

MANUAL: Personnel
Chapter Series CC -- Commissioned Corps Personnel Manual
Part 2 -- Commissioned Corps Personnel Administration

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Chapter Series CC26 -- Conditions of Service
Subchapter CC26.1 -- Officers' Responsibilities and Conduct
Personnel INSTRUCTION 6 -- Equal Opportunity: Discrimination Complaints
Processing

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Section A. Purpose and Scope

1. The purpose of this issuance is to state policy and procedures relating to Equal Opportunity (EO) discrimination complaints processing for officers of, and applicants to, the Commissioned Corps of the Public Health Service (PHS).
2. Members of the PHS Commissioned Corps who are assigned or detailed to another agency or organization may only file a complaint under this procedure when the subject of the complaint is a matter under the control of the Department of Health and Human Services (HHS). For matters not under the control of the HHS, the officer shall file his/her complaint with the agency or organization to which detailed, in accordance with the Memorandum of Agreement between the HHS and that organization.
3. PHS commissioned officers detailed to the United States Navy, United States Marine Corps, United States Army, United States Air Force, and United States Coast Guard, remain subject to the law of the Armed Forces to which detailed. EO complaints filed by these officers will be processed in accordance with the procedures of the Service to which detailed.

Section B. Background

1. The PHS Commissioned Corps is composed of about 6,000 active-duty officers. The mission of the Corps is to provide highly-trained and mobile health professionals, who carry out programs to promote the health of the Nation, understand and prevent disease and injury, assure safe and effective drugs and medical devices, deliver health service to Federal beneficiaries, and furnish health expertise in time of war or other national or international emergencies. As one of the seven Uniformed Services of the United States, the Commissioned Corps is a specialized career system designed to attract, retain, and develop health professionals who may be assigned to Federal, State, or Local agencies or international organizations to accomplish its mission.
2. Officers are appointed to respond to national emergencies. During periods of peace and non emergencies, officers are assigned duties to meet the needs of the Service.

The Commissioned Corps is structured along military lines, to provide PHS with the necessary flexibility in personnel management and deployment to achieve its primary mission. In accepting a Commission, an officer agrees to serve wherever the exigencies of the Service may require and is subject to reassignment.

3. On November 13, 1998, the President signed the Health Professions Education Partnerships Act of 1998 (Public Law 105-392). This law amended the PHS Act by including the following provision:

Active service of commissioned officers of the Service shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws relating to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability (42 U.S.C. 213(f)).

The effect of this law is to overturn the decisions handed down in Federal court cases which held that commissioned officers of the PHS were Federal employees covered by anti-discrimination legislation.

Section C. Authority

1. Section 215 of the Public Health Service Act (42 U.S.C. 216).
2. Commissioned Corps Personnel Manual, Chapter 46, Subchapter 46.1, INSTRUCTION 1, "Equal Opportunity," of the Commissioned Corps Personnel Manual.

Section D. Definitions

As used in this INSTRUCTION, the following terms have the meanings indicated:

1. Affected Parties. The complainant(s), any alleged discriminating official(s), and the management official(s) with jurisdiction over the organizational segment in which the subject matter of the complaint arose.
2. Alternative Dispute Resolution (ADR). ADR describes a number of techniques which provide alternatives to the traditional mechanisms -- negotiations and litigation -- for resolving an EO conflict. ADR techniques are generally voluntary, consensual and convened by a neutral party.

3. Commissioned Corps Liaison. An officer or an employee designated by the Agency/Operating Division (OPDIV)/Program as the resource person on commissioned corps personnel issues.
4. Complainant. A commissioned officer or an applicant for appointment to the PHS Commissioned Corps who initiates a complaint of discrimination.
5. Complaint. A written allegation of discrimination or reprisal based on race, color, religion, sex, national origin, or to a limited extent, age or disability, filed for processing, in accordance with this INSTRUCTION.
6. Day. For the purpose of this section, the term day refers to calendar day.
7. Prohibited Discrimination. Any action, omission, or use of language that results in the adverse treatment of a person because of his/her race, color, religion, sex, national origin, or to a limited extent, age or disability, as well as actions or omissions or use of language that constitute harassment or reprisal.
8. EEO Counselor. A person who has been designated by the HHS OPDIV or Program to assist in the informal resolution of issues relating to equal opportunity of the PHS Commissioned Corps officers and applicants to the PHS Commissioned Corps.
9. EEO Officer. A designated official with responsibility to manage EEO programs.
10. Equal Opportunity. Consideration and fair treatment based on merit and capability without regard to race, color, religion, sex, national origin, or to a limited extent, age or disability, for all members of, and applicants to, the PHS Commissioned Corps, in factors such as appointment, training, career development, and any other personnel practices that might affect the members opportunities and work environment.
11. EEOPG. Equal Employment Opportunity Programs Group, HHS.
12. Equal Opportunity Review Board (EORB). Is a board which is appointed by the Surgeon General (SG) to review complaint files and recommended decisions of the Agency/OPDIV/Program on an as needed basis. The Board shall consist of senior level officers and civilian employees in GS-14 and above who have been nominated by their respective Agencies/OPDIVs/Programs. The nominated individuals will have an appropriate level of training and/or experience in equal opportunity regulations and policies. EORB members will be appointed for terms of one, two, or three years. The composition of the board will be diverse and will consist of representatives from the PHS and programs to which officers are detailed.

13. Federal Personnel. Civilian employees or members of the Uniformed Services.
14. SG's Policy Advisory Council (SGPAC) Representatives. Senior level officers from the HHS OPDIVs and other Federal agencies to which officers are assigned, who were designated to provide advice to the SG on commissioned corps policy matters.
15. Report of Investigation (ROI). ROI consists of all documents and information collected or developed during the equal opportunity investigation, such as affidavits of the complainant, alleged discriminating officials and witnesses, and copies of records, policy statements, and regulations.
16. Reprisal. An unlawful act to restrain, interfere, coerce, or discriminate against an individual who is involved or participating in the discrimination complaints process (i.e., a complainant, his/her representative, or witness, or an agency official responsible for processing discrimination complaints).

Section E. Policy

1. General. All members of, and applicants to, the PHS Commissioned Corps are afforded equal opportunity when considered for appointment, career development, promotion, assignments, relocation, assimilation, retention, and separation, consistent with laws and regulations affecting the PHS Commissioned Corps and the needs of HHS. [However, as members of a Uniformed Service, commissioned officers are not covered by laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability.]

Every officer or applicant shall be free from any and all restraint, interference, coercion, or reprisal on the part of fellow officers or employees, supervisors, or other management officials in lodging any allegation relating to discrimination, filing or pursuing any complaint or appeal, appearing as a witness or serving as a representative or as an advisor to a complainant, or other action related thereto.

All personnel are accountable for their actions and are responsible for preventing and reporting incidents of discrimination and/or reprisal. It is the policy of the PHS Commissioned Corps to provide equal opportunity to all qualified professionals; to assure that there is no discrimination in the workplace based on race, color, religion, sex, national origin, or to a limited extent, age [1]/ or disability [2]/; and to resolve or adjudicate promptly and fairly all allegations relating to discrimination.

Violations of this policy shall be brought to the attention of the appropriate manager, administrator, or EEO Officer. The equal opportunity complaint procedure is designed to correct inequities in a manner consistent with commissioned corps policies and procedures. To this end, officers filing complaints must identify the desired outcome. However, compensatory damages and attorney fees are not available to commissioned officers.

2. Right to Representation

A complainant may have a representative of his/her own choosing at all stages of the pre-complaint and complaint processes. The complainant and his/her representative, if employed in HHS, may have a reasonable amount of official time in which to prepare his/her presentation. For representation to be effected, the complainant must designate his/her representative in writing. Such designation must be provided to the EEO Officer and shall become a part of the complaint file. Cancellation of such designation must also be made in writing by the complainant.

[1]/"No individual who has attained the age of forty-four shall be appointed to the Regular Corps, or called to active duty in the Reserve Corps for a period in excess of one year, unless (A) he has had a number of years of active service (as defined in section 211(d) equal to the number of years by which his age exceeds forty-four, or (B) the Surgeon General determines that he possesses exceptional qualifications not readily available elsewhere in the Commissioned Corps of the Public Health Service, for the performance of special duties with the Service or (C) in the case of an officer of the Reserve Corps, the Commissioned Corps of the Service has been declared by the President to be a military service, (42 United States Code 209(a)(3))."

[2]/Applicants to the PHS Commissioned Corps must meet medical appointment standards to be commissioned, and must be physically fit. Active-duty officers may be separated if found unfit to perform duties of their office and grade. Officers who are found fit for duty shall be provided equal opportunity and may not be

subject to prohibited discrimination.

A representative who is an active-duty commissioned officer or an employee on duty status within HHS, must advise his/her supervisor of the complainant's request for services as a representative. Any limitations on representation imposed by the supervisor must be in writing and addressed to the EEO officer. The proposed representative shall advise the complainant immediately in writing of the limitation on or the bar to service, and the reasons therefor. The complainant may appeal the restriction to the Director, Equal Employment Opportunity Programs Group, (EEOPG), HHS.

3. Legal Counsel. A complainant may, at his/her own expense, obtain such counsel as may be considered necessary to prosecute a complaint.
4. Affirmative Action Plans. PHS commissioned officers shall be included in affirmative employment plans covering Federal personnel of the HHS.
5. Other Activities. All persons involved in activities related to such matters as, but not limited to, recruitment, appointment, selection, assignment, career development, professional improvement, promotion, relocation, retention, and separation of members of, or applicants to, the PHS Commissioned Corps shall so conduct themselves as to assure that there is no discrimination against any individuals because of race, color, religion, sex, national origin, or to a limited extent, age or disability. A finding of discrimination may result in disciplinary action.

Section F. Procedures

1. Informal Process. It is the intent of HHS that every effort will be made to resolve all allegations relating to discrimination through an informal process. Officers have 60 days after an offending incident or occurrence in which to reach an informal resolution, or to file a formal complaint. Although officers and applicants are encouraged to seek informal resolution, they are not required to do so before filing a formal complaint.

Officers who wish informal resolution may either seek informal counseling through the OPDIV or Program EEO office or official, or may seek informal resolution through his/her administrative chain. If the case is near resolution, the periods for informal resolution and filing a formal complaint may be extended an additional 30 days by the EEO Officer.

- a. Rights and Responsibilities of the Officer

If an officer chooses to seek informal resolution, he/she may pursue this by choosing one of the following two options. To maximize the benefit of the informal process, officers should initiate this process, promptly, preferably within 15 days of the incident.

- (1) Consult an EEO Officer: Officers or their representatives may consult an EEO Officer and/or request an assignment of an EEO Counselor in their designated jurisdiction. In the OPHS regional offices, commissioned officer complainants may consult EEO counselors in the Office of the Secretary.

The officer shall cooperate fully with the efforts of the EEO Counselor to provide advice, establish facts, and adjust matters giving rise to the allegations. Refusal of the complainant to cooperate may be construed as a failure to pursue the complaint and may result in the dismissal of the complaint.

- (2) Administrative Chain: Officers or representatives shall consult the first line supervisor designated for the jurisdiction in which the alleged act(s) of discrimination occurred. An officer may seek informal resolution of a complaint by discussing the matter with his/her supervisor. If resolution is achieved, the affected parties will reduce the terms of the resolution to writing. If the matter is not resolved at this level, the officer may request ADR or choose to elevate the complaint to the second line supervisor. The Commissioned Corps Liaison or other senior commissioned officer may be consulted. An officer who has sought informal resolution of a complaint, but has been unsuccessful in resolving the matter within the administrative chain in his/her OPDIV or Program, may request ADR through the OPDIV or Program EEO Officer.
- (3) File formal complaints: Officers may file a formal complaint with Subsection F.2., below, the formal complaint process.

b. Responsibilities of the EEO Counselor

- (1) All requests for counseling shall be honored. The EEO Counselor shall explain the complaint procedure to the complainant, inform him/her of the ADR option, and facilitate resolution.
- (2) When the alleged discrimination is in an area subject to the EEO Counselor's supervisory or management jurisdiction, or the matter is one in which the EEO Counselor has in any way participated, the case shall be referred to the EEO Officer. The reasons for referral shall be stated in writing and made part of the original EEO Counselor's records.

- (3) If the complainant elects the ADR process, the EEO Counselor will refer him/her to the EEO Officer, who will make the appropriate referral. If the parties achieve a resolution, the terms of the agreement will be reduced to writing, and all parties involved will sign the agreement. A copy of the agreement will be provided to the EEO Officer. If a resolution is not achieved, the EEO Officer will be notified in writing.
 - (4) The EEO Counselor identifies the issue(s) and basis(es) of the potential complaint, and conducts an informal inquiry into the issues raised by the complainant.
 - (5) The EEO Counselor shall keep careful and accurate records of the counseling activities and prepare a final report for submission to the EEO Officer. Note: counseling records will be developed and maintained for commissioned corps officers in the same manner as for civil service employees.
 - (6) The EEO Counselor shall conclude all counseling and attempts to achieve informal resolution within 30 days of initial EEO Counselor contact. If the case is in ADR or near resolution, the timeframe may be extended an additional 30 days. The EEO Counselor shall arrange a final interview with the complainant at which time the EEO Counselor shall inform the complainant of the findings and of the proposed resolution to his/her complaint, and that:
 - (a) the interview concludes the counseling activity;
 - (b) if the complainant is dissatisfied with the resolution of the allegations, he/she may now file a formal complaint and obtain an investigation of the matter; and
 - (c) the formal complaint shall be made in writing and submitted to the EEO Officer within 60 days of the incident, unless an extension to the complainant was granted. If extension is granted due to ongoing informal process, the formal complaint shall be filed within 10 days of receipt of the EEO Counseling report, or within 10 days of the conclusion of ADR.
- c. Responsibilities of Supervisors or Management Officials. The supervisor or management official shall:

- (1) Maintain a work environment free of discrimination and harassment. The official shall also maintain open lines of communication and exercise a good faith effort to resolve issues and complaints to include the ADR option;
 - (2) Maintain confidentiality;
 - (3) Advise the commissioned officer or the applicant of his/her rights and responsibilities;
 - (4) Document the resolution in writing, if issue is resolved; and
 - (5) Not take any reprisal or retaliation action against an officer for exercising his/her rights under the equal opportunity policy.
- d. Responsibilities of the Commissioned Corps Liaison or Other Senior Commissioned Officer. Upon request, the Commissioned Corps Liaison or other senior officer shall be responsible for:
- (1) Providing consultation on commissioned corps policies and procedures; and
 - (2) Assisting with informal resolutions.
2. Formal Complaint Process. Officers who elect to file a formal complaint, must do so within 60 days after the offending incident. If the complaint is in ADR or near resolution, the timeframe may be extended an additional 30 days. Officers may also request an extension when they are prevented by circumstances beyond their control from submitting the matter within the time limit.
- a. Rights of the Officer or Applicant. The officer or applicant shall have the right to:
- (1) Present a complaint to designated officials without fear of intimidation, reprisal or harassment;
 - (2) Receive current and updated information on Commissioned Corps equal opportunity policies;
 - (3) Receive a fair review of his/her complaint.
- b. Responsibilities of the Officer Filing a Formal Complaint. The officer shall:

- (1) Write and sign a formal discrimination complaint and submit it to the EEO Officer. The complaint shall include statement of the issues, the date of the event and the basis of the discrimination, and identify the desired outcome or remedy that an officer is seeking. The discrimination complaint shall be addressed to the EEO Officer for the organization in which the alleged act of discrimination occurred. The complaint shall also be submitted in a narrative form, and shall include information on any attempts taken to resolve the matter at the informal level;
- (2) Follow procedures and cooperate with the investigation;
- (3) Notify the EEO Officer if a counsel is retained or a representative is appointed;
- (4) If officer files late, the officer must submit a justification along with documentation of the circumstances leading to the delay.

c. Responsibilities of the EEO Officer. The EEO Officer:

- (1) Shall review each formal complaint to verify jurisdiction over the complaint. If the EEO Officer does not have jurisdiction, the complaint shall be forwarded promptly to the appropriate OPDIV or Program EEO office;
- (2) Shall extend the time limit for filing a formal complaint when the complainant shows that he/she was prevented by circumstances beyond his/her control from submitting the matter within the time limit, or the complainant demonstrates that he/she was engaged in ADR;
- (3) May issue a preliminary decision to dismiss a complaint in whole, or in part, because:
 - (a) it was not filed in a timely manner; or
 - (b) the issues raised do not relate to equal opportunity or the denial of equal opportunity based on race, color, religion, sex, national origin, reprisal, or to a limited extent, age or disability; or
 - (c) the complainant failed to cooperate with equal employment procedures; or
 - (d) of a separation of the complainant from PHS Commissioned Corps; or

- (e) the complaint is an abuse of the process.
- (4) Shall, if the complaint is dismissed, issue a Notice of Dismissal for identified issues within the complaint by:
- (a) notifying the complainant within 30 days of receipt of a formal complaint about the dismissal; and
 - (b) ensuring the notice will include a statement that the complainant may, within 15 days of a decision, appeal the decision to the Surgeon General. The Surgeon General shall issue a final decision on the appeal within 30 days of receipt.
- (5) Shall, after accepting a formal commissioned corps discrimination complaint, notify the Director, EEOPG, of such complaint in the next monthly report. The EEO Officer shall be responsible for reporting commissioned corps equal opportunity complaints in a manner consistent with reporting complaints filed by other Federal personnel;
- (6) Shall establish a complaint file for each complaint accepted under this INSTRUCTION. The complaint file shall contain all documents or records pertaining to the matter of complaint;
- (7) Shall be responsible for designating, training, and assigning competent and impartial complaint investigators;
- (8) Shall prepare the ROI which shall consist of a detailed, complete, and accurate written record of all the information developed in the investigation which supports or refutes the significant charges made by the complainant;
- (9) Shall furnish the complainant with a copy of the ROI within 90 days of the filing of the formal complaint. The timeframe may be extended for a period not to exceed 45 days if agreed upon by the affected parties. Failure to provide the officer with a copy of the investigative file within the specified timeframe will result in the complainant having the right to request the SGPAC Representative to perform an expedited review of the file, (see subsection d., below);
- (10) Shall notify the complainant that he/she has 30 days to review, comment, and supplement the ROI and seek informal resolution of the case; and

- (a) Resolution: If a resolution is achieved, the EEO Officer shall reduce it to writing and make it part of the complaint file. The EEO Officer will provide the affected parties with a copy of the resolution, and a copy will be provided to the EEOPG as well. The Director, EEOPG, may direct further investigation into such matters as patterns of discrimination or other factors related to the conditions giving rise to the complaint;
 - (b) Withdrawal: A complainant or his/her representative may withdraw a complaint by submitting a signed statement which shall become part of the complaint file. Such a withdrawal is final and the complaint cannot be revived;
 - (c) Recommended Decision: Within 30 days of receiving comments from the complainant, the EEO Officer shall prepare his/her recommended decision for transmittal to the Surgeon General. A copy of the recommended decision shall also be provided to the complainant and the SGPAC Representative. If the EEO Officer fails to forward the complaint file within the above specified timeframe, the complainant may forward the formal complaint and supporting documentation to the Surgeon General.
- (11) Shall maintain the complete complaint file in accordance with the applicable system of records maintenance.
- d. Responsibilities of the SGPAC Representative: The SGPAC Representative shall:
- (1) Maintain an open door policy at all stages of the complaint to encourage resolution;
 - (2) Submit comments on the recommended decision to the EEO Officer for inclusion in the case file for transmittal to the Surgeon General.
- e. Responsibilities of the EEOPG. The EEOPG shall provide staff support to the Surgeon General in the management of equal opportunity cases.
- f. Responsibilities of the Surgeon General: Upon receiving the complaint file, the Surgeon General:
- (1) Shall review the complaint file, with the recommendation from the OPDIV EEO Officer, and, within 30 days, shall:

- (a) render a final decision based upon the record; or
 - (b) request the EEO Officer to conduct such further investigation as is deemed necessary and appropriate for a well-reasoned decision, and within 30 days of receipt, render a final decision based upon the record as supplemented; or
 - (c) convene a Commissioned Corps EORB, described in Section D.12., of this INSTRUCTION, to review the record and make a recommendation. The EORB will make a recommendation and submit it to the Surgeon General within 30 days. The Surgeon General will render a final decision within 30 days of receipt of recommendation from the EORB.
- (2) May determine whether the complaint constituted an abuse of process. If the Surgeon General finds a misuse of the EO process based on (i) evidence of multiple complaint filings, or (ii) allegations that are similar or identical, lack of specificity, or involve matters previously addressed, or (iii) evidence of circumventing other administrative processes, for example, retaliating against the agency's personnel or processes, or the overburdening of the EO complaint system, the Surgeon General shall take appropriate corrective measures, including disciplinary actions.
 - (3) Shall submit his/her decision in writing and ensure that the decision is being communicated to the affected parties. The Surgeon General shall then forward the complete complaint file to the EEO Officer of jurisdiction.
 - (4) Shall take appropriate disciplinary action when finding that allegations of discrimination against a commissioned officer are substantiated.
 - (5) Shall transmit the findings to the Secretary for Administration and Management, HHS, along with any recommendation of any disciplinary action when finding that allegations of discrimination against a civil service employee are substantiated.

Section G. Personnel Actions and Equal Opportunity

1. A supervisor or a management official who is aware that a commissioned officer is engaged in equal opportunity activities may notify the EEO Officer of planned or pending personnel actions affecting that officer;
2. The filing of an equal opportunity complaint shall not preclude the initiation or continuance of any administrative action;
3. When an allegation of discrimination is made in connection with an adverse action, the question of discrimination may be presented together with the adverse action for review and recommendation by the Board which considers the adverse action;
4. When allegations of discrimination are raised in connection with a grievance, processing of the grievance shall be terminated with respect to those allegations regarding discrimination.
5. When allegations of discrimination are raised in connection with a Board for Correction of commissioned corps records, the Board for Correction shall dismiss the application to allow an officer to exhaust an EO and other relevant administrative processes.

Section H. Freedom From Reprisal or Interference

1. A complainant who alleges reprisal in connection with the presentation of a pending complaint under this INSTRUCTION, may add reprisal as an additional basis with the original complaint. The charge must be in writing, contain all pertinent facts, and submitted to the EEO Officer within 15 days of the date of the alleged occurrence. The EEO Officer shall conduct an inquiry into the charge and include the findings and recommended decision with the case record for transmittal to the Surgeon General.
2. Allegations of reprisal that are filed after the recommended decision on the case has been transmitted to the Surgeon General shall be processed as a new complaint.
3. A representative or witness, who alleges reprisal due to participation in an EO complaint under this INSTRUCTION, may file a separate complaint under applicable regulations.

Section I. Miscellaneous

1. A complainant may withdraw a complaint of discrimination at any time by a memorandum addressed to the EEO Officer. The EEO Officer shall notify the Director, EEOPG, in writing, of the withdrawal together with a copy of the complainant's memorandum of withdrawal.
2. After a formal complaint is submitted, if new relevant information is identified, it shall be included in the processing of the complaint. However, the complainant bears the burden of proof that this information is relevant and could not have been included in the original presentation.

Section J. Historical Notes

On November 2001, the Secretary of HHS signed PHS Commissioned Corps regulation CC46.1-I1 repealing Departmental decisions that have held that members of the PHS Commissioned Corps are covered by Title VII of the Civil Rights Act of 1964, as amended, and the regulatory provisions found at 29 CFR 1614. Regulation CC46.1-I1 also repealed previous Departmental regulations that stated that cases that arose prior to November 13, 1998, shall be processed in accordance with Equal Employment Opportunity Commission (EEOC) regulations in effect on that date. As such, regulation CC46.1-I1 comports with recent EEOC decisions and legislative changes dealing with equal opportunities for active-duty PHS Commissioned Officers. See 42 U.S.C. § 213(f) (Supp. 2000); and also see Raymond v. Shalala, 101 F.E.O.R. 15611 (2000) and Guerard v. Thompson, 2001 WL 885251 (EEOC) where the EEOC ruled that its jurisdiction over complaints by Federal employees does not extend to uniformed military personnel, including active-duty PHS commissioned officers.

Section K. Privacy Act Provisions

Personnel records are subject to the Privacy Act of 1974. The applicable system of record is 90-90-0009, "HHS Discrimination Complaints Records, HHS/OS/ASPER."

EXHIBIT I