



CHIEF NATIONAL GUARD BUREAU MANUAL

NGB-EO
DISTRIBUTION: A

CNGBM 9601.01
25 April 2017

NATIONAL GUARD DISCRIMINATION COMPLAINT PROCESS

References: See Enclosure F.

1. Purpose. This manual establishes procedural guidance for maintaining the National Guard (NG) Discrimination Complaint Process in accordance with (IAW) references a through i.
2. Cancellation. None.
3. Applicability. This manual applies to all NG personnel serving in a Title 32 status, to include NG technicians when activities occur while the member is in a military pay status, or concerns of fitness for duty in the reserve components.
 - a. This manual does not apply to beneficiaries of services from the Army National Guard (ARNG) and Air National Guard (ANG) in programs receiving Federal financial assistance. Complaints from such beneficiaries are processed IAW reference e.
 - b. This manual does not apply to NG Service members serving in a Title 10 status, or to civilian personnel employed in a Title 5 status at State NG facilities, the National Guard Bureau (NGB), the ARNG and ANG Readiness Centers, or all NG field-operating locations.
4. Procedures. All NG members serving in Title 32 status, to include NG technicians defined in section 3 above, who believe they have been discriminated against based on race, color, national origin, religion, sex-gender, or sexual orientation, or who believe they have been the victim of sexual harassment, or of reprisal for prior engagement in the discrimination complaint process or related activity, may file a request to resolve discrimination allegations.
 - a. Alternative Dispute Resolution (ADR). ADR is available throughout this entire process.

UNCLASSIFIED

b. Remaining Anonymous. All NG members who wish to remain anonymous must notify the State Equal Employment Manager, ANG Equal Opportunity (EO) practitioner, or The Adjutants General designated representative (hereafter collectively referred to as the State representative), when first initiating an informal resolution request under Enclosure A of this manual. The claimant may not remain anonymous when filing a formal resolution request under Enclosure B of this manual.

c. State Representatives. The State or the claimant may have a representative to advocate for their interests throughout the resolution process as long as that person is willing and available to serve and is not otherwise disqualified. The State representative may or may not be an attorney.

d. Individual Protection. The lowest level commander will initiate a Commander's Reprisal Prevention Plan when informed of an Informal Resolution Request. See Enclosure E (Figure 2).

e. Additional Guidance. See Enclosures A through F for resolution procedures, hearing requests, and official review processes.

5. Summary of Changes. None.

6. Releasability. This manual is approved for public release; distribution is unlimited. Copies are available through <<http://www.ngbpdc.ngb.army.mil>>.

7. Effective Date. This manual is effective upon publication and must be reissued, cancelled, or certified as current every five years.



STEPHEN A. MIZAK

Colonel, USAF

Director, National Guard Equal Opportunity

Enclosures:

- A -- State Resolution Procedures
- B -- NGB Resolution Procedures
- C -- Hearing Requests
- D -- Reviewing Official Process
- E -- Sample Documents
- F -- References
- GL -- Glossary

ENCLOSURE A

STATE RESOLUTION PROCEDURES

1. State Informal Resolution Request (IRR). A NG member may initiate a discrimination resolution informal request with the State representative verbally or in writing. The State representative will determine if a member's allegations are acceptable for processing, for example, meeting filing time limits. The informal request will be recorded on NGB Form 333, "Discrimination Complaint in the Army and Air National Guard." See Enclosure E (Figure 1).
 - a. The State representative will acknowledge, in writing, receipt of an informal written request within seven calendar days of its receipt.
 - b. The NGB Equal Opportunity Office of Complaints Management and Adjudication (NGB-EO-CMA) will assign a tracking number to the State IRR. The State representative will contact NGB-EO-CMA to obtain this number and provide it to the member in the written acknowledgement.
 - c. The State representative will notify the commander at the lowest level of the alleged discrimination in the State IRR to obtain a possible remedy.
2. Time Limit for Filing Informal Resolution Requests. NG members must file a State IRR within 180 calendar days from the date of the alleged discrimination, or the date the member was made aware of the alleged discriminatory event or action.
3. Timeframe for Processing Informal Resolution Requests. The State NG should take no more than 180 calendar days to process a State IRR.
4. Inquiry Official (IQO). State NG leadership will appoint an IQO with equal to-or-higher rank than the alleged discriminating official and the training to conduct an expedited inquiry into the facts.
 - a. The IQO will obtain summarized witness statements and relevant documents. A Leadership Inquiry Report will be completed and forwarded to the appropriate commander through the State representative within 60 calendar days of the IQO's appointment. See Enclosure E (Figure 3).
 - b. The commander at the lowest level will review the Leadership Inquiry Report to determine the appropriate resolution. The commander at the next higher level will review decisions by the lower level commander. The lower level commander, or a commander's designated State representative, will meet with the member and explain the proposed resolution. The review process must be completed within 30 calendar days from the issuance of the Leadership Inquiry

Report. The member will indicate if they will accept the proposed resolution, withdraw the State IRR, or file an NGB Formal Resolution Request (FRR).

5. Notice of Proposed Resolution (NPR). The State representative will conduct a final interview with the member, and provide them with a NPR. The notice will inform the member of the Leadership Inquiry Report findings and conclusions, and the commander's proposed disposition and remedy, if any.

a. The NPR informs the member that an NGB FRR must be filed within 30 calendar days for any claimed discrimination not resolved by the proposed resolution. The final interview concludes the State resolution process. The State representative will forward the NPR to NGB-EO-CMA upon completion of the process. See Enclosure E (Figure 4).

b. Members will indicate on the NPR, in writing, their acceptance of the proposed resolution, withdrawal of the State IRR, or their intent to file an NGB FRR.

ENCLOSURE B

NATIONAL GUARD BUREAU RESOLUTION PROCEDURES

1. NGB FRR. NG members must file an NGB FRR with the State representative, within 30 calendar days of receipt of the NPR, or the final interview. An NGB FRR will be filed on NGB Form 333, "Discrimination Complaint in the Army and Air National Guard" and must contain a signed statement from the member, or their State representative, identifying the:
 - a. Individual(s) involved.
 - b. NG unit/organization involved.
 - c. Description of the action(s) or practice(s) forming the basis of the alleged discrimination.
2. State Action. The State representative will forward the NGB FRR to NGB-EO-CMA within five calendar days of its receipt. A copy of the State's NPR the member's State IRR, the Leadership Inquiry Report, and any accompanying documentation must be included in the package.
3. Preliminary Review of NGB FRR. Within 30 calendar days of receipt of the NGB FRR and accompanying documentation, NGB-EO-CMA will make a determination whether to accept the complaint for investigation. NGB-EO-CMA will notify the State representative to appoint an investigating officer (IO), or have one appointed, should such a determination be made. In the event of a request denial, NGB-EO-CMA will issue a Notice of Proposed Dismissal detailing the decision to dismiss. The member will be advised of their rights to request a hearing under Enclosure C.
4. Formal Investigation. The IO will complete an investigation and issue a report with findings to NGB-EO-CMA within 45 calendar days from the date of appointment. Expenses required to conduct a formal investigation, to include travel, a translator (if required), and technical support personnel (for investigations conducted by video conference or telephone) will be funded by the State NG against which the alleged discrimination is lodged.
5. IO Report Review. NGB-EO-CMA will issue an NGB NPR within 30 calendar days of receipt of the IO's Report. The NGB NPR will include NGB-EO-CMA's findings and recommendations.
 - a. If discrimination or harassment is substantiated, the NGB NPR will recommend appropriate remedial actions to the State NG. See Enclosure C.

b. If discrimination or harassment is substantiated, and remedial measures are recommended in the NGB NPR, the member will be informed by the State representative of the completion of remedial actions within 60 calendar days of receipt of the NGB NPR. The member may file a hearing request to seek remedies for a State's noncompliance with NGB-EO-CMA recommendations after 60 calendar days following receipt of the NGB NPR. See Enclosure C.

c. If discrimination or harassment is unsubstantiated, in whole or in part, the member may file a request for a hearing within 30 calendar days of receipt of the NGB NPR. See Enclosure C.

6. State NG Action. The State representative must submit a written response to NGB-EO-CMA, and to the member, within 30 calendar days of receipt of the NGB NPR pertaining to NGB's recommended resolution. The State representative thereafter, must provide a periodic update on the State's continuing remedial efforts every 30 calendar days to NGB-EO-CMA. The State representative will issue a notice to the NGB-EO-CMA and the member upon the State NG's completion of remedial actions.

ENCLOSURE C

HEARING REQUESTS

1. Hearing Requests. The Office of the NGB Chief Counsel (NGB-JA) will appoint a Hearing Officer with authority to administer oaths and affirmations; rule on offers of proof and receive relevant evidence; rule on pre-hearing motions; resolve issues of credibility; and ensure the record on significant issues are developed. The Hearing Officer is a civilian employee of the GS-15 grade, employed by NGB-JA, with an admission to practice law before a Federal court, or the highest court of a State.

a. NG members may request a hearing within 30 calendar days of receipt of the NGB NPR where the NGB-EO-CMA determines discrimination allegations are unsubstantiated, or the member's request was dismissed as unacceptable for processing by NGB-EO-CMA in a Proposed Notice of Dismissal, for example, failing to state a claim.

b. NG members may request a hearing within 60 calendar days of receipt of the NGB NPR to seek remedies denied by the State where the NGB-EO-CMA recommended remedial measures.

c. States may request a hearing before a Hearing Officer on the merits, within 30 calendar days of receipt of the NGB NPR where discrimination is substantiated against the State, and NGB-EO-CMA has recommended the State take action to resolve the discrimination, and the State disagrees with the finding of discrimination or the proposed resolution.

d. The Hearing Officer will prepare a written Notice of Decision within 15 calendar days of the close of the hearing record. The decision will contain the Hearing Officer's findings of fact and conclusions of law, reasons or basis for the Hearing Officer's findings and conclusions, and recommendations for relief and resolution when discrimination allegations are substantiated.

e. NGB-EO-CMA will deliver the Notice of Decision to the State, and the claimant or their State representative(s), within five calendar days of the Hearing Officer's decision. Simultaneously, NGB-EO-CMA will inform the State and claimant (or their State representatives) in writing of their opportunities for further review or reconsideration of the decision.

2. Noncompliance. NG members or States may request a hearing for noncompliance with the terms of a settlement agreement at any stage in this process. This request must be filed, with NGB-EO-CMA, within 30 calendar days from when the member or State knew, or should have known, of noncompliance, unless good cause for the delay exists.

3. Support Personnel. States will pay the expenses associated with support personnel required to conduct a pre-hearing conference or hearing, to include the court reporter, a translator (if required), and technical support personnel required (conducted by video conference or telephone).

4. Hearing Location. All hearings will be held at the ARNG Readiness Center in Arlington, Virginia.

a. A motion requesting a different hearing location may be filed for “good cause.”

b. The Hearing Officer will rule on such motions based on a showing that a different location is more advantageous to the parties and the NGB.

c. The State is 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 ARNG Readiness Center.

ENCLOSURE D

REVIEWING OFFICIAL PROCESS

1. Reviewing Official Process. The Reviewing Official Process presents an opportunity to resolve substantiated discrimination allegations and recommendations for remedial relief. This process is a review of the administrative record and is conducted by a General Officer assigned to NGB.

a. NGB-EO-CMA will prepare the case file for review and provide written recommendations to the Reviewing Official.

b. The Reviewing Official's decision may approve or deny a Request for Review, in whole or in part, to include recommending the suspension or termination of Federal funds to the State NG or initiating other relief within the purview of Federal authorities.

c. The Reviewing Official is not required to rule on each finding, conclusion or exception, presented in the Request for Review, and will issue a decision within 30 calendar days upon receipt of the NGB-EO-CMA's case file.

d. States may file, in writing, a Request for Initial Review of the Hearing Officer's decision explaining reasons for review based on law, fact, and/or regulation. This request must be filed with NGB-EO-CMA within 30 calendar days of receipt of the Notice of Decision. The Request for Initial Review of the Hearing Officer's decision must also be sent to the claimant, or their State representative(s), by certified mail, return receipt requested, or personally delivered at the time it is filed with NGB-EO-CMA. The claimant, or their State representative(s), may file a written response with NGB-EO-CMA within 15 calendar days of receipt of the State's Request for Initial Review of the Hearing Officer's decision, explaining the reasons for any opposition to Initial Review of the Hearing Officer's decision based on law, fact, and/or regulation.

e. NG members may file an Request for Initial Review of the Hearing Officer's Decision in writing, explaining reasons for review based on law, fact or regulation filed with NGB-EO-CMA or when a State has failed to implement a recommended resolution within 60 calendar days of receipt of the Notice of Decision. The Request for Initial Review of the Hearing Officer's decision must also be sent by certified mail, return receipt requested, or personally delivered to the State, and/or the State's representative at the same time it is filed with NGB-EO-CMA. The State, or its representative, may file a written response with NGB-EO-CMA within 15 calendar days of receipt of the Member's Request for Initial Review of the Hearing Officer's decision, explaining the reasons for any opposition to Initial Review of the Hearing Officer's decision based on law, fact or regulation.

2. State Implementation. The State NG will have 30 calendar days to either implement the recommended remedies in the Notice of Hearing Decision or request reconsideration of the decision with the initial Reviewing Official, when the Hearing Officer's decision substantiates the member's discrimination allegations, and recommends the member receive appropriate relief.

3. Final Reviewing Official Process. This is the last opportunity for NGB-EO-CMA to resolve substantiated discrimination allegations and recommendations for remedial relief. It will be conducted by a General Officer assigned to NGB, who is senior to the initial Reviewing Official.

a. NG members or States may file a Request for Final Review of the Initial Reviewing Official's decision. The written request must be filed with NGB-EO-CMA within 30 calendar days. The party not requesting the Final Review of the Initial Reviewing Official's decision may file a written response with NGB-EO-CMA within 15 calendar days of receipt of the Request for Final Review of the Initial Reviewing Official's decision.

b. NGB-EO-CMA will prepare the case file for review and provide written recommendations to the Final Reviewing Official.

c. The Final Reviewing Official's decision may approve or deny a Request for Final Review, in whole or in part, make a determination to suspend or terminate Federal funds pursuant to reference f, or pursue additional remedies within the purview of Federal authorities. The Final Reviewing Official is not required to rule on each finding, conclusion or exception presented in the Request for Final Review, and will issue a decision within 30 calendar days of receipt of the case file from NGB-EO-CMA.

d. There is no appeal administratively beyond a Final Reviewing Official's decision.

ENCLOSURE E

SAMPLE DOCUMENTS

Page 1 of 5

DISCRIMINATION COMPLAINT IN THE ARMY AND AIR NATIONAL GUARD <small>For use of this form see CNGBI 9601.01, the proponent agency is NGB-EO.</small>		HR/EO, MEO USE NGB Case Number
PRIVACY ACT STATEMENT <input type="checkbox"/> Informal <input type="checkbox"/> Formal		
<p>Authority: 42 U.S.C. Section 2000d</p> <p>Principal Purpose: To document the formal filing of a military complaint of discrimination in the Army National Guard or the Air National Guard</p> <p>Routine Use: None</p> <p>Disclosure: Voluntary. However, failure to complete all portions of this form could affect the timely processing, or result in the rejection or dismissal of your complaint.</p>		
INSTRUCTIONS		
PART I - TO BE COMPLETED BY COMPLAINANT Submit to Your Unit Commander		
<p>Any part-time military member, AGR member, Technician, former member, applicant for membership or beneficiary of the Army or Air National Guard who believes that he or she has been discriminated against because of race, color, religion, gender, or national origin (or retaliation for having participated in any way in a protected equal opportunity activity), in a matter subject to the control of the Army or Air National Guard, may file an individual complaint of discrimination. You are encouraged to discuss the complaints with and to seek assistance from your immediate supervisor, unit commander, members of the chain of command or EO/AEOT staff. Fill out Part I of this form and file the complaint within 180 days of the date of the alleged discrimination or the date that you became aware of the discriminatory event or action. The complaint should be filed with the unit commander (if the commander is not the alleged discriminating official) or with your unit EO representative. You may file with any other commander in the chain of command, the Adjutant General, the National Guard Bureau, or Inspector General Office. However, regardless of where the complaint is filed, it will be referred to the lowest applicable command level for action.</p>		
1. COMPLAINANT		
a. NAME		b. RANK
		c. POSITION
2. GENDER	3. RACE	4. NATIONAL ORIGIN
5. HOME ADDRESS (Including Zip Code)		6. TELEPHONE NUMBERS
		a. BUSINESS
		b. HOME
7. ACTIVITY OR UNIT IN WHICH ALLEGED DISCRIMINATION OCCURRED		8. ARE YOU (Check One)
		<input type="checkbox"/> PART TIME MILITARY MEMBER <input type="checkbox"/> AGR TITLE 32/ADSW TITLE 32 <input type="checkbox"/> APPLICANT FOR NG/AGR MEMBERSHIP <input type="checkbox"/> FORMER MILITARY MEMBER <input type="checkbox"/> TECHNICIAN
9. PERSON YOU BELIEVE DISCRIMINATED		
a. NAME		b. TITLE
10. REPRESENTATIVE (If any)		
a. NAME		b. ADDRESS
11. CHECK BELOW THE BASIS (Reasons) FOR ALLEGED DISCRIMINATION		
<input type="checkbox"/> R RACE (Check Your Race) <input type="checkbox"/> Black <input type="checkbox"/> White <input type="checkbox"/> American Indian/Alaskan Native <input type="checkbox"/> Asian/Pacific Islander		
<input type="checkbox"/> C COLOR (State Your Color) _____		
<input type="checkbox"/> L RELIGION (State Your Religion) _____		
<input type="checkbox"/> G GENDER (Not Sexual Harassment) (Check Your Gender) <input type="checkbox"/> Male <input type="checkbox"/> Female		
<input type="checkbox"/> S SEXUAL HARASSMENT (Check Your Gender) <input type="checkbox"/> Male <input type="checkbox"/> Female		
<input type="checkbox"/> O REPRISAL (Based Upon EO Activity) <input type="checkbox"/> Yes <input type="checkbox"/> No		
<input type="checkbox"/> N NATIONAL ORIGIN (State Your National Origin) <input type="checkbox"/> Hispanic <input type="checkbox"/> Other (Specify) _____		

NGB 333, 20000701 (EF) (Adobe 4.0)

Figure 1. Sample NGB Form 333 (Only Page 1)

Commander's Reprisal Prevention Plan

1. Explain the following:
 - a. Reprisal and provide definition to all concerned parties (See terms).
 - b. Military Whistleblowers Protection.
 - c. Consequences of reprisal.
 - d. Possible sanctions against violators.
 - e. Roles and responsibilities of leadership in the prevention of acts of reprisal.
 - f. Command's support of a thorough unbiased investigation and good faith in attempting resolution.
 - g. Need to treat all parties in a professional manner both during and following the investigation.
2. Record Personnel counseled.

Name of individual counseled on reprisal.

Commander's initials who counseled them.

Date of counseling.

Notes:

1. All persons involved in the filing (claimant), witnesses providing testimony, or those named as a Principle Agency Witness of an EO complaint are afforded protection against reprisal.
2. The commander will discuss reprisal prevention with all concerned individuals and annotate their name and the Commander will initial and specify the date the discussion took place.
3. The commander will provide this plan to the Inquiry/Investigating Officer for inclusion in the Leadership Inquiry Report.

Figure 2. Sample Commander's Reprisal Prevention Plan

LEADERSHIP INQUIRY REPORT
SAMPLE OUTLINE

A. IDENTITY OF COMPLAINANT

Name:

Employment or Military Status of Complainant:

- 1) M-Day (Drill/AT)
- 2) JAGR/ADOS
- 3) Military Technician (Dual-Status)
- 4) Military Technician (Non-Dual-Status)
- 5) Applicant for employment
- 6) Applicant for service
- 7) Former military member
- 8) Former employee

Place of Employment:

Work Phone No:

Home Phone No:

Home Address:

B. CHRONOLOGY OF INFORMAL DISCRIMINATION COMPLAINT

Date of Initial Contact with EO Professional:

Date of Initial Interview with Inquiry Officer:

Date of Alleged Discriminatory Event:

Reason for delayed contact beyond 180 days, if applicable:

Date Leadership Inquiry Report Requested:

Date Leadership Inquiry Report Submitted:

C. BASIS(ES) FOR ALLEGED DISCRIMINATION

- 1) Race (Specify) _____
- 2) Color (Specify) _____
- 3) National Origin (Specify) _____
- 4) Sex (Specify) _____
- 5) Sexual Orientation _____
- 6) Disability (Specify) _____
- 7) Religion (Specify) _____
- 8) Genetic Information _____

Figure 3. Sample Leadership Inquiry Report (*Page 1 of 2*)

**STATE NATIONAL GUARD
LETTER HEAD**

Office Symbol

Day Month Year

MEMORANDUM FOR (Name of Claimant/and or Representative)

SUBJECT: Right to File an NGB FRR Notice - Complaint number

1. This is to inform you that if the dispute you brought to the attention of the EO Professional has not been resolved to your satisfaction, you are now entitled to file a National Guard Bureau Formal Resolution Request (NGB FRR) in accordance with CNGBM 9601.01, Day Month Year, and "National Guard Discrimination Complaint Process." If you file an NGB FRR, it must be in writing, signed, and filed with this office within fifteen (15) calendar days after receipt of this notice. In the alternative, you may file the complaint with the National Guard Bureau at the following address:

National Guard Bureau
Office of Equal Opportunity
Chief, Complaints Management and
Adjudications (ATTN: NGB-EO-CMA)
AHS-Bldg. 2, Suite
111 S. George Mason Drive
Arlington, VA 22204-1373

2. A NGB FRR shall be deemed timely if it is received or postmarked before the expiration of the 15-day filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the filing period. The agency will presume you received this notice within five days from the date this notice was mailed in the absence of a return receipt of delivery.

3. All NGB FRRs will be sent to the Chief, CMA for processing. Therefore, if you choose to file your complaint with NGB, be sure to provide a copy of your complaint to this office to ensure prompt processing of your complaint.

Figure 4. Sample Right to File NGB FRR (*Page 1 of 2*)

4. The complaint must be specific and contain only those issues specifically discussed with the EO Professional or issues that are like or related to the issues that you discussed with me. It must also state whether you have filed a grievance under a negotiated grievance procedure, a lawsuit, or a complaint with another forum regarding the same claims.

5. If you retain an attorney or any other person to represent you, you and your representative must immediately notify the Chief, CMA, in writing. You and/or your representative will receive a written acknowledgement of your NGB FRR from the appropriate agency official.

6. If you file an NGB FRR, it should be signed by the claimant and contain a statement from the claimant or the representative identifying the individuals involved, the National Guard unit or organization involved and a description of the action(s) or practice(s) forming the basis of the discrimination resolution request.

SIGNATURE
State Equal Employment Manager

(Figure 4 Continued) Sample Right to File NGB FRR Page 2 of 2

ENCLOSURE F

REFERENCES

- a. CNGB Instruction 9601.01, 27 September 2015, “National Guard Discrimination Program”
- b. CNGB Instruction 0402.01, 24 July 2015, “National Guard Alternative Dispute Resolution”
- c. DoD Directive 1020.02E, 08 June 2015, “Diversity Management and Equal Opportunity in the DoD”
- d. CNGB Manual 0402.01 04 January 2016, “Alternative Dispute Resolution Procedures”
- e. NGR 600-23/ANGR 30-12, 30 December 1974 “Nondiscrimination in Federally Assisted Programs”
- f. 32 U.S.C. §108, “Forfeiture of Federal Benefits”
- g. 32 U.S.C. §709, “Technicians: Employment, Use, Status”
- h. CNGB Instruction 9600.01 13 November 2013, “Alternative Dispute Resolution Policy and Guidance”
- i. DoD Directive 1350.2, 18 August 1995, with change 01 dated 08 June 2015, “Department of Defense Military Equal Opportunity (MEO) Program”

GLOSSARY

PART I. ACRONYMS

ADR	Alternative Dispute Resolution
ANG	Air National Guard
ARNG	Army National Guard
NGB-EO-CMA	National Guard Bureau Equal Opportunity Office of Complaints Management and Adjudication
IAW	In accordance with
IO	Investigating Officer
IQO	Inquiry Official
IRR	Informal Resolution Request
NG	National Guard
NGB	National Guard Bureau
NGB FRR	National Guard Bureau Formal Resolution Request
NGB-JA	Office of the National Guard Bureau Chief Counsel

PART II. DEFINITIONS

Good Cause -- Where substantial grounds exist to justify taking, or failure to take, a particular action. Many factors can establish good cause and must be reviewed within the scope of each particular circumstance.

On the Merits -- A decision rendered based upon the substantive facts, rather than on any technical or procedural rule.