
MANAGEMENT DIRECTIVE

410.10
Amended
Number

COMMONWEALTH OF PENNSYLVANIA GOVERNOR'S OFFICE

Subject:

Guidelines for Investigating and Resolving Internal Discrimination Complaints

By Direction Of:

Naomi Wyatt

Naomi Wyatt, Secretary of Administration

Date:

February 21, 2008

This directive establishes policy and procedures to be followed when investigating and resolving internal discrimination complaints. This amendment contains major procedural changes; therefore, marginal dots are excluded.

1. **PURPOSE.** To establish policy and procedures for investigating and resolving internal complaints of alleged discrimination.
2. **SCOPE.** Applies to employees in all agencies under the Governor's jurisdiction.
3. **OBJECTIVE.** To ensure that a discrimination complaint investigation is conducted in a confidential, professional, efficient, and prompt manner.
4. **POLICY.**
 - a. **Executive Order 2003-10, Equal Employment Opportunity**, prohibits discrimination against any employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability.
 - b. **Executive Order 2002-4, Prohibition of Sexual Harassment in the Commonwealth**, prohibits sexual harassment by any Commonwealth employee against any other employee, applicant for employment, or client or other person receiving services from or conducting business with the Commonwealth.
 - c. **Pennsylvania Human Relations Act of October 17, 1955, P. L. 744, as amended**, prohibits employment and other practices of discrimination because of race, color, religious creed, ancestry, disability, age, sex, or national origin by employers, employment agencies, labor organizations, and others; creates the Pennsylvania Human Relations Commission in the Governor's Office; defines its functions, powers, and duties; provides for procedures and enforcement; provides for formulation of educational programs to prevent prejudice; provides for judicial review and enforcement; and imposes penalties.
 - d. **Manual M410.3, Guidelines for Equal Employment Opportunity Plans and Programs**, provides procedures for developing and implementing annual Equal Employment Opportunity Plans and Programs. Feb

e. Management Directive 505.7, Personnel Rules, Chapter 25.1, states that every effort is to be exerted to end discrimination against members of minority groups and women at every level of employment, including recruitment, selection, appointment, promotion, training, delegation, and decision making.

f. Filing a Complaint.

(1) Employees who believe that they have been subjected to discrimination because of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability may file a complaint with the Equal Opportunity Officer of the agency where the alleged act of harm occurred.

(2) **Filing Period.** All internal complaints of discrimination must be filed within 90 calendar days of the alleged act of discrimination.

g. Investigation procedures. All internal complaints of discrimination must be handled in accordance with the procedures set forth in Enclosure 1, Internal Complaint Investigation Procedures.

h. Reconsideration.

(1) Whenever a complainant is not satisfied with the resolution of his or her complaint, the complainant may request the agency head to reconsider the complaint.

(2) The agency head, in his or her **sole discretion**, may decide whether to accept the request to reconsider the complaint and, if accepted may, in his or her **sole discretion**, decide how to proceed with the reconsideration request.

i. Transfer to Legal Office. The procedures outlined in this directive apply only to internal investigations. Whenever a complaint or action is filed in any court or outside agency, the investigation must be transferred to the agency chief counsel or his/her designee who will direct all further investigation and/or handling.

j. Retaliation prohibited. Retaliation is expressly prohibited against persons who have filed charges, testified, assisted, or participated in any proceeding, investigation, or hearing regarding a complaint of discrimination.

k. Other avenues of recourse. If the complainant has not reached a satisfactory resolution to his or her complaint at any time during the discrimination complaint investigation, he or she may file a complaint with one of the following agencies listed in the opposite column within the respective time frames, as provided by law.

Agency

Time Frames

Pennsylvania Human Relations Commission

180 days from date of alleged occurrence

Harrisburg Regional Office - Riverfront Office Center
1101-1125 S. Front Street, 5th Floor, Harrisburg, PA 17104
Voice: (717) 787-9784 TTY: (717) 787-7279

Philadelphia Regional Office
110 North 8th Street, Suite 501, Philadelphia, PA 19107
Voice: (215) 560-2496 TTY: (215) 560-3599

Pittsburgh Regional Office
301 Fifth Avenue - 3rd Floor, Piatt Place, Pittsburgh, PA 15222
Voice: (412) 565-5395 TTY: (412) 565-5711

US Equal Employment Opportunity Commission

300 days from date of alleged occurrence

Philadelphia District Office
801 Market Street, Suite 1300
Philadelphia, PA 19107
Voice (800) 669-4000 Local (215) 440-2601
TTYL (215) 440-2610

Pittsburgh Area Office - William S. Moorhead Federal Building
1000 Liberty Avenue, Suite 1112
Pittsburgh, PA 15222
Voice: (800) 669-4000 Local: (412) 395-5902
TTY: (412) 395-5904

Enclosures:

1 - Internal Complaint Investigation Procedures

2 - Form STD-486, Equal Employment Opportunity Discrimination Complaint

This directives replaces, in its entirety, Management Directive 410.10, dated June 19, 1992.

INTERNAL COMPLAINT INVESTIGATION PROCEDURES

Equal Opportunity Managers and Specialists¹ play an important role in the resolution of discrimination complaints.² When employees have complaints of discrimination or harassment,³ Equal Opportunity Managers and Specialists are required, working with the legal office and the responsible agency official,⁴ to investigate and assist in resolving these complaints.

The purpose of investigating an allegation of discrimination or harassment is to determine if, in fact, discrimination or harassment did occur. The Equal Opportunity Manager/Specialist's role is to investigate and document the allegations of discrimination or harassment. As an investigator, it is essential that the Equal Opportunity Manager/Specialist exercise objectivity throughout the investigative process. The investigator must remain impartial and unbiased throughout the investigation gathering all relevant facts so that the ultimate decision-maker (responsible agency official) has all of the necessary information to enable him/her to make a determination about the complaint.

The investigator is not an advocate for the complainant, the alleged offender, or the employer. Rather, the investigator's role is to remain impartial and conduct every investigation with objectivity and fairness to all parties involved.

All complaints of discrimination or harassment must be handled in accordance with the procedures beginning on page 2.

¹ Although directed specifically to Equal Opportunity Managers and Specialists, these procedures apply to all internal complaint investigations no matter who is assigned the task of investigation.

² *Executive Order 2002-3, Equal Employment Opportunity*, prohibits discrimination against any employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, national origin, AIDS or HIV status, or disability.

³ Harassment, including sexual harassment, in the workplace is one form of employment discrimination which is prohibited. See *Executive Order 2002-4, Prohibition of Sexual Harassment in the Commonwealth*, and *Management Directive 505.30, Prohibition of Sexual Harassment in Commonwealth Work Settings*.

⁴ "Responsible agency official" is the agency head or his or her designee.

I. WHAT TO INVESTIGATE. ⁵

It is your responsibility to investigate **any** complaint, whether formal or informal. You must treat every complaint seriously and investigate every complaint.

A complaint does not need to be in writing to warrant the need for an investigation. However, once a verbal complaint is received, you may ask the complainant to put the complaint in writing. (Form STD-486, Equal Employment Opportunity Discrimination Complaint, may be used for this purpose, but it is not required. Sample attached as Enclosure 2.)

Do not promise confidentiality, but try to maintain it to the extent possible. If the complainant states that the complaint is confidential, explain that you are obligated to investigate the complaint, but that you will try to assure that only those who have a legitimate need to know will be notified of the complaint. Never promise NOT to investigate a complaint.

II. PREPARE FOR THE INVESTIGATION.

A. Create an Investigation File.

1. Always keep the investigation file separate from any employee's official personnel file.
2. Record the date the complaint is received. Begin an investigation log in which you record each action taken during your investigation (i.e., date, time, location, and name of person interviewed or document received).
3. Review applicable federal or state laws and regulations, employer policies and *Management Directives, Human Resource/EEO Manuals*, etc., and place a copy of each relevant document in the investigation file.

B. Prepare an Investigative Plan.

1. After receiving a complaint, whether oral or written, you should prepare an investigative plan. The investigative plan will serve as a checklist or road map for your investigation. The plan should outline all of the major steps of the investigation and also be tailored to the particular circumstances described in the complaint. Generally, the plan should contain the following items:

(a) A complete list of the complainant's allegations. Review the allegations to determine all incomplete information and develop a plan (e.g., who to talk to, what questions to ask) to ascertain any missing facts.

(b) A preliminary list of witnesses you intend to interview (always include the complainant, the alleged discriminator/harasser, and any witnesses).

(c) A detailed list of questions you intend to ask based on the allegations of the complaint. Questions should be open-ended, brief and understandable, cover all aspects of the complaint, and should not name parties or witnesses unless absolutely necessary. They should be designed to elicit facts, i.e., who, what, where, when, and how. You should be ready to ask follow-up questions, even if they are not written down.

⁵ These procedures apply only to internal investigations. Whenever a complaint or action is filed in any court or outside agency, the investigation must be transferred to the agency chief counsel (or his or her designee) who will direct all further investigation and/or handling.

- (d) A list of documents that you will seek and review during the investigation.
- 2. The plan may be added to or modified as the investigation progresses.

C. Notify Appropriate Agency Officials.

- 1. Keeping in mind the need for confidentiality, notify the appropriate responsible agency official of the complaint, and of when, where, and how you plan to conduct the investigation. If the responsible agency official is the alleged discriminator/harasser, notify the next higher official or manager.
- 2. Keeping in mind the need for confidentiality, notify the agency chief counsel, or his/her designee, of the complaint, and of when, where, and how you plan to conduct the investigation. If the agency chief counsel is the alleged discriminator/harasser, notify the Governor's General Counsel.

III. CONDUCT THE INVESTIGATION.

Discrimination and harassment claims must always be investigated. An investigation should be undertaken promptly. The investigation of harassment complaints must be given precedence over other work and must be completed promptly so that the responsible agency official can take prompt, remedial action, if necessary.

If at all possible and when available, the investigator should interview the complainant of a sexual harassment complaint within one business day of receiving the complaint. This interview does not preclude follow-up interviews to obtain additional details, clarification, or other information. The initial interview with the complainant will help the investigator plan the investigation as outlined in Section II. The investigation of a discrimination complaint that does not include claims of sexual harassment, should commence and be completed in a timely manner.

When interviewing any individual, the investigator should refrain from offering his or her opinion about any matter. The investigator must remain objective and impartial while gathering the facts. The investigator should interview all potential parties and witnesses. All interviews should be documented as to time, place, persons present, and date of the interview. The interviewer should attempt to keep the interviews as confidential as possible. The interviewer should advise each person he/she speaks to that the investigation is confidential and that the interviewee should not disclose any information about the complaint or the investigation.

A. General Procedure for Every Interview.

- 1. Introduce yourself and explain the purpose of the interview (i.e., impartially gather the facts).
- 2. Review the relevant discrimination/sexual harassment policy with the person being interviewed. Remind the person that the Commonwealth does not tolerate harassment, discrimination, or retaliation.
- 3. Use effective questioning to gather all **facts** relevant to the allegations, e.g., who, what, where, when, and how.
- 4. Listen carefully to the interviewee during each interview, and be prepared to ask follow-up questions as necessary.
- 5. Take detailed notes during the interview. Notes should include:

(a) Name and contact information for the witness.

(b) Date, time, and location of the interview.

(c) Questions and responses.

(d) Do **not** include your opinion in the interview or your notes. The interview and your notes must be free from bias and subjectivity. Record only the information provided by the witness.

6. Follow *Management Directive 590.1, Labor Relations*, whenever an employee requests union representation at any point during an investigation.

7. Advise each person that the investigation is confidential and that the interviewee should not disclose any information about the complaint or the investigation.

B. Interview the Complainant.

1. Review the relevant discrimination/sexual harassment policy with the complainant and assure him/her that the Commonwealth will not tolerate discrimination, harassment, or retaliation.

2. Emphasize that all complaints of discrimination/harassment are taken seriously and will be investigated.

3. Explain that the purpose of the interview is to impartially gather facts about the complaint. For each incident of alleged discrimination/harassment, ask detailed information including, but not limited to, the following:

(a) exactly what occurred;

(b) when it occurred, how often it occurred, and whether it is still ongoing;

(c) where it occurred;

(d) who was involved and/or present when it occurred;

(e) what was said or done by each party involved;

(f) what response did you make when the incident(s) occurred or afterwards.

4. Ask if there are any other persons who have relevant information (e.g., were there any witnesses to the incident, who were they, and what did they hear or see).

5. Ask if the complainant told anyone about the incident/conduct or if the complainant saw anyone immediately after the episodes of alleged harassment/discrimination.

6. Do not permit the complainant to describe conduct only in generalities. Ask follow-up questions to gather detailed and specific information.

7. If the last alleged incident occurred more than a month before the complaint, ask why there was a delay in reporting the conduct.

8. Ask if the complainant filed any other complaints, and if so, when and with whom.

9. Ask whether the complainant is aware of other similar acts by the alleged offender or has knowledge of any other target of the alleged offender.

10. Ask whether any physical evidence, such as notes, documents, E-mails, etc., exist to substantiate the complainant's claims. If so, ask the complainant for a copy of the documentation.

11. Ask whether the complainant's job has been affected in any way by this conduct. Also ask what effect, if any, this conduct had on the complainant.

12. If the complainant alleges harassment, ask if any of the actions of the alleged harasser were welcome or unwelcome and whether or how this was conveyed to the alleged harasser. This may require that you explore the nature and history of the relationship of the complainant and the alleged harasser.

13. Ask the complainant how he/she would like to see the situation resolved.

14. Ask if the complainant has any other relevant information.

15. Avoid any promise of absolute confidentiality, giving assurance that only those who have a legitimate need to know will be notified of the complaint. Additionally, the complainant should be advised that it will be necessary to discuss the information with the alleged offender and perhaps others and that the complainant's name might have to be revealed. Reiterate the Commonwealth's policy against retaliation. Advise the complainant that he/she should report any such incidents to you immediately.

16. Advise the complainant that you do not know what the outcome of the investigation will be, but that you may need to talk to him/her again before the investigation is completed. Further, explain that the complainant will be notified when the investigation is completed.

17. Ask the complainant to sign and date the notes of the interview at the time of the interview or, in the alternative, prepare a statement based on your interview notes and ask the complainant to sign and date the prepared statement.

18. If the complainant is uncooperative, do the best you can to gain cooperation. If the complainant refuses to cooperate, make note of the refusal and try to investigate the complaint anyway by observing the employee's working environment and interviewing co-workers or supervisors. Document in writing what you did to try to investigate the complaint. Then, so advise the responsible agency official and agency legal office.

C. Interview the Alleged Offender.

1. Review the relevant discrimination/sexual harassment policy with the alleged offender to assure that he/she understands the policy and what conduct is prohibited. Explain that the Commonwealth will not tolerate discrimination, harassment, or retaliation.

2. Explain that retaliation against any person who makes a complaint or participates in the investigation of a complaint will not be tolerated, and that acts of retaliation could serve as an independent basis for discipline, including discharge.

3. Explain that the purpose of the interview is to impartially gather facts about the complaint, that no conclusion has been reached, and that the employer requires his/her full and honest cooperation.

4. Ask the alleged offender to respond to each aspect of the allegations fully and separately. Be specific enough in asking questions, i.e., who, what, when, and where facts, to permit the alleged offender

to respond to each of the allegations made against him/her.

5. If the alleged offender claims the allegations are false, ask why the complainant might lie, misinterpret his/her actions or provide inconsistent information.

6. Ask the alleged offender if there are any other persons who may be able to corroborate or confirm his/her statements, who may have witnessed any of the alleged conduct, or who may have any other relevant information.

7. If the complaint includes allegations of harassment and if the alleged offender denies that any admitted advances were "unwelcome," ask him/her what facts support that.

8. If the alleged offender acknowledges any inappropriate conduct, get specific details of the facts of what happened, when, why, what was said, witnesses, where it occurred, and why it occurred, etc.

9. Ask whether any physical evidence, such as notes, documents, E-mails, etc., exists regarding the allegations or which may substantiate the statements of the alleged offender. If so, ask for copies of the documentation.

10. Ask if the alleged offender has any other relevant information.

11. Advise the alleged offender that you do not know what the outcome of the investigation will be, but that you may need to talk to him/her again before the investigation is completed. Further, explain that after completion of the investigation, he/she will be notified and that the employer may take disciplinary action if evidence establishes discrimination/harassment.

12. Ask the alleged offender to sign and date the notes of the interview at the time of the interview or, in the alternative, prepare a statement based on your interview notes and ask the alleged offender to sign and date the prepared statement.

D. Interview Witnesses.

1. Generally explain that the purpose of the interview is to impartially gather facts about a complaint.

2. Advise the witness that the details of the complaint and the investigation are to be kept confidential and that disclosing them to others could subject him/her to discipline.

3. Reveal as little as possible about the details of the complaint, but what is necessary to obtain all relevant factual information. For example, after explaining the general nature of the complaint, ask the witness what he/she knows about the situation.

4. Ask open-ended questions, not questions that can be answered with a yes or no. For example, ask the witness: What did you see or hear? When did this occur? Describe the alleged offender's behavior toward the complainant; describe the complainant's behavior toward the alleged offender; describe the alleged offender's behavior toward others; etc.

5. Determine whether the witness has **independent** personal knowledge of the allegations or is basing his/her statement on rumor, innuendo, or what the witness has heard from someone else. If the information is from someone else, ask from whom.

6. Ask the witness if the complainant told the witness anything regarding the complaint. What was it and when did he/she tell the witness this?

7. Ask the witness if the alleged offender told the witness anything regarding the complaint. What was it and when did he/she tell the witness this?

8. Ask the witness if he/she has any other relevant information or if he/she knows of any other person who may have relevant information.

9. Ask if the witness has any notes, physical evidence, or other documentation regarding the allegations/incidents. If so, ask for copies of the documentation.

10. Advise the witness that retaliation for assisting in the investigation is prohibited, will not be tolerated, and should be reported to you immediately if it occurs.

11. Have the witness sign and date the notes of the interview at the time of the interview or, in the alternative, prepare a statement based on your interview notes and ask the witness to sign and date the prepared statement.

E. Conduct Follow-Up Interviews.

1. Although it is essential that investigations of all complaints be conducted promptly, it is also critical that investigations be thorough and complete. Therefore, investigators should not be content with information obtained through only an initial interview, unless it is clear that no other information can be gathered.

2. At a minimum, conduct a follow-up interview with the complainant, revealing so much of the information obtained from the alleged offender and any other witnesses as is appropriate for rebuttal or corroboration.

3. Give the complainant an opportunity to add and/or refine facts as well as reveal other incidents that may have occurred, but had not been part of the original complaint.

4. Interview any new witnesses and/or conduct a follow-up interview with existing witnesses if new **facts** are revealed.

5. Conduct a follow-up interview with the alleged offender, if warranted. Present him/her with any new allegations or information, obtain a response, and provide an opportunity for rebuttal of adverse statements.

6. At the conclusion of each follow-up interview, have each person interviewed sign and date the notes of the interview at the time of the interview or, in the alternative, prepare a statement based on your interview notes and ask the person to sign and date the statement.

F. Review Relevant Documents.

1. Do not overlook sources of information to corroborate or discount the facts alleged by the complainant, witnesses, and alleged offender. This may necessitate reviewing and obtaining copies of documentation. These could include, but not be limited to:

- (a) letters or memoranda regarding personnel or disciplinary action;
- (b) documentation or correspondence leading up to any alleged action;
- (c) documentation or correspondence of similar personnel or disciplinary actions within the agency or department;
- (d) the organizational chart;

(e) regulations, *Executive Orders*, *Management Directives*, agency policies, or other documents pertinent to personnel actions, disciplinary or otherwise; or

(f) phone records, E-mails, attendance records, work schedules, expense reports, or other relevant documentation.

2. All documentation of the investigation must be stored in the investigation file created when the complaint was made. Documentation should not be placed in an employee's personnel file unless an employee is disciplined for engaging in discrimination, harassment, retaliation, or failing to cooperate with the investigation.

3. The investigator should not place any personal notes or other inappropriate notation on any documents in the investigation file.

IV. REACHING A DETERMINATION.

A. Investigative Findings.

1. Once all of the evidence is collected and interviews finalized, the investigator must meet with the responsible agency official and a representative from the agency's legal office to review the factual findings of the investigation and credibility determinations.

2. If there are conflicting versions of relevant events, the responsible agency official will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged discrimination/ harassment in fact occurred. Factors to consider include:

(a) **Inherent plausibility:** Is the story believable on its face? Does it make sense?

(b) **Demeanor:** Did the person seem to be telling the truth or lying?

(c) **Motive to falsify:** Did the person have a reason to falsify information?

(d) **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?

(e) **Past record:** Did the alleged offender have a history of similar behavior in the past?

3. However, none of the above factors is determinative as to credibility. For example, the fact that there are no eye-witnesses to alleged harassment does not necessarily defeat the complainant's credibility, because harassment may occur behind closed doors. Furthermore, the fact that the alleged offender engaged in similar behavior in the past does not necessarily mean that he/she did so again.

4. The responsible agency official and legal counsel must advise the investigator whether or not a written investigation report should be prepared. A written report may not be needed depending on the circumstances. The investigator should only prepare a written report when directed to do so by the responsible agency official and legal counsel.

5. After the meeting with the investigator, the responsible agency official in consultation with legal counsel and the investigator, must determine whether discrimination/harassment has occurred. The responsible agency official shall notify the complainant and alleged offender of the determination. If no determination can be made because the evidence is inconclusive, the complainant and the alleged offender should be so informed and the responsible agency official or manager should continue preventative measures, such as training and monitoring.

6. If the responsible agency official or manager determines harassment has occurred, he/she must take prompt remedial action to stop the harassment, to correct the effects of the harassment, and to assure it does not occur again. Those remedial actions need not be the ones the complainant requests or prefers, as long as they are effective.

7. If the responsible agency official or manager determines that discrimination, not involving harassment, has occurred, he/she must take appropriate action to correct it.

8. The responsible agency official or manager shall document the determination made and action taken.

B. Investigation Report.

1. If the responsible agency official and legal counsel determine that a written investigation report is warranted, the responsible agency official will direct the investigator to prepare a written report. The report must be factual and must **not** contain legal conclusions or editorial comments by the investigator. The legal office must review and approve the investigation report before it is issued.

2. If directed to prepare a written report, the investigator should include the following information:

(a) A list of the complainant's allegations. The alleged offender's response to each allegation.

(b) A list of persons interviewed and a summary of each statement. The summary should also include a discussion of whether or not the investigator determined that the witness was credible and the investigator's basis for this determination.

(c) A presentation of the findings of fact, listed in logical sequence, identifying evidence that either supports or discounts each allegation. If evidence conflicts, identify which evidence may be more credible due to independent corroborating testimony or other evidence.

(d) A list of relevant documents and a summary of why each document is important and what particular facts or allegations each document tends to support or discount.

(e) If necessary, a section outlining the law or policy applicable to the complaint. This section may include a discussion of the burden of proof standard or any relevant legal principle. If included, legal counsel must supply this section.

3. The investigator must meet with the responsible agency official and agency legal counsel to discuss the proposed investigative report.

4. If warranted, a final investigative report will be issued by the responsible agency official and/or legal counsel after it has been reviewed and approved by the agency legal counsel.

