
ADDRESSING

SEXUAL ORIENTATION

DISCRIMINATION

IN FEDERAL

CIVILIAN EMPLOYMENT

*A Guide to
Employee's
Rights*



**United States
Office of
Personnel
Management**

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INTRODUCTION

On May 28, 1998, President Clinton issued Executive Order 13087, reaffirming the Executive Branch's longstanding internal policy that prohibits discrimination based upon sexual orientation within Executive Branch civilian employment. The Executive Order states this policy uniformly by adding sexual orientation to the list of categories for which discrimination is prohibited. The other categories are race, color, religion, sex, national origin, handicap, and age.

It is the policy of the Federal Government to provide an equal opportunity to all of its employees. Federal employees should be able to perform their jobs in workplaces free from discrimination—whether that discrimination is based on color, religion, sex, national origin, handicap, age or sexual orientation. The President's Executive Order states, as a matter of Federal policy, that a person's sexual orientation should not be the basis for the denial of a job or a promotion. As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable.

This is the first time that the prohibition against sexual orientation discrimination has appeared in a specific directive from the President, demonstrating the strength of his conviction that discrimination based upon sexual orientation is at odds with the merit system, which is the pillar of effective and honest government. In issuing this Executive Order, however, the President reaffirmed a long-standing Office of Personnel Management (OPM) interpretation of Federal law that employment decisions that have no relationship to a person's ability to perform his or her work are squarely in conflict with Executive Branch policy. By issuing this Executive Order, the President reaffirmed existing Federal law that prohibits discrimination in certain employment decisions when the decisions are based upon conduct that does not adversely affect employee performance. Federal employees should be able to perform their jobs in workplaces free from discrimination.

The new Executive Order amends section 1 of Executive Order 11478 (1969), which now reads, in part, as follows:

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation through a continuing affirmative program in each executive department and agency. This policy of equal employment opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law.

PURPOSE

The purpose of this booklet is to make Federal employees aware of how to obtain help if they believe they have been discriminated against based upon sexual orientation. Executive Order 13087 states the Executive Branch's policy but does not create any additional enforcement rights, such as the ability to proceed before the Equal Employment Opportunity Commission. The Executive Order does not authorize affirmative action programs. There are, however, existing administrative and legal remedies available to Federal employees who believe they have been victims of discrimination based upon sexual orientation. This booklet is designed to make employees and applicants aware of existing bases for assistance and to aid them in finding the agencies that can help them. It is not designed as a comprehensive guide, but as a general overview.

AGENCY COMMITMENT

Federal agencies, as well as their managers, should commit themselves to promoting a work environment that is free from discrimination based upon sexual orientation in accordance with Executive Order 13087. Agencies should distribute the President's Executive Order to their employees and should notify them about avenues of redress. Employees should be encouraged to report to their supervisor instances of discrimination. When made aware of problems, supervisors should consult with their human resources office or agency legal counsel to ensure that appropriate steps are taken. All reports of incidents of sexual orientation discrimination should be taken seriously and addressed. In some circumstances, this may involve taking corrective steps or disciplining those who discriminate, as appropriate.

LEGAL PROTECTIONS

Prohibited Personnel Practice

The Civil Service Reform Act of 1978 describes prohibited personnel practices. One of them, contained in 5 U.S.C. § 2302(b)(10), prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the basis of conduct that does not adversely affect employee performance. OPM has interpreted this statute to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality, or heterosexuality.

Where to Seek Help

When applicants or employees believe that a prohibited personnel practice has been committed against them that constitutes discrimination based upon sexual orientation, they may seek assistance under certain circumstances from:

- I. Merit Systems Protection Board**
- II. Office of Special Counsel**
- III. Negotiated Grievance Procedure**
- IV. Agency Grievance Procedure**

Employees and applicants may **not** seek relief from the Equal Employment Opportunity Commission or file a discrimination complaint under title VII of the Civil Rights Act of 1964, as amended, because that law does not prohibit discrimination based upon sexual orientation.

Most of the available procedures require employees or applicants to raise the allegations within a specific time frame from the date that the alleged discrimination occurred. The following sections provide basic and general information about these procedures and the circumstances under which each can be used. Under some circumstances, more than one procedure may be available, and the choice of one procedure may preclude the use of others.

You should review the rules and procedures specific to your agency and those issued by agencies that decide complaints and appeals before you decide whether and how to proceed.

A cautionary note: The Federal employee appeals process can, at times, seem confusing because of the overlapping authority of several different agencies and different appeal routes and time limitations. This guide is intended to be a general introduction to possible remedies for discrimination based upon sexual orientation. It is not intended to be a substitute for legal advice on the best course of action for a particular employee. Although much of this information is available to you directly from either your agency or those agencies mentioned in this guide, you might also consult with an attorney experienced in Federal employment issues or, where applicable, a knowledgeable union officer.

I. Merit Systems Protection Board (MSPB)

If you wish to appeal from an agency action, you should contact the MSPB at the addresses listed on page 7 as soon as possible after the action was taken to determine whether it is an action upon which the MSPB may rule.

The MSPB is an independent body that hears, among other things:

- Appeals from certain agency personnel actions, which are set forth in regulations contained in section 1201.3 of title 5, Code of Federal Regulations. These include removals, suspensions for more than 14 days, and reductions in grade and pay of certain Federal employees who possess tenure.
- Cases brought by the Special Counsel involving alleged prohibited personnel practices.

These two procedures for bringing cases before the MSPB are more fully outlined below.

Appeals

When employees or applicants challenge one of the actions described above by filing an appeal within the jurisdiction of MSPB, they may also allege that the personnel action being appealed was based upon a prohibited personnel practice. If the employee establishes that it is more likely than not that this was the basis for the agency's personnel action, the personnel action will not be sustained.

Cases Brought by the Special Counsel

If the personnel action is not one appealable to MSPB, employees and applicants must seek the assistance of the Office of Special Counsel, which has authority to investigate and to petition MSPB on behalf of the employee or applicant. **The procedures for seeking the assistance of the Office of Special Counsel are described beginning on page 8.**

Appeal Procedures

Very generally, an MSPB appeal proceeds as follows:

- A person files an appeal with one of the MSPB's regional offices. The addresses of the regional offices are contained in MSPB's regulations.
- The administrative judge assigned to the case determines whether an appeal is filed within the time limits and whether the agency personnel action complained of properly may be the subject of an appeal.
- If an appeal meets these requirements, the employee or applicant has the right to choose between a hearing or a decision on the written record.
- When an administrative judge issues a decision either the employee or applicant or the agency may ask the full MSPB to review any part of the decision that is thought to be erroneous.
- Employees or applicants may seek judicial review of an MSPB decision. An agency may not. However, the United States Office of Personnel Management (OPM) may seek judicial review when the Director of OPM believes that the MSPB's decision is erroneous and will have a substantial impact on civil service law.

The procedures that MSPB follows are contained in Title 5, Code of Federal Regulations, Part 1201.

For Additional Information about the Merit Systems Protection Board

MSPB has a web site at <http://www.mspb.gov>. You may contact the MSPB's headquarters at (202) 653-7200 or (800) 209-8960, or by mail at: Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC, 20419. Copies of the MSPB's regulations are available at any MSPB office, agency personnel offices, most public libraries, and on the MSPB web site. The web site also makes available MSPB decisions, forms for filing appeals or petitions for review, and general information about the Board.

The address of MSPB Regional Offices can be found at Appendix II, 5 CFR, Part 1201.

II. Office of Special Counsel (OSC)

If you think you have been discriminated against based upon sexual orientation, you may wish to contact OSC at the address listed on page 9.

The Office of Special Counsel is an independent investigative and prosecutorial agency within the Executive Branch that receives and investigates complaints alleging prohibited personnel practices, including those involving discrimination based upon sexual orientation.

The Office of Special Counsel:

- Receives and investigates allegations from applicants, employees and former employees of prohibited personnel practices and investigates allegations to determine whether there are reasonable grounds to believe that the agency has committed a prohibited personnel practice or will do so.
- May request MSPB to stop personnel actions from taking place while it is investigating whether they were taken as a result of a prohibited personnel practice. These prohibited personnel practices include 5 U.S.C. § 2302(b)(10), which prohibits discrimination based on conduct which does not adversely affect either the employee's own job performance or the performance of others.
- May petition MSPB for corrective action to provide a remedy for the employee.
- May seek disciplinary action by MSPB against the individuals who committed a prohibited personnel practice.
- May achieve favorable results for employees without litigation before MSPB by achieving settlements of complaints prior to the initiation of any formal appeal to MSPB. May act as an intermediary between the employee and the agency to resolve issues. May seek an informal stay of a personnel action to prevent imminent harm when it has reasonable grounds to believe the employee has been subjected to a prohibited personnel practice.

The procedures for corrective action by the Special Counsel are set forth in detail in 5 U.S.C. § 1214. The procedures for disciplinary action are contained in 5 U.S.C. § 1215.

For Additional Information about the Office of Special Counsel

Information about how the Office of Special Counsel operates may be obtained from:

Office of the Special Counsel
Suite 300
1730 M Street, NW
Washington, D.C. 20036-4505

The Office of Special Counsel's phone numbers are:

Complaints Examining Unit..... (202) 653-7188 (TDD-ready)
Toll Free (800) 872-9855 (TDD-ready)
Public Information (202) 653-7984

OSC has a web site at <http://www.osc.gov>.

Complaints to the Office of Special Counsel must be in writing. Complaint forms may be downloaded from OSC's web site, or will be provided upon request. Complaints should be sent to the Complaints Examining Unit at the above address.

III. Negotiated Grievance Procedure

If you think you have been the victim of sexual orientation discrimination, you may also wish to contact the union that represents you.

Employees who are in a certified bargaining unit, that is, who are represented by a duly recognized labor organization and covered by a collective bargaining agreement, may file grievances in accordance with 5 U.S.C. § 7121.

- The definition of a grievance is contained in 5 U.S.C. § 7103(a)(9), but generally permits an employee to complain about most matters relating to employment.
- Certain subject matters are excluded from the negotiated grievance procedure. These include complaints related to retirement, life insurance, and health insurance.
- Unless specifically excluded from the grievance procedures by collective bargaining agreement, a grievance may allege the commission of a prohibited personnel practice, including one related to sexual orientation discrimination.
- Employees must elect to use one of the following avenues: the negotiated grievance procedure, the appellate procedures of MSPB (if the action is appealable to MSPB), or the procedures for asking the Special Counsel to seek corrective action from the MSPB. The rules governing the election are set forth in 5 U.S.C. § 7121(g).
- As part of the negotiated grievance procedure, the union that represents the employee may elect to place the dispute before an arbitrator who is usually jointly selected by the union and the agency as provided in the collective bargaining agreement. Grievants may not take the case to arbitration on their own.

- Under current law, an arbitrator hearing a case concerning an alleged prohibited personnel practice may:
 - (a) Stop any personnel action from taking place while he or she is hearing the case if the arbitrator determines that there are reasonable grounds to believe that a prohibited personnel practice has been committed or will be committed.
 - (b) Order the taking by an agency of certain disciplinary action against the person committing the prohibited personnel practice.
- The rules for appealing adverse arbitration decisions differ depending upon the subject of the grievance. Generally, matters that may be heard by MSPB may be appealed to the United States Court of Appeals for the Federal Circuit. Otherwise, they may be appealed to the Federal Labor Relations Authority (FLRA). Ordinarily, one may not appeal a decision of the Federal Labor Relations Authority arising from arbitration in the courts.
However, it is important to become informed about the proper appeals route in any particular circumstance.

For Additional Information about the Federal Labor Relations Authority

The Federal Labor Relations Authority is an independent body that provides leadership in establishing policies and guidance relating to the Federal labor law. Among its functions is to receive and rule on “exceptions,” that is, appeals from arbitral awards resulting from grievances. The Federal Labor Relations Authority’s telephone number is (202) 482-6560.

The Federal Labor Relations Authority’s web site is
<http://www.access.gpo.gov/flra>

IV. Administrative Grievance Procedure

Another possible area of redress for those who feel victimized by discrimination based upon sexual orientation is the agency's administrative grievance procedure.

Many agencies have their own grievance systems to resolve disputes between an employee and the agency that may not be heard elsewhere. In general, these systems try to achieve an informal resolution so that they do not have to be decided by higher levels of management. Specific procedures and time limitations vary from agency to agency.

An employee considering such a grievance must become familiar with the rules governing the particular agency's system. Employees who believe that they have been discriminated against due to sexual orientation should ask their human resource office for a copy of their agency grievance procedures to determine the subjects they cover and the procedures to follow.

CONCLUSION

We hope that this booklet will provide some important information to those who believe they have been the victims of discrimination.

This guidance should be widely distributed to employees and should be made available for review in central locations. Dissemination of information on procedural remedies is of great importance to employees who may feel victimized by discrimination. But of primary importance is creating an atmosphere of fairness to employees. They should be secure in the knowledge that the Federal agency for which they work will not treat them differently or less favorably on account of sexual orientation or any other consideration unrelated to merit.

Through the equitable treatment of employees the Federal Government can set an example for the nation that we serve.