

**CALIFORNIA MILITARY DEPARTMENT STATE ACTIVE DUTY/STATE
MILITARY RESERVE EQUAL OPPORTUNITY AND DISCRIMINATION
COMPLAINT SYSTEM**

FOR THE GOVERNOR:

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Summary. This directive establishes policies and procedures for filing, processing, investigating, settling, and adjudicating discrimination complaints in the California Military Department (CMD) for State Active Duty (SAD) members and State Military Reserve (SMR) members. It establishes a uniform Discrimination Complaint System, legal and administrative reviews, and a final decision.

Applicability. This directive applies to:

- a. Members of the California Army and Air National Guard (Active or Retired), and the State Military Reserve (SMR) serving in a full-time support status, weekend SMR status, and California National Guard (CNG) members called to State Active Duty for pay as emergency support/response.
- b. Applicants for State Active Duty positions and membership in the SMR.
- c. This directive does not apply to State Civil Service (SCS) employees, federal technicians, Title 32 Military Personnel, Title 10 Military Personnel, or state contractors.

Proponent and exception authority. The proponent of this directive is the Adjutant General. The proponent has the authority to approve exceptions to this directive that are consistent with controlling law and regulation.

Supplementation. Supplementation of this directive and establishment of forms other than CMD forms is prohibited without prior approval from the Adjutant General, ATTN: CAJS-J1-SP-EO, 9800 Goethe Road, Sacramento, CA 95827-9101.

Suggested Improvements. Users are invited to send suggested comments to the California Military Department, Equal Opportunity Officer, ATTN: CAJS-J1-SP-EO, 9800 Goethe Road, Sacramento, CA 95827-9101.

Periodic Review. All State Active Duty Regulations/Instructions/Directives, changes, and proposed improvements will be reviewed periodically for incorporation into this directive, if appropriate.

Distribution. Distribution of this directive is Army- A, Air Force – F.

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Chapter 1 - Introduction

1-1. Purpose

This directive sets policy and explains how to file, process, investigate, and resolve complaints of discrimination. It establishes a uniform complaint system for the CMD.

1-2. Authority

California Military and Veterans Code Sections 101, 130, and 163.

1-3. Explanation of Terms

Special terms used in this directive are explained in the appendix. Some of the terminology is unique to the complaint process and differs from definitions used in other directives, the meanings of these terms are essential to the understanding of this directive.

1-4. Roles and Responsibilities

- a. The Adjutant General (TAG).
 - (1) Provides the overall direction to Equal Opportunity (EO) within the CMD.
 - (2) Provides the final level of appeal and issues final decisions in all complaints of discrimination administratively processed under this directive (except for claims against the TAG personally.)
 - (3) Implement the CMD Discrimination Complaint System within the State, take appropriate steps to ensure that the CMD operates in an atmosphere free of discrimination.
 - (4) Ensure that the policies, procedures, and requirements of this directive are carried out.
- b. Director, Joint Staff, CMD.
 - (1) Provides broad guidance and overall direction of the CMD Discrimination Complaint System and issues final decisions on behalf of the Adjutant General.
 - (2) Administers EO plans, policies, and programs in the CMD.
 - (3) Administers the CMD Discrimination Complaint System and develops policies and procedures for processing, managing, and adjudicating discrimination complaints.
- c. Deputy Adjutants General.
 - (1) Implement equal opportunity within the Army and Air National Guard respectively; review and comment on cases forwarded to the Adjutant General for final decision.
- d. Staff Judge Advocate (SJA).
 - (1) Review discrimination complaint cases for legal sufficiency and compliance with applicable laws and regulations.
 - (2) Reviews final decisions for legal sufficiency.
 - (3) Provides legal advice to the CMD Equal Opportunity Officer in discrimination complaints.
 - (4) Ensures compliance with all provisions of the Privacy Act and Freedom of Information Act with respect to discrimination complaint files and Reports of Investigation.
- e. CMD Commanders/Directors. Equal Opportunity is a leadership and a readiness issue. Commanders/Directors at all levels will:
 - (1) Ensure that the policies of the Adjutant General and of this directive are adhered to in their organizations.
 - (2) Act promptly to prevent or correct situations that may give rise to complaints of discrimination. They will ensure that subordinate commanders, directors and supervisors refrain from actions or comments that might be viewed as discriminatory.
 - (3) Ensure that SAD/SMR personnel are fully aware of procedures for obtaining redress of complaints, including those against members of the chain of command.
 - (4) Conduct inquiries whenever an allegation of discrimination is brought to their attention. If the inquiry determines that the complaint has merit, commanders/supervisors will resolve the complaint at the lowest appropriate level.
 - (5) Inform individuals who are named by a complainant as responsible for discrimination of the basis and issues of the complaint.
 - (6) Ensure that the command climate does not encourage or condone reprisals against individuals who exercise their rights under this directive. In cases where discrimination or sexual harassment is substantiated, the complainant should not be further victimized by involuntary transfer or reassignment. Where there might exist the threat of bodily harm to the complainant from an unidentified person(s), or when commanders/directors otherwise determine

that a transfer is necessary, the commander/director will document the reason(s) for the transfer and inform the complainant.

f. CMD Department Equal Opportunity Officer.

- (1) Manages the CMD Discrimination Complaint System within the State on behalf of the Adjutant General.
- (2) Ensures that complaints are processed properly and within the time constraints outlined in this directive.
- (3) Coordinates with the State SJA and advises the Adjutant General on all aspects of discrimination complaint processing and management at state level.
- (4) Advises commanders regarding issues, merits, validity, and processing of discrimination complaints.
- (5) Conducts informal fact finding into allegations of discrimination on behalf of the commander to facilitate informal resolution.
- (6) Advises and assists complainants on the complaint process.
- (7) Assists the complainant in the clarification of the issue(s) and the basis(es) of the complaint.
- (8) Provides feedback to complainant on the status of his/her complaint at each step of the process and advises complainant of the next step.
- (9) Provides technical assistance to investigators of formal complaints of discrimination.
- (10) Is the custodian of records for discrimination complaint files and related records.

1-5. Implementation

The effective date of this directive will be used for processing all military discrimination complaints to include those currently filed and/or being processed prior to the effective date of this directive.

1-6. Who may File a Complaint

Any aggrieved service member (SM), covered by this directive (see the applicability paragraph), who believes that he or she has been illegally discriminated against due to age (40 and over, subject to limitations for 142 and 167 status), ancestry, color, religious creed, denial of family and medical care leave, marital status, medical condition (cancer, genetic characteristics, HIV and AIDS), national origin, race, religion, sex, sexual orientation (subject to requirements for maintaining federal recognition, as applicable), or reprisal for having engaged in a protected equal opportunity activity, in a matter subject to the control of the CMD, may file an individual complaint of discrimination.

1-7. Policy

a. The fair, equitable, and non-discriminatory treatment of all service members and employees of the CMD improves morale and productivity, fosters unit cohesion and readiness, and increases the effectiveness of the Guard. It is the policy of the CMD to provide equal opportunity for State Active Duty, State Military Reserve personnel or applicants for membership in the State Military Reserve. SMs will not be subjected to discrimination because of age (40 and over, subject to limitations for 142 and 167 status), ancestry, color, religious creed, denial of family and medical care leave, marital status, medical condition (cancer, genetic characteristics, HIV and AIDS), national origin, race, religion, sex, sexual orientation (subject to requirements for maintaining federal recognition, as applicable), or reprisal for having engaged in a protected equal opportunity activity.

b. All CMD personnel are entitled to serve in an environment free from sexual harassment. Sexual harassment is a form of discrimination and will not be tolerated. Allegations of sexual harassment will be given prompt attention and resolved as expeditiously as possible. Sanctions outlined in California Military and Veterans Code will be applied when it is substantiated that an individual has engaged in sexual harassment or other forms of illegal discrimination. Such instances will be documented in the individual's official personnel file and reflected on evaluations/appraisals, as appropriate.

c. The CMD has established and operates a State Active Duty/State Military Reserve Discrimination Complaint System designed to reflect the policies stated herein and to provide a just and effective avenue of redress to aggrieved persons in accordance with applicable laws and regulations. Personnel who believe that they have been subjected to discrimination will be permitted to participate in the complaint process established by this directive. They will not be discouraged from participation due to fear of reprisals. Any complainant who alleges reprisal for having engaged in a protected Equal Opportunity activity, i.e., for having filed a complaint of discrimination, for preparing to file a complaint of discrimination, for having testified as a witness in a discrimination complaint investigation, for informing officials within the chain of command of perceived discrimination, or any other protected communication related to equal opportunity matters must be advised that he/she may file such a complaint through Inspector General channels. In the case of a reprisal allegation, the complainant should also be advised that

the whistleblower definition of reprisal is as follows: “ Taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action against a military member for making or preparing a protected disclosure.” This definition does not address hostile work environments, condoned peer reprisal, or other forms of harassment which could constitute reprisal. Allegations of reprisal which do not pertain to “taking or threatening to take adverse personnel actions or withholding or threatening to withhold favorable personnel actions,” will be processed under the provisions of this directive. Furthermore, if a former military member of the CMD claims reprisal for participation in a protected equal opportunity activity, and the basis of the reprisal was the separation of the individual from the CMD, such complaints will be processed under the provisions of this directive.

d. Reprisal against an individual for having engaged in a protected Equal Opportunity activity is prohibited regardless of whether the protected activity pertained to the civilian or the military program.

e. The chain of command will be the primary channel for resolving discrimination complaints. Individuals will be encouraged to use command channels for redress of grievances. Allegations of discrimination will be referred for processing by the lowest appropriate command/directorate level in accordance with this directive. This provides the commander/director an opportunity to assist the complainant, inquire into the issues and allegations, take corrective action, and to attempt to resolve the complaint, where possible. The sole mechanism for appealing the disposition of an informal complaint shall be to file a formal complaint. A formal complaint will be filed by completing CMD Form 333, Discrimination Complaint in the California Military Department.

f. It is the goal of the CMD to resolve and settle all allegations and complaints of discrimination fairly, equitably and expeditiously. Whenever possible, complaints will be resolved at the unit/directorate level. However, when resolution of a complaint at the lowest level is not successful, personnel can to appeal their complaint through the chain of command to the Adjutant General.

g. Anonymous complaints alleging discrimination received by CMD officials will not be processed under this directive. However, insofar as possible, such allegations will be researched to determine their validity and merit and corrective action taken as appropriate.

1-8. Time Limits

The following time limits have been established to ensure that complaints are processed expeditiously and to ensure the availability of witnesses and information needed for investigation and resolution of complaints.

a. A complaint must be filed within 365 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the discriminatory event or action.

b. When a commander/director receives an informal complaint all required actions will be completed within 30 calendar days.

c. The lowest level of command/directorate will complete all required actions within 60 calendar days after receipt of a **formal complaint**.

d. A formal complaint not resolved to the satisfaction of the complainant will automatically be forwarded to the next level of the chain of command.

e. Each intermediate level of command will complete all required actions within 30 calendar days after the receipt of the complaint case from the subordinate commander.

f. The investigation and actions required at the Adjutant General level should be completed within 90 calendar days after receipt of the case file from the subordinate commander.

Chapter 2 - Processing of CMD Complaints

2-1. Informal Complaints

a. An informal complaint of discrimination, although it may be initially verbal, should be put in writing on CMD Form 333, Discrimination Complaint in the California Military Department. No case number shall be assigned to an informal complaint. An informal complaint may be brought to the attention of any member of the chain of command at the lowest level of command where a remedy or resolution is possible, or to the CMD Equal Opportunity Officer. For example, if a complainant who is a member of a unit at the company or squadron level brings an informal complaint of discrimination by another member or by a member of the chain of command below the commander, the complaint should remain at that level and a resolution attempted. The commander at that level shall have 30 calendar days, to resolve the complaint. If the complaint is brought against the company or squadron commander, then the informal complaint will be brought to the CMD Equal Opportunity Officer, or to a member of the chain of command at the next higher level of command. Regardless of the level at which an informal complaint is filed, the commander

at that level shall have 30 calendar days to resolve the complaint to the satisfaction of the complainant. The only means of appeal of an informal complaint is to file a formal complaint.

b. Members who believe that they have been discriminated against are encouraged to discuss their complaints with and to seek assistance from any member of their unit/directorate chain of command or the CMD Equal Opportunity Officer.

c. The CMD Equal Opportunity Officer will advise commanders/directors on processing a complaint, and may conduct basic fact finding into allegations of discrimination on behalf of the commander, but will not be used to conduct formal investigations of any complaints in which they may have a role in processing, so that they may continue to be a resource and assist both the complainant and the commander in attempts to resolve the matter to the satisfaction of the complainant and to provide advice and assistance on the proper processing of the complaint.

d. Even when a complaint is withdrawn, commanders will attempt to eliminate underlying causes of any complaint.

2-2. Formal Complaints

a. If an informal complaint remains unresolved after 30 days following the filing of the complaint, the complainant may:

- (1) Withdraw the complaint. (Withdrawal must be in writing).
- (2) File a formal complaint.

b. A formal complaint will be filed at the next higher command level above where an informal complaint resolution attempt was unsuccessful. For example, if an informal complaint is filed at the company or squadron level, and resolution is not successful, the formal complaint, if filed, will be filed at the battalion or group level of command.

c. At whatever level of command a formal complaint is filed, the commander/director shall have 60 calendar days from the date of the filing to:

- (1) Complete a procedural review of the complaint to determine whether the complaint will be:
 - (a) Accepted (in whole or in part);
 - (b) Dismissed (in whole or in part);
 - (c) Referred (in whole or in part)

(2) Complete an investigation of all accepted issues in a complaint. Commanders/Directors will appoint only impartial investigators who are not otherwise involved in the processing of the complaint and who are outside the chain of command of either the complainant or the named responsible person(s).

(3) Ensure SJA review of the investigation for legal sufficiency.

(4) Attempt resolution and take corrective action where appropriate.

d. If the complaint is resolved, the commander/director will forward the case file to the CMD Equal Opportunity Officer. The case file will include the original complaint form, investigator appointment memorandum, Report of Investigation (ROI), legal review of the ROI, any resolution agreement, any correspondence related to the complaint, and a report of corrective action or disciplinary action taken, where appropriate.

e. If the complaint is unresolved at the end of 60 days, the case file will be automatically forwarded on appeal to the next level of command unless the complainant withdraws the complaint in writing.

f. All successive level commanders will have 30 days to review the case and attempt resolution of the complaint.

g. If the complaint is resolved to the satisfaction of the complainant or withdrawn at any command level, the complainant will so indicate in writing and the entire case file will be forwarded to the CMD Equal Opportunity Officer for final disposition.

2-3 Acceptance, Dismissal, or Referral, of Complaints

a. Formal complaints of discrimination will be accepted for processing under this directive unless they are dismissed or referred for procedural reasons described below. Such dismissal or referral will not be based on the merit of the complaint. Determination as to whether any allegation in the complaint has validity and merit will be made only after conducting the inquiries or investigations. Complaints that have been accepted for processing may later be dismissed or withdrawn, as described in c and d, below.

b. Any allegations of discrimination in a complaint or the complaint in its entirety will be dismissed for the following reasons:

(1) *Untimely*. If the complaint is filed more than 365 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the discriminatory event or action.

(2) *Duplicative*. If the allegations are identical to the complainant's allegations that have been already filed or decided.

(3) *Not in purview*. Allegations by persons not covered by this directive. Also included are situations over which neither the CMD has jurisdiction or the authority to remedy.

(4) *Failure to state a claim of discrimination*. When it is determined that one or more allegations in a complaint does not affect a term, benefit, or condition of membership or is not based on discrimination because age (40 and over, subject to limitations for 142 and 167 status), ancestry, color, religious creed, denial of family and medical care leave, marital status, medical condition (cancer, genetic characteristics, HIV and AIDS), national origin, race, religion, sex, sexual orientation (subject to requirements for maintaining federal recognition, as applicable), or reprisal for having engaged in a protected equal opportunity activity, such allegations will not be processed under this directive.

(5) *Statutory or regulatory restrictions*. Complaints that are based on statutory or regulatory restrictions will not be processed under this directive.

(6) *The Complaint or Issue is Moot*. Even if discrimination were substantiated, no actions beyond those already taken would be required. A moot issue or complaint is defined as one without legal significance, through having been previously decided or settled.

c. A complaint that has been accepted may be dismissed at any stage of processing if the complainant fails to cooperate with the inquiry, investigation, or requests for information.

d. A complaint may be withdrawn at any stage of processing by the complainant. Such withdrawal must be voluntary, and so indicated in writing, by signature of the complainant.

e. Dismissal or withdrawal of a complaint does not lessen responsibility of the chain of command to determine the merits and validity of the allegations that had been raised and to take corrective action as appropriate. Commanders will attempt to assist and resolve the CMD member's problems, take appropriate corrective action, when required, and advise the member of other proper sources of assistance, such as chaplains, legal advisors, personnel officers, or inspectors general.

2-4. Time Limits

These time limits have been established to ensure that complaints are processed expeditiously and to ensure the availability of witnesses and information needed for investigation and resolution of complaints.

a. A complaint must be filed within 365 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the alleged discriminatory event or action.

b. The lowest level of command will complete all required actions within 30 calendar days after receipt of an informal complaint.

c. An informal complaint not resolved to the satisfaction of the complainant will, at the election of the complainant, either be withdrawn or become formal and filed at the next level of the chain of command.

d. The commander/director or supervisor at the level where the informal complaint was processed will meet with the complainant to determine whether the complainant wishes to withdraw the complaint. An informal complaint that is not withdrawn, at the option of the complainant, and becomes a formal complaint, will be filed at the next higher level of command. The commander/director will immediately forward the complaint form, along with any documentation gathered during the informal process, to the next higher level commander. The next level commander/director will ensure that all required actions are completed within 60 calendar days after the receipt of the formal complaint from the subordinate commander.

e. A formal complaint that is unresolved at the lowest level of command after 60 days will be automatically appealed to the next command level, unless the complainant, in writing, withdraws the complaint. Each successive level of command will have 30 days to reach resolution or the complaint will be automatically appealed to the next command level.

f. A formal complaint will not be filed at the same level of command where an informal complaint resolution has failed, but will be filed at the next higher command level, with one exception. When an informal complaint is filed at the Adjutant General level, if resolution is not successful and the complainant wishes to file a formal complaint, such complaint will remain at the Adjutant General level and a formal investigation under the provisions of Chapter 3 of this directive will be conducted.

g. The goal of the CMD Discrimination Complaint System is to expedite processing so that a resolution, settlement, or final decision is issued timely.

2-5. Complaints Against or Outside the Chain of Command

a. When a military member believes that his or her commander/director was responsible for the alleged discrimination, the member will file the formal complaint with the next higher commander/director in the chain of command.

b. When the first person in a military member's chain of command is the Adjutant General and that member believes that the Adjutant General is personally responsible for the alleged discrimination, the complaint will be forwarded by the CMD Equal Opportunity Officer to the SJA for legal determination. If the SJA determines the responsible management official is The Adjutant General, the complaint will be forwarded to the CMD Inspector General. If the SJA determines the Adjutant General was named by virtue of position, the complaint will be processed in accordance with this directive. See Appendix B for the flow diagram of the complaint process.

c. When a military member alleges that discrimination was caused by individuals in an organization that is not commanded by that member's normal chain of command, the complaint will be filed with the CMD Equal Opportunity Officer.

2-6. Processing at the Adjutant General Level

If the complaint proceeds unresolved to the Adjutant General, or if the Adjutant General is the lowest level of command in a particular complaint, it will be processed as specified in this paragraph. The CMD Equal Opportunity Officer will administratively process discrimination complaints that reach the Adjutant General unresolved or that were filed with the Adjutant General. This includes coordination with the Staff Judge Advocate, and other staff members, as appropriate.

a. The CMD Equal Opportunity Officer will provide the complaint case file to the appropriate Chief of Staff for review of the complaint, inquiry(ies) and/or investigation(s) of subordinate commander(s), resolution attempts by subordinate commander(s), and their decisions.

b. If the complainant disagreed with subordinate commanders' decision that the complaint, in whole or in part, was dismissed or did not contain allegations based on discrimination, the Chiefs of Staff or Deputy Adjutants General may reverse that decision.

c. If the Adjutant General is the first member in the chain of command for filing a complaint, the complaint will be reviewed by the CMD Equal Opportunity Officer to determine whether it should be accepted, dismissed, or referred. The formal complaint will be annotated to show whether the complaint was accepted or whether the complaint, in whole or in part, was dismissed or referred.

d. If one or more allegations in a complaint are not based on discrimination due to age (40 and over, subject to limitations for 142 and 167 status), ancestry, color, religious creed, denial of family and medical care leave, marital status, medical condition (cancer, genetic characteristics, HIV and AIDS), national origin, race, religion, sex, sexual orientation (subject to requirements for maintaining federal recognition, as applicable), or reprisal for having engaged in a protected equal opportunity activity, such allegations will not be processed under this directive. The Chiefs of Staff, Deputy Adjutants General, or The Adjutant General will direct the appropriate processing of such allegations. Memoranda will document what actions were directed on the complaint, in whole or in part, which was not based on discrimination.

e. The Chiefs of Staff, Deputy Adjutants General, or The Adjutant General may attempt to resolve the complaint or cause any additional review or inquiry to be conducted before an attempt at resolution.

f. If The Adjutant General chooses not to attempt resolution at this point or if resolution attempts are unsuccessful and an investigation has not been completed by a lower level commander, an investigation will be directed, as provided for in Chapter 3.

g. The Report of Investigation (ROI) and the entire case file will be reviewed for legal and administrative sufficiency. This review will be conducted by the Military Department Equal Opportunity Officer with a legal review by the SJA or designated representative. The legal review of the ROI in a formal complaint of unlawful discrimination or sexual harassment will determine whether:

- (1) The investigation complies with all applicable legal and administrative requirements;
- (2) The investigation adequately addresses the matters complained of;
- (3) The evidence supports the findings of the investigating officer;
- (4) The conclusions and recommendations of the investigating officer are consistent with the findings; and
- (5) Any errors or irregularities exist, and if so, their legal effect, if any.

i. The ROI may also be coordinated with other staff offices within the CMD on matters related to their functional area.

j. The Chiefs of Staff, Deputy Adjutants General, or The Adjutant General may direct any additional investigation or supplementation of the record to ensure legal sufficiency and compliance with laws and regulations.

k. After the ROI is determined to be administratively and legally sufficient, it will become part of the official complaint case file.

l. If requested, IAW with the Freedom of Information Act, a redacted copy of the ROI may be provided to the complainant.

m. Using the ROI, the advice of the Military Department Equal Opportunity Officer and of the SJA, and a personal appraisal of the case, the Adjutant General or designee will meet with the complainant to attempt to resolve the complaint.

n. If the complaint is resolved while at the Adjutant General level, the resolution agreement will be put in writing, signed and dated by the complainant and the Adjutant General or designee.

2-7. Issuance of the Final Decision

After completion of SJA review and of any needed corrective actions by the CMD, The Adjutant General will issue a final decision based on a preponderance of evidence. The evidence of record will be analyzed using principles and case law developed under Title VII of the Civil Rights Act of 1964 and CMVC Section 130. While Title VII case law is not directly applicable to Title VI complaints, certain analytical principles are employed to determine whether or not discrimination occurred. In final agency decisions, CMD will use analytical principles of Title VII without case law citation. A copy of the final decision will be forwarded to the complainant. The Adjutant General or designee will inform any person(s) named in the complaint as responsible for discrimination of the final decision. The final decision of The Adjutant General is final and may not be appealed (CMVC Section 101, 130, and 163.)

2-8. Administrative Closure

a. When a complaint is administratively closed or a final decision is issued, the administrative process established by this directive is exhausted; there are no further appeals. No other processing is required except for carrying out any terms agreed upon in a resolution or as directed in the final decision.

b. A complaint will be administratively closed when:

- (1) The Adjutant General issues a final decision.
- (2) A complaint is resolved to the satisfaction of the complainant and the formal complaint is so annotated.
- (3) A complainant voluntarily and unconditionally withdraws a complaint.
- (4) The complainant fails to pursue the complaint to the next level of the chain of command.
- (5) The Adjutant General determines that a dismissal was proper.

Chapter 3 - Inquiry and Investigation of Complaints

3-1. Fact Finding

This process is not in the same scope as an inquiry. This process is designed to present basic facts to the commander at the level the complaint is raised. Basic fact finding will be used to facilitate resolution at the lowest level.

3-2. Inquiry

A fact finding process used to determine the validity and merit of allegations of discrimination. It may involve the review of records and directives, examination of material evidence, and interview of persons who may have direct knowledge of the facts. This process is appropriate when the commander receiving the complaint of alleged discrimination does not have appointing authority to appoint an investigator.

3-3. Purpose and Nature of Investigations

An investigation appointed under the authority of this directive is an administrative fact-finding procedure to investigate allegations of discrimination or sexual harassment in order to determine to the maximum extent possible what actually occurred, to assess the validity of the allegations made by the complainant, to advise the command of any leadership or management concerns which might contribute to perceptions of unlawful discrimination and poor unit command climate, and to recommend appropriate corrective action.

a. Investigations into allegations of discrimination are conducted under authority of this directive. They will be conducted as specified herein.

b. Investigations conducted under this directive are informal. That is, they are not in the nature of a formal investigation or any other regulation or instruction that provides for a hearing for persons who may have an interest in the subject of the investigation. No respondents will be designated and no one is entitled to the rights that a respondent may receive in a proceeding under any other regulation or instruction. The IO may still make any relevant findings or recommendations, including those adverse to an individual or individuals.

c. No complainants, responsible management officials, other witnesses, nor any officials other than the appointed investigator have any right to be present during interview of other witnesses.

3-4. Appointment of Investigators

a. The Equal Opportunity Investigator is appointed by a commander, the Adjutant General, or other official with the authority to authorize an investigation into allegations of discrimination under this directive. The letter of appointment will cite this directive as the authority for the appointment.

b. Any military officer appointed as investigating officer should be equal to or senior in rank to any military member whose conduct is being investigated.

c. The Military Department Equal Opportunity Officer and Staff Judge Advocate provide advice and assistance regarding allegations, merits, and processing of complaints. They assist both commanders and complainants; therefore, they will not be appointed as IOs for any discrimination complaints in which they may have any other role in order to avoid any real or perceived conflict of interest. Only disinterested and impartial personnel will be appointed as IOs.

3-5. Authority and Requirement for Investigation

The appointing document will specify that the investigation will be conducted in accordance with this directive and will indicate the authority of the investigator.

3-6. Duties of the Investigator.

a. General. The IO is to collect facts and develop information sufficient for an objective determination of the factual merits of each allegation in the complaint. It is the duty of the investigator to:

- (1) Ascertain and consider the evidence on all sides of each issue and to do so thoroughly and impartially.
- (2) Make findings and recommendations that are warranted by the facts.

b. Witness Interviews. The IO will determine the witnesses whose testimony is necessary for a thorough, complete, and impartial investigation.

(1) In this pursuit, the investigator should interview the complainant, the official(s) alleged to have discriminated, and persons identified as having relevant information by the complainant, and other witnesses as deemed necessary by the investigator.

(2) If the IO fails to interview any witness identified as having relevant direct first hand knowledge, the Report of Investigation (ROI) must include an explanation as to why the IO did not interview that witness, to include whatever consideration the IO gave to the type and importance of the potential evidence that the witness may have contributed. (The IO would be well advised to consult with the CMD Equal Opportunity Officer and the SJA before foregoing a witness identified as having relevant information).

(3) The IO is not, of course, limited to only witnesses identified by the parties and other witnesses. The IO should seek to interview persons with information establishing essential facts or corroborating, substantiating, or refuting statements about relevant events. For example, whether or not they were identified by anybody as witnesses, in an allegation about offensive sexual comments, it may be advisable to interview co-workers of the complainant and of the person alleged to have made such comments about their knowledge of the alleged incidents and about the daily working relationship between the complainant and the alleged responsible person.

(4) Should directorate policies or procedures be called into question as contributing factors to perceptions of unlawful discrimination or hostile work environments, the IO should interview responsible members of the chain of command.

c. Document Collection. The IO should secure copies of any relevant documents, including those which might establish key events or substantiate, corroborate, or refute relevant statements of the complainant, officials alleged to have discriminated, or other witnesses. For example, in a given case, such documents might include copies of directorate wire diagrams and personnel records, correspondence of the parties, or personal documents kept to memorialize relevant events.

d. Testimony. The IO administers oaths and obtains statements from witnesses under oath or affirmation without any promise of confidentiality. The signature of the IO is sufficient to verify its accuracy of provided testimony. Additionally, sworn statements and interrogations are acceptable methods of obtaining sworn testimony from persons involved in the complaint.

e. Data Collection. When appropriate because of the issues in a particular complaint, the IO will collect and analyze information on how members of the complainant's group are treated compared to other similarly situated personnel in the organization where the discrimination is alleged to have occurred. This information may include, for instance, statistical data on promotions, disciplinary actions, awards, or other personnel actions.

f. Work Policies and Practices. When appropriate, the IO will investigate work policies and practices which are relevant to the complaint and which appear to constitute discrimination whether they have been specifically cited by the complainant or not.

g. Report of Investigation (ROI). The IO will prepare a written, signed ROI.

(1) The investigator will provide a detailed narrative report of the investigation as part of the ROI. The report will include an analysis of the complainant's case; description of the allegations, testimony, documentation, and other exhibits and their relationship to the case and the allegation(s) that had been accepted for investigation; and appropriate conclusions, recommendations, and findings, with explicit findings on whether or not discrimination has occurred.

(2) The investigator will include copies of all documentation relevant to the complaint. The evidence gathered will be clearly marked and placed as exhibits in the ROI.

(3) The investigator will prepare an executive summary of the narrative report to synopsise the key aspects of the case, the investigation, and the findings and conclusions of the ROI.

3-7. Consolidation of Complaints

Complaints filed under the provisions of this directive are individual discrimination complaints and must be filed separately by each individual who has a complaint. However, allegations that are similar in nature and are caused by the same or similar conditions, may be consolidated for purposes of inquiry, investigation, or resolution as provided herein.

Chapter 4 - Official Discrimination Complaint Case Files

4-1. The Official Discrimination Complaint Case File

a. The official discrimination complaint case file is established when a formal complaint is filed. This case file is a management document. It will be used by CMD officials to make recommendations and decisions regarding the complaint.

b. Official discrimination complaint case files include the chain of command inquiries, resolution attempts, the ROI, and other documents listed below. Case files contain information subject to the Privacy Act. They will be maintained and safeguarded in the same manner as other sensitive, personnel files. ROIs may only be released to CMD officials directly involved in the processing, management, or adjudication of complaints, such as the Adjutant General, Deputy Adjutants General, Chiefs of Staff, Director Joint Staff, SJA, and CMD Equal Opportunity Officer..

c. The official discrimination complaint case file will include all documents pertinent to the complaint. Some of the required documents are listed below. This is not an all encompassing list, nor will all such documents always appear in a case file; the specific documents in a case file depend on the particular case.

- (1) The formal complaint.
- (2) An explanation of the reason for the dismissal or referral of the complaint, if appropriate.
- (3) The inquiry conducted at the lowest command level.
- (4) If a resolution is not reached, a memorandum for record documenting the meeting, any offers made by the commander and the complainant's response.
- (5) The record of review and inquiries, if any, conducted by intermediate commanders.
- (6) The record of any further attempts at resolution taken at intermediate command levels.
- (7) Memorandum appointing the IO to conduct an investigation.
- (8) A copy of the ROI.
- (9) A copy of the legal review of the ROI.
- (10) The record of any resolution attempts at the state level.
- (11) If the complaint is withdrawn, a written, signed, and dated statement of the complainant or the representative to that effect.
- (12) If a complaint is dismissed, the letter notifying the complainant that if the complainant fails to provide information requested or take requested action, the complaint will be dismissed and the notification to the complainant of the dismissal.
- (13) Any other correspondence relating to the complaint.
- (14) A copy of all certified receipts and other documentation showing notification of delivery of material to the complainant and/or his or her representative, or other parties to the complaint.

4-2. Deposition of the Official Discrimination Complaint Case File

Official discrimination complaint case files will be maintained by the CMD Equal Opportunity Officer in a secure location for a minimum of five years after resolution, dismissal, administrative closure, or final decision.

Appendix A - Terms

Allegation - An assertion by a complainant that an act or personnel action has been discriminatory.

Basis - A reason, claimed by a complainant, for a discriminatory action; specifically, age (40 and over), ancestry, color, religious creed, denial of family and medical care leave, disability (mental and physical) including HIV and AIDS, marital status, medical condition (cancer and genetic characteristics), national origin, race, religion, sex, sexual orientation, or reprisal for having engaged in a protected equal opportunity activity. *Note* that reprisal, as a basis, is subsumed in the above.

Case Number - A number assigned to a formal complaint when it reaches the level of the Adjutant General. It is used by the CMD for statistical and identification purposes.

Complainant – Anyone exercising their right to file a discrimination complaint under this directive.

Conclusion (in an ROI) - A clear and concise statement of fact that can be readily deduced from an analysis of the evidence and the record of the case.

Fact Finding - This process is not in the same scope as an inquiry. This process is designed to present basic facts to the commander at the level the complaint is raised. Basic fact finding will be used to facilitate resolution at the lowest level.

Final Decision - A decision on the merits of a discrimination complaint, filed under this directive, issued by or in the name of the Adjutant General. A final decision is not subject to further review or appeal and it exhausts the administrative process provided for under this directive.

Finding (in an ROI) - An explicit determination of discrimination or no discrimination on each allegation and basis raised in a formal discrimination complaint.

Formal Complaint - A written complaint filed under this directive, using CMD Form 333, that alleges illegal discrimination.

Discrimination - Any action that results in unequal treatment of persons based on race, color, religion, gender (to include sexual harassment), or national origin.

Informal Complaint - A complaint of alleging discrimination expressed verbally or filed on CMD Form 333 to a member of the complainant's chain of command at any level, CMD Equal Opportunity Officer, or other CMD official.

Inquiry - A fact finding process used to determine the validity and merit of allegations of discrimination. It may involve the review of records and directives, examination of material evidence, and interview of persons who may have direct knowledge of the facts. This process is appropriate when the commander receiving the complaint is not authorized to appoint an investigator. This process is also appropriate at the lowest command level to help facilitate resolution of the complaint.

Investigation - A duly authorized, systematic, detailed examination to uncover facts and determine the truth. It is a formal process which must produce sufficient detail to support a finding of discrimination or no discrimination. Investigations of allegations of discrimination are conducted under the authority of this directive.

Mediation - Is a method of settling disputes which provides an alternative to litigation. It does not judge or blame and values equally people in dispute. This process creates a safe and non-threatening atmosphere for both complainants and respondents of complaints.

Moot - A complaint or an issue would be considered moot when, at the time the complaint is filed, all actions that would be required if discrimination were substantiated, had already been taken due to other circumstances. For example, the issue is promotion and the individual has been promoted at the time of the complaint. Or the issue is training and the individual has been trained.

Preponderance of Evidence - The standard of proof used in discrimination complaint cases. This standard requires that the findings and conclusions be supported by greater evidence than contrary findings and conclusions. That is, considering all evidence, it is more likely than not that discrimination did or did not take place. This is a lesser standard than “substantial credible evidence,” “clear and convincing evidence,” or “beyond a reasonable doubt.”

Recommendation (in an ROI) - An investigator’s proposal to the appointing authority for actions or remedies based on the facts and evidence gathered in the investigation.

Reprisal - Any act of restraint, interference, or coercion taken against an individual, or taking (or threatening to take) an unfavorable personnel action, or withholding (or threatening to withhold) a favorable personnel action for having engaged in a protected equal opportunity activity, i.e., for having filed a complaint of discrimination, for preparing to file a complaint of discrimination, for having testified as a witness in a discrimination complaint investigation, for informing officials within the chain of command of perceived discrimination, or any other protected communication related to equal opportunity matters.

Resolution of a Complaint - A voluntary, written agreement between the complainant and a representative of the CMD which results in settlement of the complaint to the satisfaction of both parties and terminates the administrative processing of the complaint.

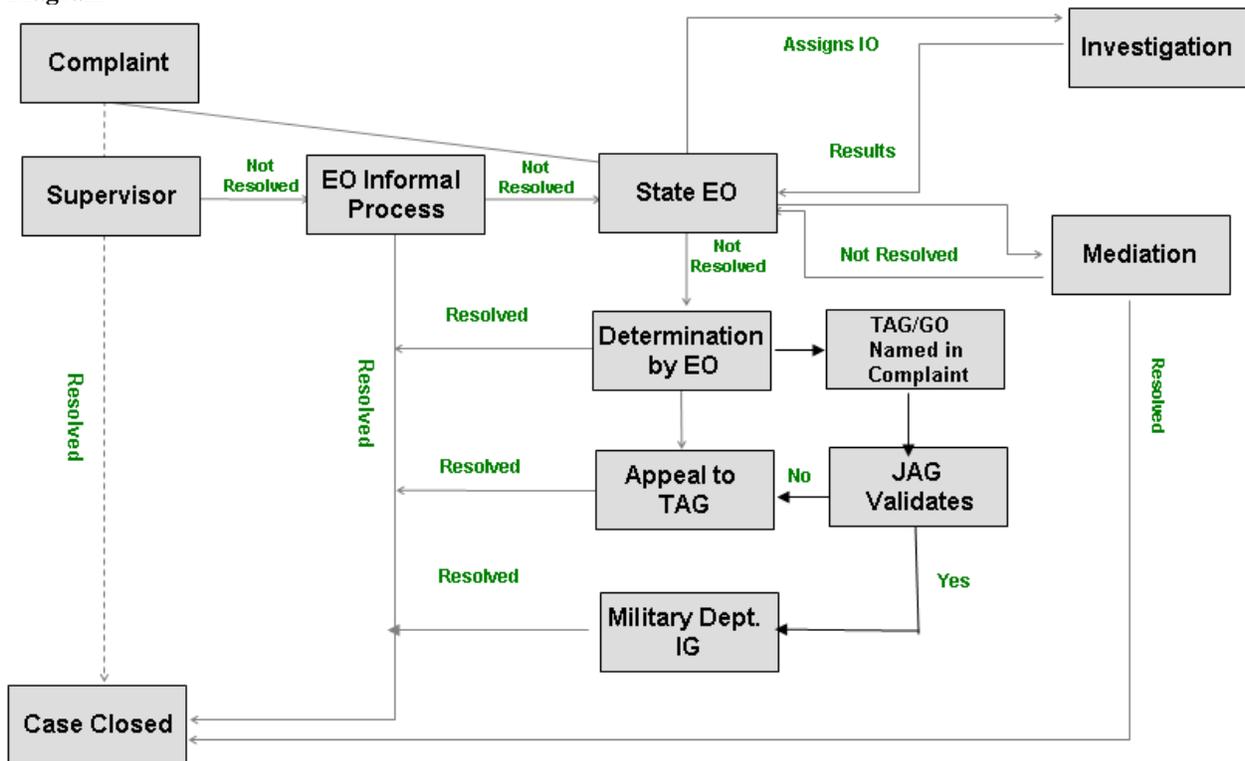
Sexual Harassment - A form of discrimination that involves unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, or career; or
- (2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
- (3) Such conduct interferes with an individual’s performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any CMD member or employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

Withdrawal of the Complaint - A voluntary, written, signed and dated statement by the complainant indicating an unconditional willingness to stop further processing and pursuit of the complaint.

Appendix B – Complain Processing Diagram



**Complainant may submit complaint directly to EO and is not required to submit through immediate supervisor.