



CHIEF NATIONAL GUARD BUREAU INSTRUCTION

NGB-EO
DISTRIBUTION: A

CNGBI 9400.01
29 November 2017

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

References: See Enclosure B.

1. Purpose. This instruction establishes policy and assigns responsibilities for nondiscrimination in Federally assisted programs in accordance with (IAW) references a through r.
2. Cancellation. This instruction cancels and supersedes National Guard Regulation 600-23/Air National Guard Regulation 30-12, 30 December 1974, "Nondiscrimination in Federally Assisted Programs."
3. Applicability. This instruction applies to all elements of the National Guard (NG) except NG Service members in a Title 10 status on active duty and civilian personnel employed in a Title 5 status at State NG organizations, the National Guard Bureau (NGB), the Army National Guard (ARNG) and Air National Guard (ANG) Readiness Centers, and all NG field-operating locations. This instruction also applies to beneficiaries of services from the ARNG and ANG in programs receiving Federal financial assistance. The term "State(s)" hereinafter refers to each of the several States, Territories, Commonwealths, and the District of Columbia.
4. Policy. It is NG policy to not exclude a person from participating in or deny the benefits of any program or activity conducted by the NG, or an activity that receives Federal financial assistance disbursed by the NG, or subject a person to discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or genetic information (except as prescribed by statute or policy consistent with statute).
 - a. Alternative Dispute Resolution (ADR). Use ADR and other collaborative dispute resolution processes early to the maximum extent practical and appropriate to resolve disputes.

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b. Inform and Instruct. Inform and instruct the State Military Department, the commanders, and the personnel of all subordinate units and all relevant agencies connected with the NG of their rights, as contained in this instruction. The obligation to comply with this instruction is a condition of continued Federal financial assistance to NG programs. Training may be conducted in conjunction with Equal Opportunity (EO) or Equal Employment Opportunity (EEO) training such as Prevention of Sexual Harassment and Human Relations Education.

c. Advertise Policy. Inform all potential members, all beneficiaries, and the general public that the NG operates on a nondiscriminatory basis and that any individual may file a written complaint with the appropriate EO State Representative if he or she believes that discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or genetic information is being practiced within any NG program that is subject to the provisions of this instruction.

(1) Any individual who believes that he or she has been subjected to discrimination prohibited by this instruction may file a State Informal Resolution Request (IRR) either on his or her own or through an authorized representative. If multiple individuals file the same IRR, the action should be incorporated into a single State IRR.

(2) IRRs will be filed with the EO State Representative of the NG unit that has jurisdiction over the personnel or facility where the act of discrimination is alleged to have occurred or at any successive organizational level.

d. Compliance Reviews. Compliance with this instruction is subject to inspection by the NGB Inspector General or other officers detailed by the Secretary of the Army or the Secretary of the Air Force to conduct periodic general inspections of the NG.

e. Termination of Federal Assistance. If there appears to be a failure to comply with this instruction, and if the noncompliance or threatened noncompliance cannot be corrected, the Chief of the National Guard Bureau (CNGB) will take action to refuse to grant or to continue to provide Federal assistance (or any combination of the above) or take any other action authorized by law. No order that terminates or that refuses to grant or to continue to provide Federal assistance as a result of noncompliance with this instruction will become effective until the CNGB has advised the State NG of its failure to comply and has determined that compliance cannot be secured by voluntary means; there has been a hearing for failure by the State NG to comply with a requirement posed by this instruction and an express finding of noncompliance has been found at said hearing; the action has been approved by the Secretary of Defense after said finding; a period of 30 days has expired

following the filing by the Secretary of Defense of a full written report of the circumstances and the grounds for such action with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved.

f. Other Means Authorized by Law. No action to affect compliance by any other means authorized by law will be taken until the CNGB has determined that compliance cannot be secured by voluntary means; the action has been approved by the Assistant Secretary of Defense for Manpower and Reserve Affairs; the State NG has been notified of its failure to comply and of the action to be taken to effect compliance; and the expiration of at least 10 days from the mailing of such notice to the State NG. During this period of at least 10 days, additional efforts will be made to persuade the State NG to comply with this instruction and to take such corrective action as may be appropriate.

g. Hearings. Whenever an opportunity for a hearing is required, reasonable notice will be given by the NGB Chief of the Complaints Management and Adjudication Office (NGB-EO-CMA) by means of registered or certified mail to the affected State NG. This notice will advise the State NG of the proposed action to be taken, the specific provision under which the proposed action is to be taken, and the matters of fact or law asserted as the basis for this action. The notice will also fix a date not less than 20 calendar days after the date of such notice within which the State NG may either request that the matter be scheduled for hearing or they will advise the State NG that the matter in question has been set down for a hearing at a stated time and place. The time and place will be reasonable and will be subject to change for good cause. The complainant, if any, will also be advised of the time and place of the hearing.

(1) A State NG may waive a hearing and instead submit written information such as certified documents, affidavits, briefs, and arguments. The failure of a State NG to request a hearing under this paragraph, to appear at a hearing for which a date has been set, or to submit written materials will be deemed a waiver of the right to a hearing and consent to a decision being made on the basis of available information.

(2) All hearings will be held at the Herbert R. Temple Jr., Army National Guard Readiness Center in Arlington, Virginia, unless a motion requesting a different location is filed for good cause. States are responsible for providing appropriate facilities for the hearing and the services of a court reporter or transcriber, and will pay the travel expenses of the Hearing Officer when the hearing is not conducted at the normal location.

h. Hearing Rules. NGB and the State NG will have an open hearing and may examine any witness present. Both NGB and the State NG will be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the Hearing Officer at the outset of or during the

hearing. Technical rules of evidence will not apply to such hearings, but rules or principles designed to ensure presentation of the most credible evidence available and to cross-examine testimony where reasonably necessary and within the discretion of the Hearing Officer will be applied. Hearing Officers may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other written evidence or exhibits offered as evidence will be open to examination and objections by the parties. Both parties will be given the opportunity to refute both facts and arguments during the hearing. Both parties will be allowed reasonable time for final arguments and, subject to the discretion of the Hearing Officer, may file written briefs. A verbatim transcript of the hearing will be made, except to the extent that the substance of certain testimony may be stipulated for the record.

i. Consolidated or Joint Hearings. If the same or related facts are asserted to constitute noncompliance with this instruction in two or more programs to which it applies or with this instruction and the regulations of one or more Federal departments or agencies that have been issued to further nondiscrimination in Federally assisted programs, the Secretary of the Army or the Secretary of the Air Force, as appropriate, and after consultation with the Assistant Secretary of Defense for Manpower and Reserve Affairs, if in agreement with such other departments or agencies, may provide for the conduct of consolidated or joint hearings. In such instances, primary responsibility for conduct of the hearings may be assigned to the NGB or to another department or agency as agreed.

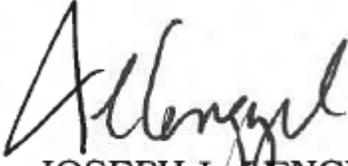
j. Decisions and Notices. Decisions will contain the Hearing Officer's findings, conclusions, and resolution. In the absence of exceptions filed by the State NG, the CNGB may, within 45 calendar days after the initial decision, review the decision. Notice will be given to the State NG. Subsequent to the filing of such exceptions or notice of review, the CNGB will review the initial decision and issue his or her own decision thereon, including the reasons. In the absence of either exceptions by the State NG or a notice of review, the initial decision will constitute the final decision.

(1) Hearing Officers will make decisions whenever a hearing is waived by a State NG.

(2) A final decision by the CNGB that provides for the refusal to grant or to continue to provide Federal financial assistance, or the imposition of any other sanction available, will be promptly transmitted through the Secretary of the Army or the Secretary of the Air Force, as appropriate, to the Secretary of Defense, who may either approve such decision, vacate or modify it, or remit or mitigate any sanction imposed. The final decision may provide for the suspension or termination of or the refusal to grant or to continue Federal financial assistance. It may also contain such terms, conditions, and other provisions that are consistent with and will effectuate the purposes of

applicable Federal law and this instruction. Included are provisions designed to ensure that no Federal financial assistance will thereafter be extended for the support of the NG of the particular State determined to be in default in its performance of an assurance given by it, pursuant to this instruction, or to have otherwise failed to comply with this instruction unless and until it corrects its noncompliance and satisfies the CNGB that it will fully comply with the specified requirements. Any final action taken IAW the above provisions is subject to judicial review to the extent provided by law.

5. Definitions. See Glossary.
6. Responsibilities. See Enclosure A.
7. Summary of Changes. This is the initial publication of CNGBI 9400.01.
8. Releasability. This instruction is approved for public release; distribution is unlimited. Obtain copies through <<http://www.ngbpdc.ngb.army.mil>>.
9. Effective Date. This instruction is effective upon signature and must be reissued, canceled, or certified as current within five years from the date signed.



JOSEPH L. MENGYEL
General, USAF
Chief, National Guard Bureau

Enclosures:

- A -- Responsibilities
- B -- References
- GL -- Glossary

ENCLOSURE A

RESPONSIBILITIES

1. CNGB. The CNGB is the responsible department official who has the principal responsibility for the administration of nondiscrimination in Federally assisted programs as they apply to the NG. The CNGB will implement nondiscrimination in Federally assisted programs as they apply to the NG, IAW references a through e.

2. Director of NGB-EO. The Director of NGB-EO will:

a. Oversee implementation of nondiscrimination for the NGB and the NG, including the policies and procedures in references b through r.

b. Develop, coordinate, and publish supplemental guidance and procedures for implementation of this instruction, as necessary, IAW reference j.

c. Conduct periodic compliance reviews within State military departments, subordinate military units, and any other agencies or organizations connected to the NG.

3. NGB-EO-CMA. The Chief of NGB-EO-CMA will:

a. Provide advice and assistance to complainants and the subjects of complaints throughout the complaint process.

b. Coordinate with the Office of the NGB Chief Counsel (NGB-JA) when issuing guidance.

c. Assign tracking numbers to State IRRs received from EO State Representatives.

d. Make a determination whether or not to accept the Formal Resolution Request (FRR) for investigation within 30 days. If accepted, NGB-EO-CMA will notify the State EO Representative to appoint an Investigating Officer (IO). If denied, the NGB-EO-CMA will issue a Notice of Proposed Dismissal detailing the decision to dismiss.

4. NGB-JA. NGB-JA will:

a. Appoint Hearing Officers who have the requisite skills, abilities, and experience. A prospective Hearing Officer may be required to undergo a background investigation.

b. Withdraw or suspend a Hearing Officer's appointment for any reason he or she believes is appropriate. The decision to withdraw or suspend a Hearing Officer's appointment under this instruction is not appealable.

c. Designate the duty uniform to be worn by a military officer who is appointed and serving as a Hearing Officer. This may include civilian clothes.

d. Provide legal advice, as required, throughout the complaint process.

e. Provide full-spectrum legal representation and support to the NGB and legal support to State NG management regarding discrimination complaints. NGB-JA attorneys and paralegals are not authorized to provide individual complainants with legal representation or assistance.

f. Participate in ADR proceedings, when appropriate, that arise during disputes about discrimination complaints.

g. Coordinate with the State Judge Advocate (JA) as necessary.

h. Coordinate with the Director of NGB-EO and the Chief of NGB-EO-CMA to provide discrimination-process training and guidance for Hearing Officers, JAs, civilian attorneys, and paralegal personnel.

5. The Director of the ARNG (DARNG) and the Director of the ANG (DANG). The DARNG and the DANG will implement this instruction and the relevant Service-specific guidance for their respective directorates.

6. TAGs and NG Joint Force Headquarters – State Offices (NG JFHQs-State). TAGs and NG JFHQs-State Offices will:

a. Comply with references b through r, applicable law, and this instruction.

b. Allow the CNGB (or his authorized representatives) access to its books, records, accounts, other sources of information, and facilities to determine compliance with this instruction.

c. Inform participants, beneficiaries, and other interested persons of the information contained in this instruction.

d. Appoint a competent Inquiry Official (IQO) who is of a rank that is either equal to or higher than that of the alleged offender to conduct an expedited inquiry into the facts.

7. Hearing Officers. Hearing Officers will render decisions that contain findings, conclusions, and resolutions, whether a hearing is actually conducted by a State NG or if it is waived.

8. EO State Representatives. EO State Representatives will:
 - a. Ensure complaints are appropriately documented on NGB Form 333, "Discrimination Complaint in the Army and Air National Guard."
 - b. Coordinate with NGB-EO-CMA to obtain a complaint tracking number and send the complainant a written acknowledgment within seven calendar days of receiving State IRR.
 - c. Ensure State NG leadership appoints an IQO during the State IRR process.
 - d. Conduct a final interview with the complainant and provide him or her with a Notice of Proposed Resolution (NPR) to inform the complainant of the Leadership Inquiry Report (LIR) findings and conclusions and the commander's proposed disposition and remedy, if any. The final interview completes the State IRR process.
 - e. Ensure the complainant indicates on the NPR, in writing, his or her acceptance of the proposed resolution, withdrawal of the State IRR, or intent to file an NGB FRR.
 - f. Forward the NGB FRR to the NGB-EO-CMA within five calendar days of its receipt. A copy of the State's NPR, the member's State IRR, the LIR, and any accompanying documentation must be included in the package.
 - g. Ensure State NG leadership appoints an IO during the NGB FRR process.
 - h. Inform the complainant of the completion of remedial action taken by the State NG, if any, within 60 calendar days of receipt of the NGB NPR.
9. IO. The IO will complete an investigation and issue a report with findings within 45 calendar days of appointment.
10. IQO. An IQO will:
 - a. Be appointed by the appropriate State Leadership to complete an LIR.
 - b. Be in a rank that is equal to or higher than the alleged offender and have the necessary training to conduct an expedited inquiry into the facts.
 - c. Complete the LIR and forward it to the appropriate commander within 60 calendar days of the IQO's appointment.

11. Commanders at All Levels. The lowest-level commander in the complainant's chain of command will review the LIR to determine a proposed resolution. The commander at the next-higher level will review the lower-level commander's proposed resolution and forward it to the EO State Representative.

ENCLOSURE B

REFERENCES

- a. DoD Directive 5105.77, 30 October 2015, “National Guard Bureau”
- b. DoD Directive 5500.11, 27 May 1971, Incorporating Change 1, 15 August 1972, Certified Current 21 November 2003, “Nondiscrimination in Federally Assisted Programs”
- c. Title 42 United States Code (U.S.C.), Sections 2000d through 2000d-7 (Title VI of the Civil Rights Act of 1964, as amended)
- d. Army Regulation (AR) 600-23, 16 January 1970, “Nondiscrimination in Federally Assisted Programs”
- e. Air Force Instruction 36-2707, 16 December 2010, Certified Current 07 January 2015, “Nondiscrimination in Programs and Activities Assisted or Conducted by the Department of the Air Force”
- f. 29 U.S.C. § 701, “Rehabilitation Act of 1973”
- g. 42 U.S.C. Chapter 76 (§ 6101, et seq.), “Age Discrimination in Federally Assisted Programs”
- h. DoD Directive 1020.1, 31 March 1982, Incorporating Change 1, 16 November 1994, Certified Current 21 November 2003, “Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense”
- i. AR 600-7, 15 November 1983, “Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army”
- j. CNGB Instruction 5000.01A, 26 April 2017, “Chief of the National Guard Bureau Issuances”
- k. CNGB Instruction 9601.01, 27 September 2015, “National Guard Discrimination Complaint Program”
- l. CNGB Instruction 0402.01, 24 July 2015, “National Guard Alternative Dispute Resolution”
- m. CNGB Manual 0402.01, 04 January 2016, “Alternative Dispute Resolution Procedures”

- n. 32 U.S.C. § 108, “Forfeiture of Federal Benefits”
- o. DoD Directive 1350.2, 18 August 1995, Certified Current 21 November 2003, Incorporating Change 2, 08 June 2015, “Department of Defense Military Equal Opportunity (MEO) Program”
- p. Executive Order 13160, 23 June 2000, “Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs”
- q. Public Law 110-233, 122 Stat. 881, 21 May 2008, “Genetic Information Nondiscrimination Act of 2008”
- r. Directive-Type Memorandum 16-005, 30 June 2016, “Military Service of Transgender Service Members”

GLOSSARY

PART I. ACRONYMS

ADR	Alternative Dispute Resolution
ANG	Air National Guard
ARNG	Army National Guard
CNGB	Chief of the National Guard Bureau
DANG	Director of the Air National Guard
DARNG	Director of the Army National Guard
EEO	Equal Employment Opportunity
EO	Equal Opportunity
FRR	Formal Resolution Request
IAW	In accordance with
IO	Investigating Officer
IQO	Inquiry Official
IRR	Informal Resolution Request
JA	Judge Advocate
LIR	Leadership Inquiry Report
NG	National Guard
NGB	National Guard Bureau
NGB-EO	Office of National Guard Bureau Equal Opportunity
NGB-EO-CMA	Complaints Management and Adjudication Office
NGB-JA	National Guard Bureau Office of Chief Counsel
NG JFHQs-State	National Guard Joint Force Headquarters-State
NPR	Notice of Proposed Resolution
TAG	The Adjutant(s) General

PART II. DEFINITIONS

Alternative Dispute Resolution -- Any procedure that parties agree to use anytime throughout the complaint process to resolve issues in controversy, including but not limited to settlement negotiations, conciliation, facilitation, mediation, fact-finding, arbitration, or any combination thereof

Authorized Representative -- A person who legally advocates for the interests of a complainant throughout the resolution process as long as that person is willing and available to serve and is not otherwise disqualified. The authorized representative may or may not be an attorney. For example, an authorized representative may be a person who has “power of attorney” authority on behalf of the complainant, a close friend, a community advocate, or a licensed attorney.

Equal Opportunity State Representative -- The State Equal Employment Manager, an Equal Opportunity practitioner, or The Adjutant General-

designated representative with the required training are all able to serve as Equal Opportunity State Representatives and process Equal Opportunity complaints.

Federal Assistance -- This includes grants and loans of Federal funds; the granting or donation of Federal property and interests in property; the detailing of personnel; or the sale and lease of and the permission to use (on other than a casual or transient basis) Federal property or any interest in such property without consideration or at a nominal consideration, or with consideration, or at a consideration that is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of assistance.

Hearing Officer -- A General Service¹⁵ civilian employed and appointed by the Office of the National Guard Bureau Chief Counsel, with an admission to practice law before a Federal Court or the highest court of a State, to rule on pre-hearing motions and offers of proof, receive relevant evidence, resolve issues of credibility, and ensure an accurate record on significant issues.

Inquiry Officer -- A person appointed by State National Guard leadership to conduct a Leadership Inquiry Report during the State Informal Resolution Request process.

Investigating Officer -- An officer who conducts a formal investigation and, at the end of that investigation, issues a report with findings.

National Guard Bureau Formal Resolution Request -- A discrimination complaint filed with the Chief of Complaints Management and Adjudication Office after the State Informal Resolution Request process.

National Guard Field Operating Locations -- Detachments geographically separated from the National Guard Bureau's physical location but are under its authority and staffed by Title 10 and Title 5 personnel who work for the Chief of the National Guard Bureau or the Readiness Centers.

Notice of Decision -- A decision issued by a Hearing Officer that includes findings of fact and conclusions of law, reasons for the findings and conclusions, and recommendations for relief and resolution when discrimination allegations are substantiated.

Notice of Proposed Resolution -- An official document containing the findings, conclusions, proposed resolution, and remedy regarding a complaint. The

State issues a Notice of Proposed Resolution during the State Informal Resolution Request process.

Program -- Any program, project, or activity for the provision of services, financial aid, or other benefits to individuals, or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. This includes any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions that must be met in order to receive the Federal financial assistance. This includes any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

State Leadership -- The appropriate commander within the State unit chain of command.

State Informal Resolution Request -- The initial discrimination complaint filed at the State level. It is initiated by the complainant and processed by the Equal Opportunity professional.

State National Guard -- The National Guard in each of the several States, Territories, Commonwealths, and the District of Columbia.