

Vermont National Guard

Joint Policy Memorandum

J2021-20

Equal Employment Opportunity

&

Standard Operating Procedure

**Equal Employment Opportunity
Complaint Process**



**OFFICE OF THE ADJUTANT GENERAL
789 Vermont National Guard Road
Colchester, Vermont 05446-3099**

NGVT-TAG-EEO (100)

September 2021

MEMORANDUM FOR All Vermont National Guard (VTNG) Managers, Supervisors,
and Technicians

SUBJECT: Joint Policy J2021-20 Equal Employment Opportunity and Standard
Operating Procedure for Processing Employment Discrimination Complaints

1. It is the policy of the VTNG that all employees and applicants for employment have a right to enjoy employment opportunities at the VTNG regardless of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 and older), disability, and genetic information. Any employee or applicant who believes they have been denied this right, or subjected to retaliation for complaining about discrimination or participating in a process outlined in this SOP, may file a complaint.
2. This SOP defines and establishes the procedure for processing and resolving employment discrimination complaints involving Title 5 employees and dual status Title 32 Technicians in a non-military pay status, as well as applicants for employment at the Vermont National Guard.
3. The SOP is in compliance with 29 CFR Part 1614, and Management Directives 110 and 715.
4. Any questions you have concerning the employment discrimination policy, this SOP, or the pertinent laws and regulations may be referred to the Staff Judge Advocate or the State Equal Employment Manager.

GREGORY C. KNIGHT
Major General
The Adjutant General

VTNG

1. General Information	5
1.1. Purpose.....	5
1.2. References.....	5
1.3. Cancellation.....	5
1.4. Applicability.....	5
1.5. Effective date.....	5
2. Definitions.....	6
2.1. Administrative Judge.....	6
2.2. Aggrieved Person or Complainant.....	6
2.3. Alternative Dispute Resolution.....	6
2.4. Class.....	6
2.5. Class Complaint.....	6
2.6. Compensatory Damages.....	6
2.7. Discrimination.....	6
2.8. EEO Counselor.....	7
2.9. EEO Professional.....	7
2.10. Formal Complaint.....	7
2.11. Informal Complaint.....	7
2.12. Mixed Case Complaint.....	7
2.13. Retaliation.....	7
2.14. Supervisor.....	7
3. Responsibilities.....	8
3.1. The Adjutant General.....	8
3.2. Human Resources Officer.....	8
3.3. The State Equal Employment Manager.....	8
3.4. Supervisors.....	8
3.6. Staff Judge Advocate.....	9
3.7. EEO Professionals.....	9
4. Discrimination Complaint Filing Process	9
4.1. Objective.....	9
4.2. Scope of the program.....	10
4.3. Representation.....	10
4.4. Initiating the EEO Counseling Process, the informal complaint:.....	10
4.5. The EEO Counselor's Report.....	12
4.6. Formal Complaints.....	12

5. Investigation	14
5.1. Procedure for Initiating the Investigation	14
5.2. Post Investigation Procedure	14
5.3. Concerns Regarding the Investigation or Complaint Process	15
6. The Hearing and Appeal Process for Individual Complaints	15
6.1. Procedure for Requesting a Hearing	15
6.2. Final Orders	15
6.3. Appealing a Final Order	16
7. Mixed Case Complaints	16
7.1. Guidance on Processing Mixed Complaints	16
7.2. Processing Mixed Case Appeals Initially filed with the MSPB	16
8. Class Action Complaints	18
8.1. Procedure for Processing Class Action Complaints Prior to Class Certification	18
8.2. Procedure for Processing Class Action Complaints to Obtain Certification	19
8.3. Post Class Certification Procedure	19
9. Special Considerations for Complaints of Sexual Harassment	20
9.1. Commander's Responsibilities for Processing Sexual Harassment Complaints	20
10. Anonymous Complaints	20
11. Settlement	22
11.1. When Settlement Can Occur	22
11.2. Terms of the Settlement	22
11.3. Allegations of Noncompliance with Settlement Agreements	22

1. General Information

1.1. Purpose.

This Standard Operating Procedure (SOP) sets forth the procedure for processing claims of employment discrimination and retaliation. It provides for a prompt, fair, and efficient process that will ensure all personnel comply with the mandates of Title VII and the applicable regulations issued by the Equal Employment Opportunity Commission.

1.2. References.

- a) Title 29, Code of Federal Regulation, Part 1614.
- b) Equal Employment Opportunity Commission Management Directive 110.
- c) Equal Employment Opportunity Commission Management Directive 715.
- d) 10 USC 1561.

1.3. Cancellation.

This SOP replaces all prior versions, including the Joint Civilian Discrimination Instruction Guide, July 2017.

1.4. Applicability.

- a) This SOP applies to all federal employees of the VTNG, applicants for federal employment, and those who supervise them. Federal employees and federal applicants include employees under Title 5 and dual status technicians under Title 32 in a non-military pay status.
- b) This SOP does not cover independent contractors unless exceptional circumstances exist in which the EEOC has determined there is an employer/employee relationship due to the fact that the VTNG exerts substantial direction and control over the person's activities.
- c) This SOP does not cover any employee serving in a military pay status or actions concerning fitness for duty in the reserve components.

1.5. Effective date.

The Vermont National Guard J2021-20 Joint policy on Equal Employment Opportunity and this standard operating procedure are effective when the policy is signed.

2. Definitions

2.1. Administrative Judge.

The Administrative Judge is the person appointed by the Equal Employment Opportunity Commission when a hearing is requested, who assumes full responsibility for the adjudication of the complaint, including oversight of the development of the record.

2.2. Aggrieved Person or Complainant.

An aggrieved person or complainant is an employee, former employee, or applicant for employment who believes he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or has been subjected to retaliation (as defined in this SOP). While interchangeable, in this SOP, aggrieved person is used prior to a complaint being filed, and complainant is used after a complaint is filed.

2.3. Alternative Dispute Resolution.

Alternative Dispute Resolution (ADR) is as any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trials, arbitration and the use of ombudsmen, or any combination thereof.

2.4. Class.

A group of employees, former employees, and/or applicants for employment who allegedly have been or are being harmed by the VTNG's personnel policy or practice, based on their common race, color, religion, sex, national origin, age, or disability.

2.5. Class Complaint.

A written complaint of discrimination filed on behalf of a group that has numerous employees sharing common questions of fact and common claims. The agent for the group must be able to fairly and adequately protect the interests of the group.

2.6. Compensatory Damages.

Payments intended to fully compensate victims of intentional discrimination, if allowed by law, for pecuniary and non-pecuniary losses that result directly from the discrimination. These damages are in addition to equitable relief such as back pay, interest, reinstatement, and attorney's fees.

2.7. Discrimination.

An unlawful employment practice that occurs when the VTNG fails to hire or promote, discharges, or otherwise discriminates against any person with respect to compensation, terms, conditions, or privileges of employment because of that person's race, color, religion, sex, national origin, age, or disability. Discrimination also means any limitation, segregation,

or classification of employees or applicants for employment that deprives or tends to deprive a person of employment opportunities or otherwise adversely affects their status as an employee because of race, color, religion, sex, national origin, age, or disability.

2.8. EEO Counselor.

An EEO Counselor is someone who serves as a neutral, provides an aggrieved person with his/her rights and obligations under equal employment opportunity laws, gathers limited data and may attempt an informal resolution where ADR is not offered or accepted, pursuant to 29 C.F.R. 1614.

2.9. EEO Professional.

An EEO Professional is a trained EEO Counselor or the State Equal Employment Manager.

2.10. Formal Complaint.

A written allegation or allegations of unlawful discrimination signed by a complainant and submitted to an EEO Professional.

2.11. Informal Complaint.

A written or oral allegation or allegations of unlawful discrimination submitted to an EEO Professional by a complainant who has not submitted as a formal complaint.

2.12. Mixed Case Complaint.

A mixed case complaint is a complaint filed with the Merit Systems Protection Board (MSPB) that alleges that a VTNG action over which the MSPB has jurisdiction was effected, in whole or in part, because of discrimination based on race, color, religion, sex, national origin, age, disability, or retaliation.

2.13. Retaliation.

Taking an adverse action against an individual for opposing an employment practice that discriminates based on any of the protected categories or for filing an unlawful discrimination charge, testifying, participating in any way in an investigation, proceeding, litigation, or for expressing good faith opposition to a perceived discriminatory practice.

2.14 Supervisor.

Any person, including a manager, director, or commander, who in the interest of the VTNG, has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action when such action requires the use of independent judgment and is not merely clerical or routine in nature.

3. Responsibilities

3.1. The Adjutant General.

The Adjutant General is responsible for establishing an effective equal opportunity employment program that meets the statutory and regulatory requirements of the Equal Employment Opportunity Commission's Guidance under Management Directive 715.

3.2. Human Resources Officer.

The Human Resources Officer shall ensure all supervisors are provided all required EEO training and are informed of their responsibilities under this SOP.

3.3. The State Equal Employment Manager.

The State Equal Employment Manager is responsible for:

- a) Ensuring all supervisor training programs include information on the VTNG's equal opportunity policies and procedures.
- b) Disseminating information on available resources related to equal employment opportunity.
- c) Submitting data to Equal Employment Opportunity Commission (EEOC) as required.
- d) Designing, implementing, and maintaining a system to record complaints.
- e) Appointing and managing a sufficient number of Equal Employment Opportunity Counselors to facilitate informal complaints on EEO related issues.
- f) Providing an alternative dispute resolution program. The program will apply to both the pre-resolution request as well as the formal resolution request processes.
- g) Ensuring all employees and applicants have access to written materials containing VTNG's EEO Complaint procedures (including relevant timelines), as well as the name and contact information of all EEO Counselors by posting the information on bulletin boards, public websites, and internal websites.

3.4. Supervisors.

Supervisors are responsible for:

- a) Assuring that employees are aware of the EEO complaint process, and in particular, assuring that it is available to individuals with disabilities.
- b) Notifying the SEEM of any EEO complaints.

- c) Including a performance evaluation element demonstrating annual review of their personnel operations as well as career progression/placement actions and procedures to assure their conformity with the EEO program.
- d) Providing pertinent information (such as personnel records) to the SEEM, EEO Counselors, and/or the EEOC in the course of an informal resolution request, investigation, or appeal.

3.5. Commanders.

Commanders or officer in charge of a unit are responsible for carry out an investigation of the matter in accordance with 10 USC 1561.

3.6. Staff Judge Advocate.

The Staff Judge Advocate shall defend the VTNG against any administrative complaint, grievance, claim, or action. To avoid a conflict of interest, the Staff Judge Advocate will not conduct legal sufficiency reviews of EEO matters such as acceptance/dismissal of complaints, legal theories utilized by EEO Professionals during investigations, and legal determinations made in final agency actions.

3.7. EEO Professionals.

The EEO Professional is responsible for the following:

- a) Working with the aggrieved person by listening to him or her, explaining the complaint process, offering traditional counseling, or ADR (if available and suitable).
- b) Conducting a limited inquiry.
- c) Conducting final interviews.
- d) Issuing a Notice of Right to File a Formal Complaint letter if the matter is not resolved within the designated timelines.
- e) Preparing Counselor's Reports.

4. Discrimination Complaint Filing Process

4.1. Objective.

The purpose of the EEO discrimination complaint process is to provide for the prompt, fair, and impartial processing and resolution of complaints, consistent with the legal obligations under 29 CFR Part 1614. The objective of EEO counseling is to seek opportunities to

resolve issues at the lowest organizational level at the earliest possible time.

4.2. Scope of the program.

An aggrieved person who believes that he or she has been subjected to employment discrimination or retaliation as defined by this SOP must consult an EEO Professional. The EEO Professional will conduct informal counseling or offer Alternative Dispute Resolution (ADR). If the matter does not resolve to the satisfaction of the aggrieved person, that person may file a formal complaint. The complaint will be investigated and a determination will be made. The program includes an opportunity for a hearing and a right to appeal.

4.3. Representation.

An aggrieved person may choose at any time throughout the complaint process, including the counseling stage, to be represented. The EEO Counselor is not an advocate for either the aggrieved person or the VTNG, but acts as a neutral in the EEO process.

4.4. Initiating the EEO Counseling Process, the informal complaint:

- a) An aggrieved person initiates the EEO counseling process by contacting a supervisor or an EEO Professional and advising that person that he or she has been subjected to unlawful discrimination.
- b) The aggrieved person must initiate this contact within 45 calendar days from when she or he becomes aware of the discriminatory act or from the effective date of the personnel action. The 45-day time limit may be extended for reasons outlined in 29 CFR 1614.105(a)(2). Failure to initiate this contact within 45 calendar days may result in dismissal of a formal complaint.
- c) All complaints of unlawful discrimination will be forwarded to the SEEM. The SEEM will assign an EEO Counselor to contact the aggrieved person.
- d) At the initial contact session, the EEO Counselor will provide the aggrieved person with a written notice of his or her rights and responsibilities. See 29 C.F.R. § 1614.105(b).
- e) The EEO Counselor will determine if the claim is appropriate for processing under 29 CFR Part 1614 and where appropriate, offer the use of Alternative Dispute Resolution (ADR) or any other appropriate informal dispute resolution procedures to resolve the claim.
- f) If the EEO Counselor determines the claim is appropriate for processing, she or he may conduct a limited inquiry. The purpose of the limited inquiry is to obtain basic information (e.g. information to determine jurisdictional questions or information to help resolve the matter).

- h) If the EEO Counselor determines that the aggrieved person's issue is not appropriate for processing (i.e. there is no jurisdiction), he or she will inform the aggrieved person and, if possible, provide him or her with the appropriate process for addressing the matter. If the aggrieved person insists on filing a discrimination complaint, the EEO Counselor will conduct a final interview and issue the Notice of Right to File a Discrimination Complaint.
- i) The EEO Counselor will not attempt to dissuade a person from filing a complaint.
- h) If traditional counseling is selected, the EEO Counselor will work with the aggrieved party to informally resolve the matter within 30 days of being notified of his or her intent to file a complaint, unless a longer period of time is agreed upon in writing of an additional period of no more than 60 days.
- i) If ADR is selected, the aggrieved person must do so in writing. The EEO Professional who initially assisted the aggrieved person will not be the same EEO Professional conducting ADR. However, the EEO Professional can continue to maintain overall responsibility for tracking the complaint. When ADR is chosen, the matter must be resolved with ninety (90) days from the initial contact with the EEO Counselor.
- j) After traditional counseling or ADR or is complete, the EEO Counselor will conduct a final interview with the aggrieved person. If the matter is resolved, the parties must reduce the terms to writing and sign the document outlining those terms. If the matter did not resolve, the EEO Counselor will conduct a final interview and give the aggrieved person a Notice of Right to File a Formal Complaint.
- k) A formal complaint must be filed with the SEEM or designee within fifteen 15 calendar days of receipt of the Notice of Right to File a Formal Complaint.
- l) An aggrieved person may remain anonymous during the informal stage. However, he or she may choose to cease anonymity as doing so may significantly help in attempting to resolve matter. The complaint file is not a public document to be released outside the EEO complaint process. The identity of the aggrieved person does not remain confidential in the formal complaint process.
- m) When an aggrieved person engages an EEO Professional for the purpose of obtaining information, but does not elect to start process, the visit will be recorded as an inquiry.

4.5. The EEO Counselor's Report.

- a) When advised that an aggrieved person has filed a formal complaint, the EEO Counselor will submit a written report pursuant to 29 C.F.R. § 1614.105(c) within fifteen 15 calendar days to the SEEM.
- b) The report will contain such information like jurisdiction, claims, bases, requested remedy, and whether an attempt to resolve the dispute was made by counseling or ADR.

4.6. Formal Complaints.

- a) Before filing a formal complaint, a complainant must have first contacted an EEO Counselor and attempted to informally resolve the matter through traditional EEO counseling or ADR.
- b) A formal complaint must be in writing, be specific to the claim(s) raised during the EEO counseling, and be signed by the complainant or the complainant's attorney.
- c) Formal complaints must be filed with the SEEM or designated EEO Professional within 15 calendar days from the date the complainant receives the Notice of Right to File a Discrimination Complaint.
- d) A complainant may amend a complaint at any time prior to the completion of the investigation.
- e) The VTNG will provide the complainant written acknowledgement that it has received the formal complaint as required by 29 CFR 1614.106(e). The written acknowledgement will be sent to the complainant within 5 calendar days of the VTNG receiving the formal complaint or any amendment thereto.
- f) The acknowledgement will contain information about the process.
 - 1) It will inform the complainant of the date on which the complaint or amendment was filed.
 - 2) It will state that the VTNG will conduct an impartial investigation within 180 days of filing unless the parties agree in writing to an extension.
 - 3) It will advise the complainant that she or he has the right to appeal the final order made by the VTNG.
 - 4) It will provide the EEOC contact information where requests for a hearing must be sent. The field office for Vermont is:

The Equal Opportunity Commission
JFK Federal Building
15 New Sudbury Street, Room 475
Boston, MA 02203-0506
1-800-669-4000

- g) After the complaint is filed, the VTNG will review it and decide whether or not the case should be dismissed for one of the reasons set forth in 29 CFR 1614.107.
 - 1) Where the VTNG believes that the claims in a complaint should be dismissed for one of the statutory reasons listed in 29 CFR 1614.107, the VTNG will notify the complainant in writing of its determination. The dismissal letter will state the rationale for that determination and that those claims will not be investigated. A copy of the dismissal letter will be placed in the investigative file. A determination under this paragraph is reviewable by an 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.
 - 2) For all claims not dismissed, the VTNG will send the complainant an acceptance letter stating the claims to be investigated.
- h) Formal complaints covering four special situations are detailed elsewhere in this SOP.
 - 1) The first situation involves a “mixed case complaint” as defined by 29 CFR 1614.302(a). In a “mixed case complaint,” the complainant, who is a member of a bargaining unit, files a complaint that includes an issue that can be appealed to the Merit Systems Protection Board. Such situations must be processed under Section 8 of this SOP.
 - 2) The second situation involves an aggrieved person who wishes to file a complaint for a class of employees. Such situations must follow the procedures in Section 9 of this SOP.
 - 3) The third situation involves allegations of sexual harassment brought to the attention of a commanding officer. In addition to following this SOP, commanders must comply with 10 USC 1561. See Section 10 for more details.
 - 4) The fourth situation involves anonymous complaints of discrimination. The procedures for processing those complaints are found under Section 11 of this SOP.

5. Investigation

5.1. Procedure for Initiating the Investigation.

- a) If the VTNG doesn't dismiss the complaint, it will conduct an investigation.
- b) The VTNG will request an investigation within 30 calendar days of the date of receipt of the formal complaint. The investigation will not be requested until the VTNG has decided which claims to accept and which claims to dismiss as outlined in SOP 5.6.
- c) The VTNG has 180 days from the day the complainant filed the formal complaint to complete its investigation. The time period may be extended as described in 29 1614.106 and 29 CFR 1614.108(e).
- d) The investigation may be conducted by the Investigation Resolution Directorate in the Defense Civilian Personnel Advisory Service (DCPAS) or similarly trained professional.
- e) All costs associated with the investigation, including witness travel and depositions, are typically paid by the unit/organization in which the discrimination complaint arises.

5.2. Post Investigation Procedure.

- a) When the investigation is complete, the VTNG will issue a notice with hearing rights. The notice will give the complainant the choice to either request a hearing before an EEOC Administrative Judge, or request the VTNG to issue a decision as to whether the discrimination occurred. It will also notify complainant that she or he must make the request within 30 days of receipt of the notice.
- b) A copy of the investigative file and any report of findings will be provided to the SEEM. An un-redacted copy will be provided to the Staff Judge Advocate. A redacted copy, in compliance with the Privacy Act, will be provided to the complainant within the time frame under 29 CFR 1614.108(f).
- c) If the complainant does not request a hearing or a final decision without a hearing within 30 calendar days after receipt of the notice of hearing rights, the SEEM will notify the complainant that a final decision will be issued within 60 calendar days from the end of the 30 calendar day request period, and that further appeal rights will be provided at that time.
- d) If the complainant requests the VTNG to issue a decision and no discrimination is found, or if the complainant disagrees with a part of the

decision, he or she can appeal the decision to the EEOC or challenge it in federal district court.

5.3. Concerns Regarding the Investigation or Complaint Process.

If a complainant is dissatisfied with the processing of his or her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, the SEEM will provide a written response indicating the actions the VTNG took to resolve the concerns. While such complaints are not final orders (and thus not appealable), a copy of the letter will be maintained with the complaint file.

6. The Hearing and Appeal Process for Individual Complaints

6.1. Procedure for Requesting a Hearing.

- a) A complainant may request a hearing before an EEOC Administrative Judge after the VTNG has completed its investigation.
- b) To request a hearing, the complainant must make a request in writing or online through the EEOC's Public Portal at <https://publicportal.eeoc.gov/> and provide a copy of the request to the SEEM.
- c) A request for a hearing must be made within 30 days from the date the complainant receives the notice with hearing rights. If a complainant requests a hearing, an EEOC Administrative Judge will conduct the hearing, make a decision, and order relief if discrimination is found.
- d) When a complainant requests a hearing, the EEOC will appoint an administrative judge to conduct a hearing. The administrative judge will have full responsibility for the adjudication of the complaint, including overseeing the development of the record.

6.2. Final Orders.

- a) Once the VTNG receives the Administrative Judge's decision, the VTNG will issue a final order.
 - 1) The VTNG has 40 days to issue the final order, which will notify the complainant whether or not the VTNG will fully implement the decision of the administrative judge. The notice will contain information about the complainant's right to appeal to EEOC, the right to file a civil action in federal district court, the name of the proper defendant(s), and the deadline for filing both an appeal and a civil action.
 - 2) If the VTNG's final order does not fully implement the decision of the administrative judge, then the VTNG will file an appeal in accordance

with 29 CFR 1614.403.

- b) The VTNG will also issue a final order when it dismisses an entire EEO complaint under 29 CFR 1614.107, or when it receives a request for an immediate final decision, or when it does not receive a reply to the notice issued under 29 CFR 1614.108(f).
 - 1) The final orders issued under this section shall consist of findings by the VTNG on the merits of each issue in the complaint, or the rationale for dismissing any claims in the complaint. When discrimination is found, the VTNG will provide appropriate remedies and relief.
 - 2) The VTNG will issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision, 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.
 - 3) The final order shall contain notice of the right to appeal the final action to the Equal Employment Opportunity Commission, 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.

6.3 Appealing a Final Order

Appeals to the EEOC are governed by 29 CFR 1614.403. A complainant can appeal the VTNG's final order (including a final order dismissing a complaint) to EEOC Office of Federal Operations. The complainant must file the appeal no later than 30 days after receiving the final order. An appeal can be filed using the EEOC's Public Portal located at <https://publicportal.eeoc.gov/>.

7. Mixed Case Complaints

7.1. Guidance on Processing Mixed Complaints.

Some discrimination complaints involve "mixed" issues – claims that can be handled by both the VTNG under this SOP and claims typically handled by the Merit Systems Protection Board (MSPB). If the matter is filed first with the VTNG, it is called a "mixed case complaint." If a matter is filed first with the MSPB, it is called a "mixed case appeal." Whichever forum the matter is filed in first is considered an election to proceed in that forum. See 29 C.F.R. 1614.302. Complainants will be notified that the case will not proceed simultaneously, but will proceed wherever he or she filed first.

7.2. Processing Mixed Case Appeals Initially filed with the MSPB.

When a mixed case appeal is initially filed with MSPB, the MSPB must determine

whether it has jurisdiction.

- a) If the MSPB's jurisdiction of a mixed case appeal is questioned and the appeal is dismissed, the VTNG will notify the complainant in writing of the right to file an EEO complaint subject to 29 CFR 1614.107.
 - 1) The complainant must contact an EEO counselor within 45 days of receipt of the notice of dismissal.
 - 2) The date on which the complainant files his or her appeal with MSPB will be deemed to be the date of initial contact with the counselor.
 - 3) If the MSPB dismisses a timely appeal for jurisdictional reasons after the VTNG already has investigated the complaint, the VTNG will reissue a notice under 29 CFR 1614.108(f) giving the complainant the right to elect between a hearing before an administrative judge and an immediate final decision. See the procedures under 6.2.
- b) If the MSPB's jurisdiction of a mixed case appeal is not questioned, the VTNG will dismiss its case.
 - 1) The VTNG will advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155.
 - 2) The complainant will be advised of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue.
 - 3) The VTNG's decision to dismiss a mixed case complaint is not appealable to the EEOC except where it is alleged that 29 CFR 1614.107(a)(4) has been applied to a non-mixed case matter.
- c) Whenever the VTNG or the MSPB questions the MSPB's jurisdiction, the VTNG will hold the mixed case complaint in abeyance until the issue is ruled upon. The VTNG will notify the complainant that it is holding the case in abeyance and instruct him or her to bring the allegations of discrimination to the attention of the MSPB. Until the ruling, all time limitations for processing or filing under this part will be tolled. The VTNG decision to hold a mixed case complaint in abeyance is not appealable to EEOC.
 - 1) If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the VTNG will dismiss the mixed case complaint pursuant to 29 CFR 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue.

- 2) If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the VTNG will resume processing the complaint as a non-mixed EEO complaint.

7.3. Processing Mixed Case Complaints Initially filed with the VTNG.

When a mixed case complaint is initially filed with the VTNG, the VTNG will issue a notice to the complainant that it has accepted the complaint.

- a) The notice will also advise the complainant that if the VTNG has not issued a final decision within 120 days of filing the mixed case complaint, the complainant may appeal the matter to the MSPB or may file a civil action as specified by 29 CFR 1614.310(g), but not both.
- b) The notice will further state that if the complainant is dissatisfied with the VTNG's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the VTNG's final decision.
- c) When the VTNG's investigation of the mixed case complaint is complete, the VTNG will provide notice to the complainant that a final decision will be issued within 45 days without a hearing. When a final decision on a mixed complaint is made, it will provide notice to the complainant of her or his right to appeal the matter to the MSPB (not the EEOC) within 30 days of receipt and of the right to file a civil action as provided under 29 CFR 1614.310(a).

8. Class Action Complaints

8.1. Procedure for Processing Class Action Complaints Prior to Class Certification.

- a) An aggrieved person wishing to file a class complaint must initiate the EEO counseling process in accordance with Section 5.4. of this policy.
- b) The aggrieved person may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim(s) raised in an individual complaint. If the complainant moves for class certification after completing the counseling process, no additional counseling is required.
- c) The SEEM will send a written notice to the Human Rights Officer, the Staff Judge Advocate, and the Adjutant General when a class complaint is filed. The notification will include the aggrieved person's name, the name of his or her representative, the docket number, the date of initial contact, the identification of the class, and the claim(s) raised.
- d) When notified of a class complaint, the Staff Judge Advocate will designate

an attorney to represent the Agency.

- e) The SEEM will attempt to resolve the individual allegations and personal concerns of the aggrieved person. Before attempting to resolve class-wide issues, the SEEM must coordinate any proposed action with the Human Resources Officer, the Staff Judge Advocate and the Adjutant General.
- f) If the matter does not resolve, the SEEM will prepare a draft report. The report will include the class claims, the basis, the definition of the proposed class, information about the potential class size, information about how the aggrieved person claims reflect claims of class (commonality and typicality), and adequacy of representation of the class.

8.2. Procedure for Processing Class Action Complaints to Obtain Certification.

- a) The EEOC, through one of its administrative judges, determines whether to certify a class in accordance with 26 CFR 16.14.204.
- b) A class complaint must be signed by the agent for the class and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.
- c) Within 30 days of receiving a class complaint, the VTNG will forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the EEOC.
- d) The EEOC will transmit its decision to accept or dismiss a class complaint to the VTNG. The VTNG will take final action by issuing a final order within 40 days of receipt of the EEOC's decision. The final order will notify the agent of the class whether or not the VTNG will implement the decision of the administrative judge. If the final order does not implement the decision of the administrative judge, the VTNG will simultaneously appeal the administrative judge's decision to the EEOC's Office of Federal Operations. A dismissal of a class complaint shall inform the class agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed accordingly, or the complaint is also dismissed as an individual complaint in accordance with one of the reasons listed in 29 CFR 1614.107(a). In addition, it shall inform the class agent of the right to appeal the dismissal of the class complaint to the Equal Employment Opportunity Commission or to file a civil action in federal court.

8.3. Post Class Certification Procedure.

- a) When a class complaint is accepted by the EEOC, the VTNG must use reasonable means to notify the class members of the acceptance of the

class complaint, a description of the issues accepted as part of the complaint, an explanation of the binding nature of the final decision or resolution on the class members, and the name, address and telephone number of the class representative.

- b) In lieu of an investigation by the VTNG, an EEOC Administrative Judge will develop the record through discovery and a hearing. The Administrative Judge will issue a recommended decision to the VTNG. Within 60 days of receipt of the recommended decision on the merits of the class complaint, the VTNG must issue a final decision which either accepts, rejects or modifies the recommended decision. If no decision is issued within that time frame, the recommended decision becomes the VTNG's final decision in the class complaint.
- c) A class complaint may be resolved at any time by agreement between the VTNG and the class agent. Notice of such resolution must be provided to all class members, and reviewed and approved by the Administrative Judge.

9. Special Considerations for Complaints of Sexual Harassment

9.1. Commander's Responsibilities for Processing Sexual Harassment Complaints.

- a) A commanding officer or officer in charge of a unit who receives a complaint alleging sexual harassment from an employee under his or her supervision is required to carry out an investigation of the complaint in accordance with 10 USC 1561.
- b) The commanding officer must immediately inform the SEEM of the sexual harassment complaint.
- c) The SEEM will contact the employee to advise that person of their rights under this SOP.
- d) An investigation under this SOP can be concurrent with an investigation under 10 USC 1561.

10. Anonymous Complaints

While a matter is pending during the counseling period, an aggrieved person has a right to remain anonymous. When requested, the EEO Professional will refrain from divulging the person's identity until authorized by the aggrieved person. However, to insure a fair process, the right to remain anonymous will end upon the filing of a formal EEO complaint, or upon the election of alternative dispute resolution.

The VTNG may conduct an investigation into an anonymous complaint of discrimination when no aggrieved person has been identified.

11. Settlement

11.1. When Settlement Can Occur.

Settlement of a complaint may occur at any time during the process. The SEEM is available to help coordinate negotiations by working with the Staff Judge Advocate, management representatives, and the complainant (or his or her representative).

11.2. Terms of the Settlement

The settlement agreement may include remedial action, back pay, attorney's fees, and/or compensatory damages, provided that those damages are allowed by law. For claims involving age discrimination (as well as reprisal claims based on prior age discrimination complaints) attorney's fees and compensatory damages are not payable.

11.3. Allegations of Noncompliance with Settlement Agreements

A complainant who alleges breach of a settlement agreement with the VTNG must provide written notice to the SEEM of the specific provisions of the agreement that have been breached. Within 30 calendar days of the notice, the SEEM will conduct a fact-finding and provide a written decision signed by the Adjutant General or designee to the complainant as to whether the VTNG is in breach and/or efforts to resolve the matter. The written decision will provide the complainant notice of the right to appeal the decision to the EEOC.