

EEO COUNSELOR SKILLS

I THE TEXTBOOK

COUNSELING GENERALLY



ROLES AND RESPONSIBILITIES

Where an aggrieved person seeks EEO counseling, the Counselor must ensure that the person understands his/her rights and responsibilities in the EEO process.

Roles, cont.

- **THE COUNSELOR SHOULD NEVER ATTEMPT TO DISSUADE A PERSON FROM FILING A COMPLAINT.**
- However, you will need to explain the laws and regulations and why the complaint is not covered, if it is not.
- IF THE AGGRIEVED PERSON INSISTS ON FILING A CHARGE THAT YOU ARE AWARE IS NOT COVERED UNDER THE LAW, TAKE THE CHARGE AND ISSUE THE NOTICE OF FINAL INTERVIEW

ALTERNATIVE DISPUTE RESOLUTION

- An Agency must have an ADR program.
- The Counselor must inform the person who is seeking information of the agency's ADR program and if their case is one that can be referred to the ADR program.
- The Counselor should explain the options of going to ADR pre-complaint or of taking the traditional EEO counseling process.
- It is very important that the Counselor explain the differences between the two processes.

FIRST INTERVIEW

- Determine claim(s) and basis(es) raised by the potential complaint.
- Must determine the jurisdictional questions:
 - (1) is the person an employee or applicant or can they be considered an employee because of the agency's control of their work;
 - (2) when did the actions on which the complaint arise occur;
 - (3) is the complainant alleging a continuing violation;

First Interview, cont.

- (4) is the person claiming a constructive discharge;
- (5) is there more than one basis of the complaint;
- (6) who is involved in the complaint;
- (7) has the individual filed on the same issues in another forum and
- (8) is the individual making a claim not covered by EEOC such as whistleblower or discrimination because of homosexuality.

There must be sufficient information for the agency to properly identify the legal claim raised at the end of the counseling period.

First interview, cont.

It is not expected that the Counselor will obtain all the information needed to determine the claims during the first interview, but the Counselor needs to obtain enough information to allow the agency to understand all the issues being presented by the individual seeking counseling.

The Counselor must be sure the aggrieved person understands the difference between an inquiry and an investigation.

The Counselor must inform the individual that they may amend their complaint during the processing of the complaint, but they should do so in a timely manner.

First Int. cont.

The Counselor must, depending on the facts and circumstances of the case, inform the person that there are of procedures available to them in pursuit of a discrimination claim. The aggrieved individual must be informed that he/she may have to elect the process he/she wishes to pursue.

Elections options apply in:

1. Age cases
2. Mixed case complaints
3. Equal Pay Act complaints
4. and **in most agencies** where a negotiated grievance procedures allows for discrimination to be raised in that process.

The counselor must be familiar with these procedures, be able to identify such cases and know where the complainant should seek information regarding the procedures.

Spin off complaints

ADDRESSES DISSATISFACTION, UNFAIRNESS AND BIAS IN ALL ASPECTS OF COMPLAINTS PROCESSING

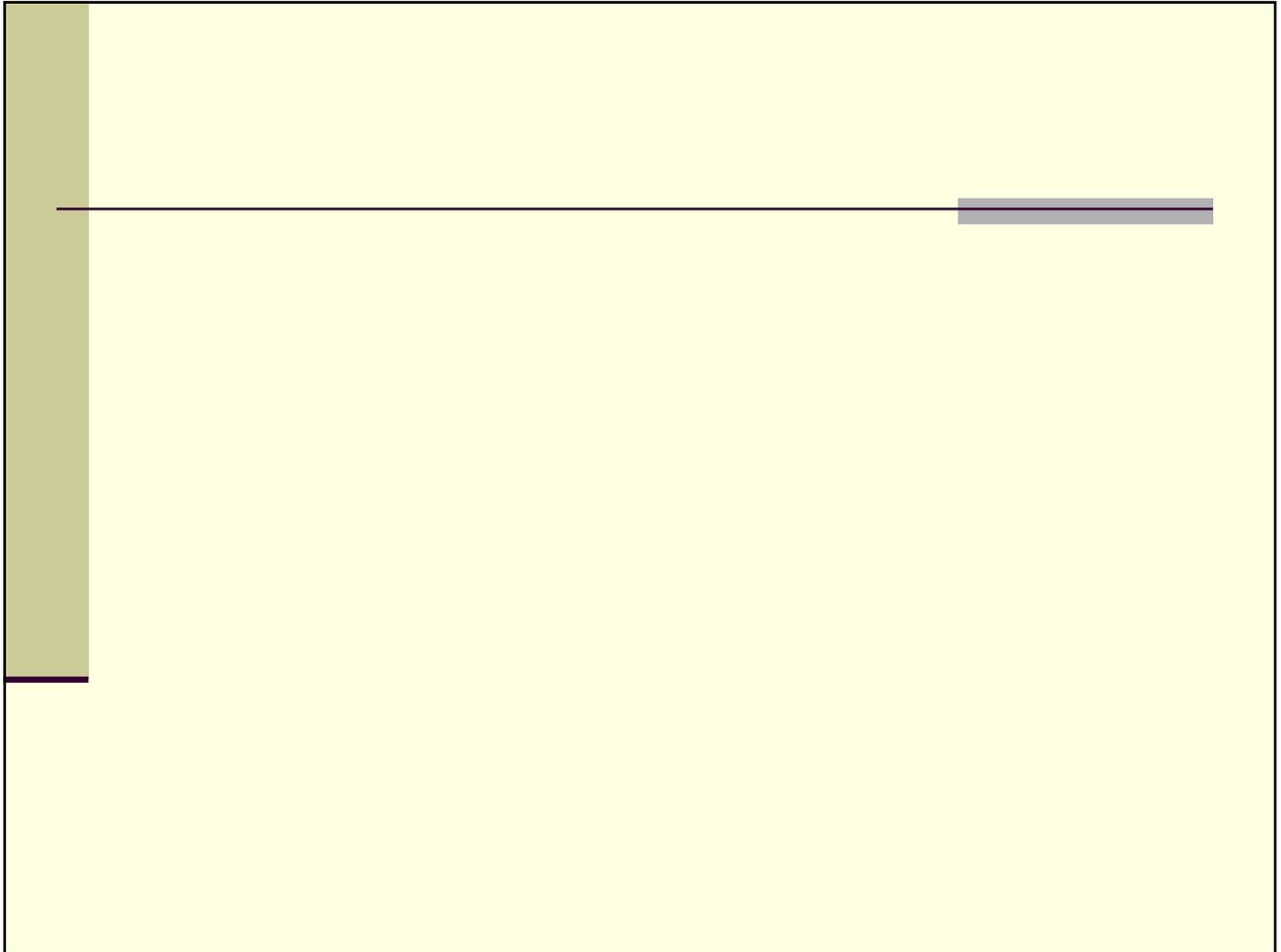
These must be raised within the original complaint. They should be raised as early as possible. Ex. With the agency's EEO department if it involves counseling, investigation or mediation. **The complaint should be raised with the party who is the alleged source of the problem.** The agency EEO office should also be prepared to address allegations of improper processing of the complaint where appropriate and act accordingly to address the complainant's concerns. A new complainant should not be filed.

Spin off complaints

Addressing & Resolving Spin-Offs

- Agency EEO office shall advise complainant to bring concerns to appropriate individual and address with underlying complaint.

- Appropriate individuals are:
 - ✓ Agency EEO Office,
 - ✓ Agency EEO Counselor/Investigator,
 - ✓ AJ, or
 - ✓ EEOC on appeal or for systemic problems.



Spin off not survive

If there is a dismissal of the underlying claim, the allegations concerning the processing of the claim do not state an independent allegation of employment discrimination. The spin-off complaint will not survive the dismissal of the underlying claim.

Systemic problems concerning the EEO complaint processing shall be referred to the Complaints Adjudication Division in the EEOC's Office of Federal Operations.

WRITTEN NOTICE

At the initial interview or as soon as possible thereafter, the EEO Counselor must provide all aggrieved persons written notice of their rights and responsibilities. 1614.105(b).

RESOLUTION

Whether the complainant chooses ADR or not, the Counselor must seek to resolve the dispute at the lowest level possible. If resolved, the Counselor must document the resolution.

The counselor or EEO coordinator should also check within a few weeks whether the terms of the resolution have been implemented.

STATUTES AND REGULATIONS

- TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED
 1. RACE
 2. COLOR
 3. RELIGION
 4. SEX
 5. NATIONAL ORIGIN
 6. RETALIATION

- Age Discrimination in Employment Act

Protects those over 40

Reverse discrimination for under 40 not covered

Supreme Court has now ruled retaliation for filing federal age complaint exists

Gomez-Perez v. Potter, No. 06-1321
(U.S. May 27, 2008)

- Rehabilitation Act of 1973, as amended

Has been amended by the Americans with Disabilities Act Amendment Act which took effect January 1, 2009.

Can be either disparate treatment or failure to accommodate or both.

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- Fair Labor Standards Act, as amended (Equal Pay Act of 1963)

Remember only applies to differences in pay due to **gender**.

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- **29 C.F.R. 1614 and MD 110**

THE SOURCES

Provide the framework for all the work you do.

MUST HAVE, MUST READ, MUST FOLLOW

Reasons For Dismissing Complaints

- Failure to state a claim.
- States same claim as pending or previously resolved matter.
- Untimely.
- Moot.
- Proposed action.
- Failure to cooperate.
- Abuse of EEO process.
- “Spin-off” complaint.



Partial Dismissals

- **Partial dismissal may not be appealed until final action taken.**
- **The agency shall address all claims in complaint, including reasons for partial dismissal.**

Abuse of Process

A clear pattern of misuse of EEO process for a purpose other than prevention and elimination of employment discrimination. Multiple complaints, and evidence of either:

- Allegations similar or identical to previously filed complaints, involves matters previously resolved or are vague,
- or Evidence of intent to overburden or retaliate against agency EEO system.

AFTER THE FIRST INTERVIEW

- Make sure the complainant agrees with how the agency defines the claims that are subject of inquiry.
- Determine if the complainant has filed on the issue before.
- Determine if the claim is “like and related” to any pending claims and should; therefore, be consolidated with or amended to the other pending complaint.

CONDUCTING THE INQUIRY

- The limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is to be performed whether the complainant proceeds through ADR or through the traditional counseling.
- The scope of the limited inquiry will vary depending on the bases and issues presented.
- The Counselor must be in control of the inquiry at all times.

Inquiry, cont.

- The Counselor should seek to resolve the issues in dispute.
- The Counselor must listen to and understand the viewpoint of both parties while attempting resolution. This will help the Counselor in assisting the parties to achieve resolution.
- It is not the Counselor's role to develop or advocate specific terms of an agreement.
- The Counselor must be very careful not to inject his/her views on settlement negotiations.
- The Counselor is a neutral and if the complainant seeks advice, the Counselor should remind the complainant of his right to be represented.

ISSUANCE OF FINAL INTERVIEW NOTICE

- If resolution is not possible, the Counselor must hold a final interview with the complainant within 30 days of the date the aggrieved person brought the dispute to the Counselor's attention, unless the aggrieved person consented to an extension of time, not to exceed 60 days.
- If the dispute has not been resolved at the end of the extended period, then the Counselor must advise the aggrieved person in writing of his/her right to file a complaint.

Final Interview Notice

- Counselor must provide the individual with the name or names of the persons authorized to receive complaints of discrimination.
- The Counselor must inform the individual that the formal complaint must:
 1. Be in writing
 2. Be specific regarding the claim(s) raised in the EEO counseling which the individual wishes to pursue

Final interview cont.

3. Be signed by the complainant or his/her attorney and
4. Be filed within fifteen (15) calendar days of the final interview.

Consequences of filing formal complaint

- Counselor must inform the individual that once the formal complaint is filed that the complaint file, or part of it, may be shared with those who are involved or need to access it—including the person identified as being responsible for the actions giving rise to the complaint.
- The identity of the individual does not remain confidential in the formal process.

consequences

- The individual is responsible for advising the appropriate officials immediately when he or she retains counsel.
- The individual is responsible for advising the appropriate officials if his or her address or telephone number changes.
- The Counselor must advise the complainant of the consequences of failing to inform the agency of the possible consequences of failing to make these disclosures.

ADR

- An election of ADR is final.
- Once the election is made, the ADR period is 90 days.
- Even if ADR is elected, the Counselor must complete the intake function including obtaining the information needed to determine: basis(es), claims(s), and timeliness.
- An EEO Counselor may not serve as the neutral in the same case where he/she is the Counselor.

ADR, cont.

- If the dispute is resolved during the ADR process, the resolution must be documented and the EEO Counselor informed of the resolution.
- If the dispute is not resolved, the ADR coordinator or other appropriate ADR official will inform the Counselor who will then issue the Notice of Right to File a Formal Complaint.

Filing of EEO Counselor's Report where ADR Fails

- When advised that the individual has filed a formal complaint, the EEO Counselor will submit a written report.

Counselor's Report

- The report must contain:
 1. A precise description of the claim(s) and the basis(es) identified by the complainant.
 2. Pertinent documents gathered during the inquiry, if any.
 3. Specific information bearing on the timeliness of the counseling contact.
 4. If timeliness appears to be a factor, an explanation of the delay;
 5. An indication as to whether an attempt to resolve the complaint was made.
 6. The agency will keep a copy of the original report in case to insure availability.

Class Action Complaints

- Class is defined as: a group of employees (including joint employees), former employees or applicants who alleged they have been or are being adversely affected by an agency personnel policy or practice that discriminates against the group on a prohibited basis(es).

Class actions, cont.

- The class agent must bring the matter to the attention of the EEO Counselor within forty five (45) calendar days of the date when the specific policy or practice adversely affected the class agent or, if a personnel action, within 45 days of the effective date of that action.
- The EEO requirements for the class claim are the same as those for an individual claim except that the facts must be framed to meet the requirements of 1614.204.

Requirements to sustain Class Complaint

- A class complaint is a written complaint of discrimination on behalf of a class by the agency of the class alleging that:
- The class is so numerous that a consolidated complaint of the members of the class is impractical
- There are questions of fact common to the class
- The claims of the agency of the class are typical of the claims of the class

Requirements, cont.

- The agent of the class, or if represented, the representative will fairly and adequately protect the interests of the class.
- An individual in the EEO process can move for certification of the class at any stage where it becomes apparent that there are class implications raised in the individual complaint. There is no additional counseling required if the individual moves for certification after counseling is completed.

Mixed Case Complaints

- A complaint where an individual files a discrimination charge related to or stemming from an action that may be appealed to the Merit System Protection Board.
- The charge may contain only a discrimination claim or it may also contain non-discrimination claims over which the MSPB has jurisdiction.
- Two determinations must be made: does the employee have standing and the claim that forms the basis of the complaint must be appealable to the MSPB.

Standing to file

- The following employees have a right to appeal to the MSPB and therefore to initiate a mixed case complaint or appeal:
- Competitive service employees not serving a probationary or trial period under an initial appointment
- Career appointees to the Senior Executive Service
- Non-competitive service veterans preference eligible employees with one or more years of current continuous service
- Non-preference eligible excepted service employees who have completed their probationary prior or with two or more years of continuous service.

No standing to file

- Probationary employees (exception see 5 CFR 315.806 allowing appeals alleged discrimination based on party affiliation, marital status, procedural deficiencies)
- Certain non-appropriated fund activity employees
- Employees serving under a temporary appointment limited to one year or less and
- Employees of the Central Intelligence Agency, the General Accounting Office, the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority and the Federal Bureau of Investigation.

Appealable Actions

- Reduction in grade or removal for unacceptable performance
- Removal, reduction in grade, suspension for more than fourteen (14) days, or furlough for thirty (30) or less for cause that will promote the efficiency of the service
- Separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of reduction in force
- Reduction in force action affecting a career appointee in the Senior Executive Service
- Reconsideration decision sustaining a negative determination of competence for a general schedule employee
- Disqualification of employee or applicant because of a suitability determination.

CAVEAT

- An individual who is claiming they were forced to resign or retire (constructive discharge) is alleging a removal. If has standing the case is a mixed complaint.
- Key words—front pay, get my job back, forced to go because of supervisor's actions, didn't want to retire, etc. Think constructive discharge and inquire.

Election

- The individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed-case EEO complaint, but not both.
- Whichever the individual files first is considered an election. Counseling is not a formal election.
- Where an individual files an MSPB appeal and timely seeks counseling, the counseling may continue pursuant to 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to 1614.105 (d), (e) or (f)

Processing of Mixed Complaint

- Counselor should explain the consequences of the election i.e. will not get hearing on a mixed case from the EEOC
- Five different procedures for handling dual filing:

Agency not dispute MSPB Jurisdiction

- If agency not disputing MSPB Jurisdiction, the agency must thereafter dismiss any complaint on the same claim regardless of whether the claims of discrimination are raised on appeal with the MSPB
- The agency or the Administrative Judge must advise the complainant that he/she must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB
- Where an agency has not accepted a complaint for processing; i.e. has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission.

Where Agency Questions Jurisdiction

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

Where complainant files with agency first

- If the complainant files a mixed case at the agency and then files a mixed case appeal with the MSPB, the agency should advise MSPB of the prior agency filing and request MSPB dismiss the appeal without prejudice.

Where complainant has pending case(s) involving issues
linked to mixed case

- The agency should file with MSPB a motion to consolidate the non-mixed case claims with the mixed case appeal.
- Upon filing the motion, the non-mixed complaint will be held in abeyance pending a decision by the MSPB AJ on the agency's motion.
- If MSPB not consolidate, the complaints will be processed under 1614.106, et seq.
- Time for processing will commence to run without notice, fifteen (15) days following the decision to deny.
- If MSPB consolidates the mixed case will be dismissed.

Processing mixed case complaints filed at the Agency

- If an individual elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, expect:
 - Within forty five (45) days following completion of the investigation the agency must issue a final decision without a hearing before and AJ
 - Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within 120 days of the date of filing the mixed complaint, the complainant may appeal the claim to the MSPB at any time thereafter, as specified in 5 CFR 1201.154(a), or may file a civil action as specified in 1614.310(g), but not both

Processing, cont.

- Also upon filing of the complaint, the agency must notify the complainant, if he/she is dissatisfied with the agency's final decision on the mixed case complaint, he/she may appeal the claim to the MSPB (not the EEOC) within thirty (30) days of receipt of the agency's final decision
- Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within forty-five (45) days without a hearing before an EEOC AJ
- Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the claim to the MSPB (not EEOC) within 30 days of receipt of the notice and the right to file a civil action as provided in 1614.310(a).

Negotiated Grievance Procedures

- Where covered by 5 USC 7121 (d)
 - When an individual is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated procedure, the employee must elect to file an EEO or a grievance.
 - The election is true “irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination”
 - If an employee first files a grievance and thereafter files a complaint of discrimination on the same claim, the complaint must be dismissed without prejudice to the complainant’s right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of Part 1614.
 - The dismissal must inform the individual of the obligation to raise the discrimination claims in the grievance process and of the right to appeal the final grievance decision to the EEOC.

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- Where no covered by 5 USC 7121(d)
 - Examples—United States Postal Service and Tennessee Valley Authority
 - In such agencies, aggrieved individual may file a complainant pursuant to 1614 and also file a grievance pursuant to the collective bargaining agreement involving the same claim
 - In such agencies, complaints filed pursuant to 1614 may be held in abeyance where a grievance is filed on the same claim, if written notice of the abeyance is provided.
 - Complaints may be held in abeyance until a final decision is issued in the grievance.

Age Case Processing

- Complainant must elect to either file a complaint with agency or go directly to Federal Court
 - If elects complaint processing must exhaust administrative remedies prior to filing in court
 - Agency final action
 - 180 days after the complaint filed if no final action is taken

Age, cont.

- The individual may bypass the administrative process and file a civil action directly in U.S. District Court
 - Individual must first provide Commission with a written notice of intent to sue under the ADEA.
 - The notice must be filed within 180 days of the alleged discriminatory act
 - Once a timely notice of intent to sue is filed with the Commission, the individual must wait at least thirty (30) days before filing the civil action.

Equal Pay Act Complaints

- An individual does not have to file an administrative complaint before filing a lawsuit under the EPA
 - If the individual wants to file a complaint, it will be processed like a Title VII complaint under 1614.
 - Complainants in EPA cases should be notified of the statute of limitations in EPA cases—two years or, if a willful violation is alleged, three years which applies even if the individual files an administrative complaint
 - Should be notified of right to file directly in a court of competent jurisdiction without first providing notice to the Commission or exhausting administrative remedies