managers and supervisors.
- 7.16 Responsibilities of employees.

Pre-Complaint Processing

- 7.25 Pre-complaint processing.
- 7.26 EEO Alternative Dispute Resolution Program.

Complaints

- 7.30 Presentation of complaint.
- 7.31 Who may file a complaint, with whom filed, and time limits.
- 7.32 Representation and official time.
- 7.33 Contents of the complaints.
- 7.34 Acceptability.
- 7.35 Processing.
- 7.36 Hearing.
- 7.37 Final action.
- 7.38 Appeals.

Other Complaint and Appeal Procedures

- 7.39 Negotiated grievance, MSPB appeal and administrative grievance procedures.

Remedies, Enforcement and Compliance

- 7.40 Remedies and enforcement.
- 7.41 Compliance with EEOC final decisions.
- 7.42 Enforcement of EEOC final decisions.
- 7.43 Settlement agreements.
- 7.44 Interim relief.

Statistics and Reporting Requirements

- 7.45 EEO group statistics and reports.

Subpart B—[Reserved]

Authority: 29 U.S.C. 206(d), 633a, 791 and 794; 42 U.S.C. 2000e note, 2000e-16, 42 U.S.C. 3535(d); E.O. 11478 of Aug. 8, 1969; 34 FR 19285, Aug. 12, 1969; E.O. 10577, 3 CFR 1954-1958; E.O. 11222, 3 CFR 1964-1965.

Subpart A—Equal Employment Opportunity Without Regard to Race, Color Religion, Sex, National Origin, Age, Disability or Reprisal

General Provisions

§ 7.1 Policy.

The Department's equal employment opportunity policy conforms with the policies expressed in title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4); the Civil Rights Act of 1991; Executive Order 11478 of 1969 (34 FR 12985, 3 CFR 1966-1970 Comp., p. 803); the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. *et seq.*); the Equal Pay Act of

1963 (29 U.S.C. 206d); sections 501 and 504 of the Rehabilitation Act of 1973, and reaffirming Executive Order 12871 (29 U.S.C. 791, 794); the Civil Service Reform Act of 1978 (5 U.S.C. 1101 *et seq.*); Executive Order 13087 of 1998 (63 FR 30097); and with the EEOC's implementing regulations, codified under 29 CFR part 1614. It is HUD's policy to provide equality of opportunity in employment in the Department for all persons; to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, disability or reprisal in all aspects of its personnel policies, programs, practices, and operations and in all its working conditions and relationships with current or former employees and applicants for employment; and to promote the full realization of equal opportunity in employment through continuing programs of affirmative employment at every level within the Department. Procedures for filing EEO claims are found in the EEOC regulations at 29 CFR part 1614. HUD is committed to promoting affirmative employment through the removal of barriers and by positive actions at every level, including the early resolution of EEO disputes.

§ 7.2 Definitions.

AE means affirmative employment.

Aggrieved individual means a person who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. The terms "aggrieved individual" and "aggrieved person", as used in this part, are interchangeable.

Alternative Dispute Resolution (ADR) means a variety of approaches used to resolve conflict rather than traditional adjudicatory or adversarial methods such as litigation, hearings, and administrative processing and appeals. The approaches used may include, but are not limited to: negotiation, conciliation, facilitation, mediation, fact-finding, peer review, mini-trial, arbitration, or ombudsman.

Claim means action the agency has taken or is taking that causes the aggrieved person to believe that he or she is a victim of discrimination. This term replaces the formerly used term "allegation" and is used interchangeably with the term "issue".

Comparable means a person designated as head of an organizational unit that is analogous to that headed by an Assistant Secretary.

Conflict-of-interest complaint means an EEO complaint arising in the Department which names the Director of EEO or the Deputy Director of EEO, or

both, as the responsible management officials.

Director of Equal Employment Opportunity (EEO) means the Director of HUD's Office of Departmental Equal Employment Opportunity who is also designated as the Director of EEO in this part.

Disability means the same as the term "handicap" under EEOC's regulations at 29 part 1614.

Discrimination Complaint Manager (DCM) means the designee, appointed by the Assistant Secretary (EEO Officer) or the Assistant Secretary's comparable, who assists the EEO Officer in discharging his or her EEO responsibilities and is responsible for carrying out the EEO discrimination complaint process for the organizational unit pursuant to the applicable civil rights laws, the regulations at 29 CFR part 1614 and this part.

Diversity Program Manager means the designee appointed by the Assistant Secretary (EEO Officer) or the Assistant Secretary's comparable who assists the EEO Officer in promoting appreciation of the contributions of women, minorities, and persons with disabilities, and in promoting the value of all Department employees.

EEO means equal employment opportunity.

EEO Officer Pro Tem means the Chief of Staff or an official at a neutral federal agency designated to process an EEO claim that would be a conflict of interest for the Director of EEO or the Deputy Director of EEO, or both.

EEOC and *Commission* mean the Equal Employment Opportunity Commission.

Final action means the Department's issuance of a final decision or final order.

Final decision means HUD's determination of the findings of fact and law on the merits or the procedural issues of an EEO complaint based upon the available record.

Final order means the Department's final action which states whether the Department will fully implement the decision or order of an EEOC Administrative Judge, or both.

Neutral means an individual who mediates or otherwise functions to specifically aid the parties in resolving the issues, and has no official, financial, or personal conflict of interest with respect to the issues being disputed, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

Organizational unit means the jurisdictional area of the Department's program offices such as the Office of the

Secretary, the Office of General Counsel, etc.

Record means all documents related to the EEO complaint as outlined in EEOC Management Directive 110.

Reprisal means the action taken against a current or former employee or applicant in retaliation for previous EEO participation in protected EEO activity or for opposing employment practice or policy illegal under EEO statutes. The terms "reprisal" and "retaliation" are used interchangeably.

§ 7.3 Designations.

(a) *Director of Equal Employment Opportunity.* The Director of the Office of Departmental Equal Employment Opportunity (ODEEO) is designated as the Director of EEO, except for complaints naming the Director or Deputy Director of Departmental EEO, or both, as the responsible management official(s) in complaints arising in the ODEEO which present a conflict-of-interest. In such cases, the Director of EEO may:

- (1) Transfer the case to the Chief of Staff for processing; or
- (2) On behalf of the Department, enter into an agreement with one or more federal agencies for processing of the Department's conflict-of-interest cases by the designated federal official chosen to serve as the EEO Officer Pro Tem.

(b) *Deputy Director of Equal Employment Opportunity.* The Deputy Director of the ODEEO is designated as the Deputy Director of EEO and acts in the absence of the Director of EEO.

(c) *Equal Employment Opportunity Officer.* The Director of EEO shall designate the Assistant Secretary or the Assistant Secretary's comparable as EEO Officer for the Department's respective organizational units for complaints arising in the respective Assistant Secretary's or Assistant Secretary's comparable organizational unit.

(d) *Equal Employment Opportunity Discrimination Complaint Manager (DCM).* Each Assistant Secretary (EEO Officer) shall designate a DCM to represent the organizational unit in EEO matters and assist the EEO Officer in carrying out EEO responsibilities. The DCM shall be the Administrative Officer (AO) for the organizational unit or another designee of the EEO Officer.

§ 7.4 Affirmative employment programs.

The Office of the Secretary, each Assistant Secretary, the General Counsel, the Inspector General, the President of the Government National Mortgage Association, the Chief Financial Officer, the Chief Procurement Officer, the Chief Information Officer, the Director of Lead Hazard Control, the

Director of the Office of Multifamily Housing Assistance Restructuring, the Director of the Departmental Enforcement Center, the Director of the Real Estate Assessment Center, and the Director of the Office of Federal Housing Enterprise Oversight and other positions that may be established and are comparable to an Assistant Secretary, shall establish, maintain and carry out a plan of affirmative employment (AE) to promote equal opportunity in every aspect of employment policy and practice. Each plan shall identify instances of under-representation of minorities, women and persons with disabilities, recognize situations or barriers that impede equality of opportunity, and include objectives and action items targeted to eliminate any employment, training, advancement, and retention issues which adversely affect minorities, women and persons with disabilities. Each plan must be consistent with 29 CFR part 1614, is subject to approval by the Director of EEO and shall be developed within the framework of Department-wide guidelines published by the Director of EEO.

§ 7.5 EEO Alternative Dispute Resolution Program.

In accordance with the Secretary's Policy Statement regarding Alternative Dispute Resolution (ADR) located on the Department's website and 29 CFR 1614.102(b)(2), the Department shall establish and maintain an ADR program that addresses, at a minimum, EEO matters at the pre-complaint and formal complaint stages of the EEO process. ADR is a non-adversarial process that does not render a judgment with respect to the dispute. With the assistance of an impartial and neutral third party, ADR offers parties involved the opportunity to reach early and informal resolution of EEO matters in a mutually satisfactory fashion.

(a) *Program availability.* In appropriate cases, the EEO ADR Program is made available to an aggrieved person or Complainant during the pre-complaint and the formal complaint processing periods. Participation in the program by the parties is knowing and voluntary. Agency managers have a duty to cooperate in an ADR proceeding once the agency has determined that a matter is appropriate for ADR and the aggrieved person/complainant has elected to participate in ADR. At the formal stage, the complainant may request participation in the ADR Program. However, a determination of the appropriateness of ADR at the time of the request will be made on a case-

by-case basis by the appropriate ODEEO official designated by the Director of EEO and does not affect the processing of the formal complaint, including the investigation.

(b) *EEO ADR program procedures.* The ODEEO shall establish and maintain all EEO ADR Program procedures which include appropriate consultations.

(c) *ADR training.* Training and education on the EEO ADR Program will be provided to all Department employees, managers and supervisors, and other persons protected under the applicable laws.

(d) *Pre-complaint ADR election process.* The appropriateness of a particular EEO matter or EEO complaint for the Department's ADR Program shall be determined on a case-by-case basis by the ODEEO official designated by the Director of EEO. The EEO Counselor shall advise the aggrieved person that the aggrieved person may choose between participation in the EEO ADR Program or the EEO traditional counseling activities provided for at 29 CFR 1614.105(c). The aggrieved person's election to proceed through ADR instead of EEO counseling is final.

(e) *ADR counseling requirements.* (1) The minimum information to be provided by the EEO Counselor about the Department's ADR Program includes the following:

- (i) Definition of the term ADR;
- (ii) An explanation of the stages in the EEO process at which ADR may be available;
- (iii) A description of the ADR technique(s) used by the Department;
- (iv) A description of how the program is consistent with the EEO ADR core principles that ensure fairness and require voluntariness, neutrality, confidentiality, and enforceability;
- (v) An explanation of procedural and substantive alternatives; and
- (vi) All time frames for the EEO administrative process including ADR.

(2) The EEO Counselor shall have no further involvement in resolving the EEO matter after the referral to the EEO ADR program.

(f) *Extension of pre-complaint processing period for ADR.* Where the aggrieved person chooses to participate in ADR, the pre-complaint processing period shall not exceed 90 days from the date of initial contact with the EEO Office.

(1) The aggrieved person shall be informed in writing by the EEO Counselor, no later than the thirtieth day after contacting the EEO Counselor, of the right to file a discrimination complaint, if the matter presented by

the aggrieved person has not been resolved.

(2) Prior to the end of the 30-day period from the date of initial contact with the EEO Office, the aggrieved person may agree, in writing, with the Department to postpone the final interview and extend the pre-complaint period for an additional period of no more than 60 days if the matter is not resolved. If the matter has not been resolved before the conclusion of the agreed extension, the notice of right to file a discrimination complaint shall be issued no later than the 90th day of initial contact with the EEO Office. The notice shall inform the aggrieved person of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the aggrieved person's duty to assure that the Department is informed immediately if the aggrieved person retains counsel or a representative and if the aggrieved person changes address.

(g) *EEO ADR Program's relationship to negotiated grievance, MSPB appeal and administrative grievance procedures.* Participation in the EEO ADR program does not preclude the aggrieved person or Complainant from exercising rights under any of the Department's other complaint or appeal procedures, when no resolution is reached. When participation in ADR results in a settlement agreement and the aggrieved person or Complainant believes the Department has failed to comply with its terms, the aggrieved person or Complainant may exercise the right of appeal pursuant to 29 CFR 1614.504.

Responsibilities

§ 7.10 Responsibilities of the Director of EEO.

The Director and Deputy Director of EEO are responsible for:

- (a) Advising the Secretary with respect to the preparation of plans, procedures, regulations, reports, and other matters pertaining to the Government's equal employment opportunity policy and the Department's EEO/ADR/AE programs;
- (b) Developing and maintaining plans, procedures, and regulations necessary to carry out the Department's EEO programs, including a Department-wide program of affirmative employment developed in coordination with other officials; and approving programs of affirmative employment established by each EEO Officer or comparable organizational head;
- (c) Evaluating, at least annually, the sufficiency of each organizational unit's

EEO/ADR/AE program and providing reports thereon to the Secretary with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibility;

(d) Appraising the Department's personnel operations at regular intervals to ensure their conformity with the policies of the Government's and the Department's EEO program;

(e) Making changes in programs and procedures designed to eliminate discriminatory practices and improve the Department's EEO/ADR/AE programs;

(f) Selecting EEO Counselors;

(g) Providing for counseling by an EEO Counselor to a current or former employee or applicant for employment who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, age, disability, or in retaliation for participation in protected EEO activity; or for opposing a policy or practice illegal under EEO statutes;

(h) Providing for the prompt, fair and impartial processing of individual complaints involving claims of discrimination within the Department subject to 29 CFR part 1614;

(i) Making the final decision on discrimination complaints and ordering such corrective measures as may be necessary, including disciplinary action warranted in circumstances where an employee has been found to have engaged in a discriminatory practice.

(j) Executing settlement agreements to resolve EEO complaints;

(k) Making available an ADR Program for EEO matters at both the pre-complaint and formal EEO complaint stages of the EEO administrative process;

(l) Developing and providing annual mandatory EEO and ADR training for EEO Counselors, and all supervisors and managers in conjunction with HUD Training Academy, Office of Human Resources, and the Office of General Counsel, other federal agencies and resources with ADR information and expertise; and

(m) Publicizing to all employees and posting at all times the names, business telephone numbers and addresses of the EEO Counselors, EEO Director, EEO Officers, and Diversity Program Managers, notice of EEO complaint processing time limits and the requirements of contacting an EEO Counselor and completing the counseling phase before filing a complaint.

§ 7.11 Responsibilities of the EEO Officers.

Each EEO Officer is responsible for:

(a) Advising the Director of EEO on all matters affecting the implementation of the Department's EEO/ADR/AE policies and programs in the organizational unit;

(b) Developing and maintaining a program of affirmative employment for the organizational unit and ensuring that the program is carried out in an exemplary manner;

(c) Publicizing to all employees of the organizational unit the name and address of the Director of EEO, the EEO Officer(s), and the EEO Counselor(s), the EEO Discrimination Complaint Manager(s), the Affirmative Employment Program (AEP) Manager, the Diversity Program Manager, ADR Officials, and the EEO complaint procedures;

(d) Informing all managers and supervisors in the organizational unit of the responsibilities and objectives of the EEO Counselors, DCMs, ADR officials, EEO investigators, and of the EEO complaint process and the importance of cooperating and coordinating with all appropriate Department personnel to informally find solutions to problems brought to the EEO Officer's attention by current or former employees and applicants;

(e) Evaluating and documenting the performance by the managers and supervisors in the organizational unit in carrying out their responsibilities under this subpart;

(f) Seeking a resolution of EEO matters brought to their attention;

(g) Designating a senior level Affirmative Employment Program (AEP) Manager in Headquarters responsible for preparing the AEP plan; managing the plan; providing advice and guidance to managers and supervisors in removing barriers to EEO/AE/ADR and in implementing all of their EEO/AE responsibilities; and reviewing all recruitment and personnel actions taken by managers and supervisors to ensure the achievement of AEP objectives;

(h) Designating the Administrative Officer (AO) or other Headquarters organizational unit official as the DCM to manage and direct the organization's EEO responsibilities. In making such designation, the EEO Officer shall ensure that the designation as the DCM does not otherwise conflict with the official duties of the employee so designated;

(i) Designating a senior level Diversity Program Manager in HUD Headquarters to manage and direct the organization's Diversity Program and providing resources for diversity activities for its employees;

(j) Ensuring the successful operation of the EEO/AE/ADR Program by requiring management's support;

(k) Approving and making reasonable accommodation to the known physical or mental limitations of qualified employees with disabilities unless the accommodation would impose an undue hardship on the operations of Department; and

(l) Adhering to and implementing the Department's policy on religious accommodation.

§ 7.12 Responsibilities of the EEO Counselors.

The EEO Counselor is responsible for counseling and attempting resolution of matters brought to the EEO Counselor's attention pursuant to §§ 7.25 and 7.30 and 29 CFR part 1614, by any current or former employee or applicant for employment who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, age, disability or in reprisal for participating in EEO activity or opposing policies and practices that are illegal under the EEO statutes. These responsibilities include, but are not limited to:

(a) Advising individuals, in writing, of their rights and responsibilities, including:

(1) The right to request a hearing and decision from EEOC or an immediate final decision from the agency after an investigation;

(2) Election rights;

(3) The right to file a notice of intent to sue and a lawsuit under the ADEA instead of an administrative complaint of age discrimination; and

(4) The duty to mitigate damages;

(5) Relevant time frames.

(b) EEO Counselors shall advise aggrieved persons that only the claims raised in pre-complaint counseling (or issues or claims like or related to claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the Department.

(c) EEO Counselors shall advise aggrieved persons of their duty to keep the Department and EEOC informed of their current address and the name of the representative, if applicable, and to serve copies of hearing and appeal notices on the Department.

(d) EEO Counselors shall provide to the aggrieved person the notice of the right to file an individual or a class complaint. If the aggrieved person informs the EEO Counselor that the aggrieved person wishes to file a class complaint, the EEO Counselor shall explain the class complaint procedures and the responsibilities of a class agent and provide class complaint counseling

prior to the issuance of the notice of right to file a complaint.

(e) EEO Counselors shall advise aggrieved persons that, where the Department agrees to offer ADR in a particular case, they may choose between participation in the EEO ADR Program and the traditional EEO counseling process. The EEO Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person initially contacted the Department's EEO office to request counseling, unless the aggrieved person agrees to a longer counseling period or if the aggrieved person elects the ADR program and agrees to extend the initial 30-day pre-complaint period for an additional period of no more than 60 days.

(f) If the matter has not been resolved before the conclusion of the agreed extension, the EEO Counselor shall issue the notice of right to file a discrimination complaint no later than the 90th day of the aggrieved person's initial contact with the EEO Office. The notice shall inform the aggrieved person of the right to file a discrimination complaint within 15 days of receipt of the notice; of the appropriate official with whom to file a complaint; and of the aggrieved person's duty to assure that the Department is informed immediately if the aggrieved person retains counsel or a representative and if the aggrieved person changes address.

(g) EEO Counselors shall prepare a report sufficient to document the fact that the required counseling actions were taken and an attempt to resolve any jurisdictional questions was made. The report shall include a precise description of the claim(s) and the basis(es) identified by the aggrieved person; pertinent documents gathered during the inquiry, specific information concerning timeliness of the initial counseling contact, and a statement as to whether a resolution attempt was undertaken, and if so, the disposition.

(h) EEO Counselors shall not attempt in any way to dissuade the aggrieved person from filing an EEO complaint. The EEO Counselor shall not reveal to the responsible management officials the identity of an aggrieved person who consulted the EEO Counselor, except when authorized to do so by the aggrieved person, or until the Department has received a formal discrimination complaint from that person involving that same matter.

§ 7.13 Responsibilities of the Assistant Secretary for Administration.

The Assistant Secretary for Administration shall:

(a) Provide leadership in developing and maintaining personnel management policies, programs, automated systems and procedures which will promote continuing affirmative employment to ensure equal opportunity in the recruitment, selection, placement, training, awards, recognition and promotion of employees, including an applicant flow tracking system;

(b) Provide positive assistance and guidance to organizational units and personnel offices to ensure the effective implementation of the personnel management policies, programs, automated systems, and EEO procedures;

(c) Participate at the national level with other government departments and agencies, other employers, and other public and private groups, in cooperative action to improve employment opportunities and community conditions which affect employability;

(d) Prepare and implement plans for recruitment and reports in accordance with the Federal Equal Opportunity Recruitment Program (FEORP) and the Disabled Veterans Affirmative Action Program (DVAAP);

(e) Provide reasonable accommodations to the known physical or mental limitations of qualified employees with disabilities unless the accommodations would impose an undue hardship on the operation of the Department's programs;

(f) Adhere to and implement the Department's policy on religious accommodation;

(g) Designate a senior level Disability Program Manager to promote EEO/ADR/AE for persons with disabilities; to assure the accessibility of all HUD facilities and programs; and to manage the resources for providing reasonable accommodation;

(h) In conjunction with the Director of EEO, provide and coordinate mandatory EEO Counselor training;

(i) Provide and coordinate mandatory supervisors' and managers' EEO/AE/ADR training;

(j) Provide applicant data to ODEEO for analysis; and

(k) Designate a DCM to represent the organizational unit in EEO matters. The DCM shall be the AO for the organizational unit or another designee of the EEO Officer.

§ 7.14 Responsibilities of the Office of Human Resources.

In accordance with guidelines issued by the Assistant Secretary for Administration, Human Resources Officers shall:

(a) Appraise job structure and employment practices to ensure equality

of opportunity for all employees to participate fully on the basis of merit in all occupations and levels of responsibility;

(b) Communicate the Department's EEO policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, disability, or age and solicit their recruitment assistance on a continuing basis;

(c) Upon request, provide personnel information to EEO Counselors and other authorized officials or agents of the agency who are involved in the processing of a discrimination complaint;

(d) Evaluate hiring methods and practices to ensure impartial consideration for all job applicants;

(e) Ensure that new employee orientation programs contain appropriate references to the Department's EEO/ADR/AE policies, procedures and programs and accomplishment of EEO objectives under the Department's Performance, Accountability, Communications System (PACS) or other Departmental performance appraisal system;

(f) Participate in the preparation and distribution of such educational materials as may be necessary to adequately inform all employees of their rights and responsibilities as described in this part, including the Department's EEO program directives;

(g) In coordination with the Director of the HUD Training Academy, develop an on-going training program for supervisors and managers to ensure understanding of the Departmental EEO/ADR/AE programs, policy and other requirements which foster effective teamwork and high morale;

(h) In coordination with the Director of the HUD Training Academy, the Office of General Counsel, the Office of Administration and the Director of EEO, develop an on-going training program for managers and supervisors to ensure understanding of the Department's EEO and ADR programs. At a minimum, the training should include:

(1) The Civil Rights Act of 1964 (42 U.S.C. 2000d);

(2) Sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794);

(3) The Administrative Dispute Resolution Act of 1996 (5 U.S.C. 556, 571) and its amendments emphasizing the federal government's interest in encouraging mutual resolution of disputes and the benefits associated with using ADR;

(4) EEOC's regulations and policy guidance concerning EEO, AE and ADR;

(5) The ADR methods employed by the Department;

(6) An explanation of how to draft a settlement agreement that complies with the standards required by ODEEO and 29 CFR part 1614;

(7) An explanation of the recourse available where noncompliance by the Department is alleged; and

(8) Training on EEO policy, programs and procedures;

(i) In coordination with the Director of the HUD Training Academy, the Office of General Counsel, the Office of Administration, and the Director of EEO, the Department may enter into agreements to have EEO/AE/ADR mandatory annual supervisory and management training provided by other federal agencies or other resources;

(j) Decide all personnel actions on merit principles and in a manner which will demonstrate affirmative EEO for the organization;

(k) Ensure to the greatest possible utilization and development of the skills and potential abilities of all employees;

(l) Track applicant flow and promptly take or recommend appropriate action to overcome any impediment to achieving the objectives of the EEO/ADR/AE programs and accomplishing the EEO objectives under the Performance, Accountability, Communications System (PACS) or other Departmental performance appraisal system;

(m) Provide applicant data to ODEEO for analysis; and

(n) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishments in EEO.

§ 7.15 Responsibilities of managers and supervisors.

All managers and supervisors of the Department are responsible for:

(a) Removing barriers to EEO and ensuring that affirmative employment objectives are accomplished in their areas of responsibility;

(b) Evaluating and documenting subordinate managers and supervisors on their performance of EEO/ADR/AE responsibilities;

(c) Encouraging and taking positive steps to ensure respect for and acceptance of minorities, women and persons with disabilities, veterans and others of diverse characteristics in the workforce;

(d) Ensuring the non-discriminatory treatment of all employees and for providing full and fair opportunity for all employees in obtaining employment and career advancement, including support for ADR, the Upward Mobility Program, the Mentoring Program and

the implementation of Individual Development Plans;

(e) Encouraging and authorizing staff participation in the various Diversity Program observances and training opportunities;

(f) Being proactive in addressing EEO/ADR/AE issues, and maintaining work environments that encourage and support complaint avoidance through sound management and personnel practices;

(g) Resolving complaints of discrimination early in the EEO process either independently, or through the use of ADR techniques;

(h) Making reasonable accommodations to the known physical and mental limitations of applicants and employees with disabilities when those accommodations can be made without undue hardship on the business of the Department;

(i) Attending mandatory annual supervisory and management training; and

(j) Adhering to and implementing the Department's policy on religious accommodations.

§ 7.16 Responsibilities of employees.

All employees of the Department are responsible for:

(a) Being informed as to the Department's EEO/ADR/AE programs;

(b) Adopting an attitude of full acceptance and respect for minorities, females, persons with disabilities, veterans and others of diverse characteristics in the workforce, and support for and participation in ADR;

(c) Providing equality of treatment and service to all persons with whom they come in contact in carrying out their job responsibilities;

(d) Providing assistance to supervisors and managers in carrying out their responsibilities in the EEO/ADR/AE programs; and

(e) Cooperating during EEO investigations and throughout the entire EEO ADR process.

Pre-Complaint Processing

§ 7.25 Pre-complaint processing.

(a) An "aggrieved person" must request counseling in accordance with 29 CFR 1614.105(a). The aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC's regulation at 29 CFR 1614.105 shall govern the Department's pre-complaint processing.

(b) The Department or the EEOC shall extend the 45-day time limit in

paragraph (a) of this section when the individual shows that the individual was not notified of the time limits and was not otherwise aware of them, that the individual did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence the individual was prevented by circumstances beyond the individual's control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the ODEEO or the EEOC.

(c) At the initial counseling session, EEO Counselors must advise individuals, in writing, of their rights and responsibilities, including:

(1) The right to request a hearing and decision from an Administrative Judge of the EEOC or an immediate final decision from the Department following an investigation in accordance with 29 CFR 1614.108(f);

(2) Election rights pursuant to 29 CFR 1614.301 and 29 CFR 1614.302;

(3) The right to file a notice of intent to sue pursuant to 29 CFR 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this subpart;

(4) The duty to mitigate damages;

(5) Relevant time frames; and

(6) The requirement that only the claims raised in pre-complaint counseling (or claims like or related to claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the Department.

§ 7.26 EEO Alternative Dispute Resolution Program.

(a) The aggrieved person may elect to participate in the EEO ADR Program or the traditional EEO counseling procedures. When ADR is chosen, the EEO Counselor shall advise the aggrieved person that if the dispute is resolved during the ADR process, the terms of the agreement must be in writing and signed by both the aggrieved person and the appropriate Department representative. The Director of EEO may execute ADR settlement agreements that are initiated in the EEO process. The EEO Counselor shall advise the aggrieved person that if no resolution is reached under the EEO ADR Program, or if the matter has not been resolved 90 days from the initial contact with the EEO Office, the aggrieved person will receive a final interview and the notice of right to file a formal complaint shall be issued by the EEO Counselor. Nothing said or done during attempts to resolve the complaint through ADR may be included in any EEO complaint (should

ADR be unsuccessful) nor can the ADR proceedings be disclosed.

(b) In appropriate cases (as determined by the Director of EEO on a case-by-case basis), ADR is available during the formal complaint process. Participation in ADR at the formal complaint stage does not affect the normal processing of the formal complaint, including the investigation. Should ADR be initiated at the formal complaint stage, the time period for processing the complaint may be extended by agreement for not more than 90 days. If ADR does not resolve the issue(s), the complaint must be processed within the extended time period agreed upon by the parties, but no later than the 90th day.

Complaints

§ 7.30 Presentation of complaint.

At any stage in the presentation of a complaint, including the counseling stage, the Complainant shall be free from restraint, interference, coercion, discrimination, or reprisal and shall have the right to be accompanied, represented, and advised by a representative of the Complainant's own choosing, except as limited by 29 CFR part 1614.

§ 7.31 Who may file a complaint, with whom filed, and time limits.

(a) *Who may file a complaint.* Any aggrieved person (referred to elsewhere in this part as the Complainant in the formal complaint stage) who has satisfied the requirements of § 7.25, may file a complaint, unless there is an executed settlement agreement or amended complaint of like or similar issues. The complaint must be filed with the Director of EEO within 15 days of receipt of the notice of right to file a complaint issued by the EEO Counselor. The Department may accept a complaint only if the Complainant has met the appropriate requirements of 29 CFR part 1614.

(b) *Filing and computation of time.* (1) All time periods in this subpart stated in terms of days are calendar days unless otherwise stated.

(2) A document shall be deemed timely if the document is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if the document is received by mail within five days of the expiration of the applicable filing period.

(3) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(4) The first day counted shall be the day after the event from which the time period begins to run and the last day of

the period shall be included, unless the last day falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

§ 7.32 Representation and official time.

(a) At any stage in the processing of an EEO complaint, including the counseling stage under 29 CFR 1614.105 and during participation in the EEO ADR Program, the Complainant shall have the right to be accompanied, represented, and advised by a representative of Complainant's choice, except as limited by 29 CFR part 1614.

(b) If the Complainant is an employee of the Department, the Complainant shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Department and EEOC requests for information if the Complainant is otherwise in active duty status. If the Complainant is an employee of the Department and the Complainant designates another employee of the Department as the Complainant's representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to Department and EEOC requests for information.

(c) The Department is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the Complainant and representative to confer. The Complainant and the Complainant's representative, if employed by the Department and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the Department or the EEOC during the investigation, informal adjustment, or hearing on the complaint.

(d) In cases where the representation of a Complainant or the Department would conflict with the official or collateral duties of the representative, the EEOC or the Department may, after giving the representative an opportunity to respond, disqualify the representative.

(e) Unless the Complainant states otherwise in writing, after the Department has received written notice of the name, address and telephone number of a representative for the Complainant, all official correspondence shall be with the representative with copies to the Complainant. When the Complainant designates an attorney as representative, service of all official correspondence

shall be made on the attorney and the Complainant, but time frames for receipt of materials shall be computed from the time of receipt by the attorney. The Complainant must serve all official correspondence on the designated representative of the Department and shall notify the Department of any changes of the representative and Complainant's address.

(f) The Complainant shall at all times be responsible for proceeding with the complaint and cooperating in the entire EEO complaint process, whether or not the Complainant has designated a representative.

(g) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the Department or some other Federal agency, shall be in a duty status when their presence is authorized or required by EEOC or Department officials in connection with an EEO complaint.

§7.33 Contents of the complaint.

(a) *Information to be included in complaint.* (1) The complaint filed should include the following information:

(i) The specific claim or personnel matter which is alleged to be discriminatory;

(ii) The date the act or matter occurred;

(iii) The protected basis or bases on which the alleged discrimination occurred;

(iv) Facts and other pertinent information to support the claim(s) of discrimination; and

(v) The relief desired.

(2) To expedite the processing of complaints of discrimination, the Complainant may use the HUD EEO-1 Complaint Form to file the complaint.

(b) *Amendments.* (1) A Complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a Complainant may file a motion with the EEOC Administrative Judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

(2) The Department shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the Complainant of the date on which the complaint or amendment was filed. The Department shall advise the Complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. Such acknowledgment shall also advise the Complainant that:

(i) The Complainant has the right to appeal the dismissal of or final action on a complaint; and

(ii) The Department is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the Department shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the Complainant may request a hearing from an EEOC Administrative Judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

(c) *Joint processing and consolidation.*

(1) Complaints of discrimination filed by two or more Complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Department or the EEOC for joint processing after appropriate notification to the parties.

(2) Two or more complaints of discrimination filed by the same Complainant shall be consolidated by the Department for joint processing after appropriate notification to the Complainant. When a complaint has been consolidated with one or more earlier filed complaints, the Department shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint, except that the Complainant may request a hearing from an EEOC Administrative Judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

(3) EEOC Administrative Judges or the EEOC may, in their discretion, consolidate two or more complaints of discrimination filed by the same Complainant.

(d) *Class complaints.* (1) *Definitions.*

(i) A class is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by the Department's personnel management policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, disability, or in reprisal for participating in protected EEO activity or for opposing a practice made illegal under the EEO statutes.

(ii) A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class

that satisfies the requirements of 29 CFR 1614.204.

(2) *Pre-complaint processing.* A current or former employee or applicant who wishes to file a class complaint must be counseled in accordance with 29 CFR 1614.105. A Complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a Complainant moves for class certification after completing the counseling process in 29 CFR 1614.105, no additional counseling is required. Class certification shall be denied by the EEOC Administrative Judge, when the Complainant has unduly delayed in moving for certification.

(3) *Certification.* Class complaints are certified by an EEOC Administrative Judge in accordance with the provisions of 29 CFR 1614.204.

(e) *Mixed case complaints.* (1)

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, disability, or in reprisal for participating in protected EEO activity or for opposing a policy or practice made illegal by the EEO statutes, related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only a claim of employment discrimination or the complaint may contain additional claims that the MSPB has jurisdiction to address.

(2) *Election.* An aggrieved person may initially file a mixed case complaint with the Department pursuant to this section or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. The Department shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the Department or to file a mixed case appeal with the MSPB. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the Department shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to 29 CFR 1614.107.

(3) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under 29 CFR part 1614, subpart C,

rather than with the MSPB, the procedures in 29 CFR part 1614, subpart A, shall govern the processing of the mixed case complaint with the following exceptions:

(i) At the time the Department advises a Complainant of the acceptance of a mixed case complaint, the Department shall also advise the Complainant that:

(A) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the Complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at 29 CFR 1614.310(g), but not both; and (B) If the Complainant is dissatisfied with the Department's final decision on the mixed case complaint, the Complainant may appeal the matter to MSPB (not EEOC) within 30 days of receipt of the Department's final decision;

(ii) Upon completion of the investigation, the notice provided the Complainant in accordance with 29 CFR 1614.108(f) will advise the Complainant that a final decision will be issued within 45 days without a hearing; and

(iii) At the time that the Department issues its final decision on a mixed case complaint, the Department shall advise the Complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at 29 CFR 1614.310(a).

(4) *Dismissal.* The Department may dismiss a mixed case complaint for the reasons provided in, and under the conditions prescribed in 29 CFR 1614.107. If MSPB's Administrative Judge finds that MSPB does not have jurisdiction over the matter, the Department shall resume processing of the complaint as a non-mixed case EEO complaint.

§ 7.34 Acceptability.

(a) The Director of EEO shall determine whether a complaint comes within the purview of 29 CFR part 1614 and shall advise the Complainant and Complainant's representative, if applicable, in writing of the acceptance or dismissal of the claims(s) of the complaint. The Notice of Receipt is provided to the Complainant, Complainant's representative, if applicable, and to the organizational unit through the appropriate EEO Officer and DCM.

(b) Dismissals of complaints are governed by the notice requirements and procedures in 29 CFR 1614.106(e)(1) and 29 CFR 1614.107.

(c) Prior to a request for a hearing in a case, the Department shall dismiss an entire complaint for any of the reasons

provided in 29 CFR 1614.107(a)(1) through (9), including a complaint that alleges dissatisfaction with the processing of a previously filed complaint; or where the Department, strictly applying the criteria in EEOC decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(1) Evidence of multiple complaint filings; and

(2) Claims that are similar or identical, lack specificity or involve matters previously resolved; or

(3) Evidence of circumventing other administrative processes, retaliating against the Department's in-house administrative processes or overburdening the EEO complaint system.

(d) Where the Director of EEO believes that some, but not all, of the claims in a complaint should be dismissed for the reasons provided in this section and 29 CFR 1614.107(a)(1) through (9), the Department shall notify the Complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under 29 CFR 1614.107(b)(1) that some claims should be dismissed is reviewable by an EEOC Administrative Judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

§ 7.35 Processing.

(a) The Director of EEO will process complaints filed under 29 CFR part 1614 for the Department with the assistance of the EEO Officer, DCM, the EEO Counselor and the full cooperation of all other Department managers, supervisors and other employees.

(b) The Director of EEO shall, in accordance with 29 CFR part 1614, provide for the development of an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. The person assigned to develop the factual record may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue and is encouraged, in

accordance with 29 CFR 1614.108(b), to incorporate ADR techniques into the investigative efforts in order to promote early resolution of complaints.

(c) The Director of EEO will provide the Complainant and Complainant's representative, if applicable, and the EEO Officer a copy of the record developed. Within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in 29 CFR 1614.108(f), the Department shall provide the Complainant with a copy of the investigative file, and shall notify the Complainant that, within 30 days of receipt of the investigative file, the Complainant has the right to request a hearing and decision from an EEOC Administrative Judge or may request an immediate final decision pursuant to 29 CFR 1614.110 from the Department.

§ 7.36 Hearing.

(a) *Notification of right to request a hearing.* The Director of EEO will notify the Complainant, the General Counsel, EEO Officer, DCM and Complainant's representative, where applicable, of the Complainant's right to request an administrative hearing and decision before the EEOC or the Department's final decision and the time frames for executing the right to request an administrative hearing. Note: Where a mixed case complaint is filed, the Complainant has no right to a hearing before an EEOC Administrative Judge unless the MSPB has dismissed the mixed case complaint or appeal for jurisdictional reasons. (See 29 CFR 1614.302(2)(b).)

(b) *Requesting a hearing.* Where the Complainant has received the notice required in § 7.35(c) and 29 CFR 1614.108(f) or at any time after 180 days have elapsed from the filing of the complaint, the Complainant may request a hearing by submitting a written request for a hearing directly to the EEOC office indicated in the Department's acknowledgment letter. The Complainant shall send a copy of the request for a hearing to the Department's EEO office. Within 15 days of receipt of a copy of complainant's request for a hearing, or the docketing notice from the EEOC, whichever is earlier, the Director of EEO shall provide a copy of the complaint file to EEOC and, if not previously provided, to the Complainant,

Complainant's representative, if applicable, and the appropriate Office of General Counsel.

(c) *EEOC appointment of EEOC Administrative Judge.* When a Complainant requests a hearing, the EEOC shall appoint an EEOC Administrative Judge to conduct a hearing in accordance with this section. Upon appointment, the EEOC Administrative Judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record. Any hearing will be conducted by an EEOC Administrative Judge or hearing examiner with appropriate security clearances.

(d) *Dismissals.* EEOC Administrative Judges may dismiss complaints pursuant to 29 CFR 1614.107, on their own initiative, after notice to the parties, or upon the Department's motion to dismiss a complaint.

(e) *Offer of resolution.* Any time after the filing of the written complaint but not later than the date an EEOC Administrative Judge is appointed to conduct a hearing, the Department may make an offer of resolution to a Complainant who is represented by an attorney.

(1) Any time after the parties have received notice that an EEOC Administrative Judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the Department may make an offer of resolution to the Complainant, whether represented by an attorney or not.

(2) The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The Department's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief.

(3) With regard to monetary relief, the Department may make a lump sum offer covering all forms of monetary liability, or the Department may itemize the amounts and types of monetary relief being offered.

(4) The Complainant shall have 30 days from receipt of the offer of resolution to accept the offer of resolution. If the Complainant fails to accept an offer of resolution and the relief awarded in the EEOC Administrative Judge's decision, the Department's final decision, or the EEOC decision on appeal is not more favorable than the offer, then, except where the interest of justice would not be served, the Complainant shall not receive payment from the Department of attorney's fees or costs incurred after the expiration of the 30-day acceptance period.

(5) An acceptance of an offer must be in writing and will be timely if postmarked or received within the 30-day period. Where a Complainant fails to accept an offer of resolution, the Department may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

(f) *Orders to produce evidence and failure to comply.* (1) The Complainant, the Department, and any employee of the Department shall produce such documentary and testimonial evidence as the EEOC Administrative Judge deems necessary. The EEOC Administrative Judge shall serve all orders to produce evidence on both parties.

(2) When the Complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an EEOC Administrative Judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the EEOC Administrative Judge shall, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(g) *Discovery, conduct and record of hearing.* (1) *Discovery.* The EEOC Administrative Judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the EEOC Administrative Judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the EEOC Administrative Judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. Grounds for

objection to producing evidence shall be that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) *Conduct of hearing.* The Department shall provide for the attendance at a hearing of all employees approved as witnesses by an EEOC Administrative Judge. Attendance at hearings will be limited to persons determined by the EEOC Administrative Judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The EEOC Administrative Judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The EEOC Administrative Judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the EEOC Administrative Judge shall exclude irrelevant or repetitious evidence. The EEOC Administrative Judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing Complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an EEOC Administrative Judge, or who otherwise engages in improper conduct.

(3) *Record of hearing.* The hearing shall be recorded and the Department shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the EEOC Administrative Judge at the hearing shall be made part of the record of the hearing. If the Department submits a document that is accepted, the Department shall furnish a copy of the document to the Complainant. If the Complainant submits a document that is accepted, the EEOC Administrative Judge shall make the document available to the Department representative for reproduction.

§ 7.37 Final action.

(a) *Department final decision without a hearing.* The Director of EEO shall make the final decision for the Department based on the record developed through the processing of the complaint. The Director of EEO may consult with the General Counsel, the Assistant Secretary of Administration, the Office of Human Resources, the EEO Officer, the DCM, the EEO Counselor,

other managers and supervisors, all designees and comparables, and all other persons the Director of EEO deems necessary. The decision, where appropriate, shall include the remedial and corrective action necessary to ensure that the Department is in compliance with the EEO statutes and to promote the Department's policy of equal employment opportunity. When the Department dismisses an entire complaint under 29 CFR 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under 29 CFR 1614.108(f), the Department shall take final action by issuing a final decision. The final decision shall consist of findings by the Department on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with 29 CFR part 1614, subpart E. The Department shall issue the final decision within 60 days of receiving notification that a Complainant has requested an immediate decision from the Department, or within 60 days of the end of the 30-day period for the Complainant to request a hearing or an immediate final decision where the Complainant has not requested either a hearing or a decision. The final action shall contain notice of the right to appeal the final action to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of the Notice of Appeal Petition (EEOC Form 573) shall be attached to the final action.

(b) *Department final order after decision by EEOC Administrative Judge.* When an EEOC Administrative Judge has issued a decision under 29 CFR 1614.109 (b), (g) or (i), the Department shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the EEOC Administrative Judge's decision. The final order shall notify the Complainant whether or not the Department will fully implement the decision of the EEOC Administrative Judge and shall contain notice of the Complainant's right to appeal to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the EEOC Administrative Judge, then the Department shall simultaneously

file an appeal in accordance with 29 CFR 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(c) *Decision and final order by EEOC Administrative Judge after hearing.* Unless the EEOC Administrative Judge makes a written determination that good cause exists for extending the time for issuing a decision, an EEOC Administrative Judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the EEOC Administrative Judge of the complaint file from the Department. The EEOC Administrative Judge shall send copies of the hearing record, including the transcript, and the decision to the parties. If the Department does not issue a final order within 40 days of receipt of the EEOC Administrative Judge's decision in accordance with 29 CFR 1614.110, then the decision of the EEOC Administrative Judge shall become the final action of the Department.

(d) *Decision and final order by EEOC Administrative Judge without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the EEOC Administrative Judge, file a statement with the EEOC Administrative Judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in 29 CFR 1614.109(g)(1). The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the EEOC Administrative Judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the EEOC Administrative Judge determines that some or all facts are not in genuine dispute, the EEOC Administrative Judge may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 days, issue an order limiting

the scope of the hearing or issue a decision without holding a hearing.

§7.38 Appeals.

(a) *Appeals to the EEOC.* (1) A Complainant may appeal the Department's final action or dismissal of a complaint. The regulations at 29 CFR part 1614, subpart D, govern a Complainant's right of appeal.

(2) The Department may appeal as provided in 29 CFR 1614.110(a).

(3) A class agent or the Department may appeal an EEOC Administrative Judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or the Department may appeal a final decision on a petition pursuant to 29 CFR 1614.204(g)(4).

(b) *Time limits for appeals to the EEOC.* Appeals described in 29 CFR 1614.401 (a) and (c) must be filed within 30 days of Complainant's receipt of the dismissal, final action or decision, or within 30 days of receipt by the attorney of record, if represented. Appeals described in 29 CFR 1614.401(b) must be filed within 40 days of receipt of the hearing file and decision. Where a Complainant has notified the Director of EEO of alleged noncompliance with a settlement agreement in accordance with 29 CFR 1614.504, the Complainant may file an appeal 35 days after service of the allegations of noncompliance, but no later than 30 days after receipt of the Department's determination.

(c) *How to appeal.* (1) The Complainant, the Department, a class agent, grievant or individual class claimant (referred to elsewhere in this part as the appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

(2) The appellant shall furnish a copy of the appeal to the opposing party at the same time the appeal is filed with the EEOC. In or attached to the appeal to the EEOC, the appellant must certify the date and method by which service was made on the opposing party.

(3) If an appellant does not file an appeal within the time limits of this section, the appeal shall be dismissed by the EEOC as untimely.

(4) Any statement or brief on behalf of a Complainant in support of the appeal must be submitted to the Office of

Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the Department in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

(5) The Department must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the Complainant has filed an appeal or within 30 days of submission of an appeal by the Department.

(6) The Department may be represented by the Office of General Counsel in appeals before the Office of Federal Operations.

(7) Any statement or brief in opposition to an appeal must be submitted to the EEOC and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The Office of Federal Operations will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

(d) *Request for reconsideration.* A decision issued under paragraph (a) of § 1614.405 is final within the meaning of 29 CFR 1614.407 unless the EEOC reconsiders the case. A party may request reconsideration within 30 days of receipt of a decision of the EEOC, which the EEOC in its discretion may grant, if the party demonstrates that:

(1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or

(2) The decision will have a substantial impact on the policies, practices or operations of the Department.

Other Complaint and Appeal Procedures

§ 7.39 Negotiated grievance, MSPB appeal and administrative grievance procedures.

(a) *Negotiated grievance procedure.* An aggrieved person covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure can file a complaint under these procedures or a negotiated grievance, but not both. An election to proceed under this section is indicated only by the filing of a written complaint. An election to proceed under a

negotiated grievance procedure is indicated by the filing of a timely grievance. (See 29 CFR 1614.301.)

(b) *MSPB appeal procedure.* (1) *Who can file appeal and when.* An aggrieved person alleging discrimination on basis of race, color, religion, sex, national origin, age or reprisal because of participation in related to or stemming from an action that can be appealed to the MSPB can file a complaint under these procedures, or an appeal with the MSPB, but not both. Whichever is filed first, the complaint or the appeal, is considered an election to proceed in that forum. (See 29 CFR 1614.302 through 29 CFR 1614.309.)

(2) *Right to file civil action about MSPB appeal or decision.* The procedures of this section are governed by 29 CFR § 1614.310.

(3) *MSPB appeal rights.* The provisions of 29 CFR part 1614, subpart C, shall govern MSPB appeal rights.

(c) *Administrative grievance procedure.* (1) *Grievance.* A request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction related to employment with the Department and over which the Department has control, including an allegation of coercion, reprisal or retaliation. The range of matters is limited to those for which no other means of administrative review is provided.

(2) *Covered employee.* Any non-bargaining unit employee, including a former employee or applicant for whom a remedy can be provided.

(3) *Responsibilities of participants in the grievance procedure.* Each employee has the responsibility for making a maximum effort to achieve informal settlement of a personal grievance.

(4) *Grievance requirements.* The procedures, responsibilities and processes to be followed by an employee wishing to file an administrative grievance are found in HUD Handbook 771.2 REV-2, Administrative Grievances.

Remedies, Enforcement and Compliance

§ 7.40 Remedies and enforcement.

(a) *Remedies and relief.* When the Department, or the EEOC, in an individual case of discrimination, finds that a current or former employee or applicant has been discriminated against, the Department shall provide full relief in accordance with 29 CFR 1614.501.

(b) *Attorney's fees and costs.* In a decision or final action, the Department, EEOC Administrative Judge or the EEOC

may award the applicant or current or former employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.

(1) Full relief in Title VII and Rehabilitation Act cases may include compensatory damages, an award of attorney's fees (including expert witness fees) and costs when requested and verified, in accordance with the requirements of 29 CFR 1614.501(e).

(2) Time period and persons covered. Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the Department, EEOC Administrative Judge or EEOC, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the Complainant. The Department is not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the EEOC affirms on appeal an EEOC Administrative Judge's decision finding discrimination after the Department takes final action by not implementing an EEOC Administrative Judge's decision or when the parties agree the Department will pay for attorney's fees for pre-complaint representation.

(c) *Notice of representation.* Written submissions to the Department that are signed by the representative shall be deemed to constitute notice of representation.

(d) *Nonattorney fees and costs.* Reporter, witness, printing and other related fees and costs may be awarded, in accordance with 29 CFR 1614.501(e)(1)(iii) and 1614.501(e)(2)(ii)(C).

§ 7.41 Compliance with EEOC final decisions.

(a) Relief ordered in a final EEOC decision is mandatory and binding on the Department except as provided in this section. The Department's failure to implement ordered relief shall be subject to judicial enforcement, as specified in 29 CFR 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the Department requests reconsideration and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the Department shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty

status in the position specified by the EEOC, pending the outcome of the Department's request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of paragraph (b) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the EEOC upholds its decision after reconsideration.

(2) When the Department requests reconsideration, the Department may delay the payment of any amounts ordered to be paid to the Complainant until after the request for reconsideration is resolved. If the Department delays payment of any amount pending the outcome of the request to reconsider and the resolution of the request requires the Department to make the payment, then the Department shall pay interest from the date of the original appellate decision until payment is made.

(3) The Department shall notify the EEOC and the employee in writing at the same time the Department requests reconsideration that the relief the Department provides is temporary or conditional and, if applicable, that the Department will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the Department to provide notification will result in the dismissal of the Department's request.

(4) When no request for reconsideration is filed or when a request for reconsideration is denied, the Department shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision, unless otherwise ordered in the decision.

§ 7.42 Enforcement of EEOC final decisions.

(a) *Petition for enforcement.* A Complainant may petition the EEOC for enforcement of a decision issued under the EEOC's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically provide the reasons that led the Complainant to believe that the Department is not complying with the decision.

(b) *Referral to the EEOC.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the EEOC, or, as directed by the EEOC, refer

the matter to another appropriate Department.

(c) *EEOC notice to show cause.* The EEOC may issue a notice to the Secretary that the Department has failed to comply with a decision and to show cause why there is noncompliance. Such notice may request the head of the Department or a representative to appear before the EEOC or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(d) *Notification to complainant of completion of administrative efforts.* Where the EEOC has determined that the Department is not complying with a prior decision, or where the Department has failed or refused to submit any required report of compliance, the EEOC shall notify the Complainant of the right to file a civil action for enforcement of the decision pursuant to title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the Department's refusal to implement the ordered relief in accordance with the Administrative Procedure Act (5 U.S.C. 701 *et seq.*), and the mandamus statute (28 U.S.C. 1361), or to commence new proceedings in accordance with the appropriate statutes.

§ 7.43 Settlement agreements.

(a) The Department shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. These efforts shall include ADR. Any settlement reached shall:

- (1) Be in writing;
- (2) Identify the claims resolved;
- (3) Be signed by both parties and/or their designees; and
- (4) Otherwise comply with 29 CFR part 1614.

(b) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. Final action that has not been the subject of an appeal or civil action shall be binding on the Department. If the Complainant believes that the Department has failed to comply with the terms of a settlement agreement or decision, the Complainant shall notify the Director of EEO, in writing, of the alleged noncompliance within 30 days of when the Complainant knew or should have known of the alleged noncompliance. The Complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be

reinstated for further processing from the point processing ceased.

(c) The Department shall resolve the matter and respond to the Complainant, in writing. If the Department has not responded to the Complainant, in writing, or if the Complainant is not satisfied with the Department's attempt to resolve the matter, the Complainant may appeal to the EEOC for a determination as to whether the Department has complied with the terms of the settlement agreement or final decision. The Complainant may file such an appeal 35 days after the Complainant has served the Department with the allegations of noncompliance, but must file an appeal within 30 days of the Complainant's receipt of the Department's determination. The Complainant must serve a copy of the appeal on the Department and the Department may submit a response to the EEOC within 30 days of receiving notice of the appeal.

§ 7.44 Interim relief.

(a) When the Department appeals and the case involves removal, separation, or suspension continuing beyond the date of the appeal, and when the EEOC Administrative Judge's decision orders retroactive restoration, the Department shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified in the decision, pending the outcome of the Department appeal. The employee may decline the offer of interim relief.

(b) Service under the temporary or conditional restoration provisions of paragraph (a) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the EEOC upholds the decision on appeal. Such service shall not be credited toward the completion of any applicable probationary or trial period or the completion of the service requirement for career tenure, if the EEOC reverses the decision on appeal.

(c) When the Department appeals, the Department may delay the payment of any amount, other than prospective pay and benefits, ordered to be paid to the Complainant until after the appeal is resolved. If the Department delays payment of any amount pending the outcome of the appeal and the resolution of the appeal requires the Department to make the payment, then the Department shall pay interest from the date of the original decision until payment is made.

(d) The Department shall notify the EEOC and the employee in writing at the same time the Department appeals that the relief the Department provides is temporary or conditional and, if applicable, that the Department will delay the payment of any amounts owed but will pay interest as specified in paragraph (c) of this section. Failure of the Department to provide notification will result in the dismissal of the Department's appeal.

(e) The Department may, by notice to the Complainant, decline to return the Complainant to the Complainant's place of employment if the Department determines that the return or presence of the Complainant will be unduly disruptive to the work environment. However, prospective pay and benefits must be provided. The determination not to return the Complainant to the Complainant's place of employment is not reviewable. A grant of interim relief does not insulate a Complainant from subsequent disciplinary or adverse action.

(f) If the Department files an appeal and has not provided required interim

relief, the Complainant may request dismissal of the Department's appeal. Any such request must be filed with the Office of Federal Operations within 25 days of the date of service of the Department's appeal. A copy of the request must be served on the Department at the same time the request is filed with EEOC. The Department may respond with evidence and argument to the Complainant's request to dismiss within 15 days of the date of service of the request.

Statistics and Reporting Requirements

§ 7.45 EEO group statistics and reports.

(a) The Department shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and disability of its employees and applicant flow in accordance with 29 CFR 1614.601 through 29 CFR 1614.602 and the Department shall report to the EEOC on employment by race, national origin, sex and disability, in the form and at such times as the EEOC may require.

(b) The Department shall report to the EEOC information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part, at such times and in such manner as the EEOC prescribes.

(c) The Department shall advise the EEOC whenever the Department is served with a Federal court complaint based upon a complaint that is pending on appeal at the EEOC.

(d) The Department shall submit annual written national equal employment opportunity plans of action for the review and approval of the EEOC. Plans shall be submitted in a format prescribed by the EEOC and in accordance with 29 CFR 1614.602.

Subpart B—[Reserved]

Dated: April 16, 2001.

Mel Martinez,

Secretary.

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