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**Date:** April 11, 2000

**Route To:** 6100

**Subject:** Use of Official Time and Agency Resources - Equal Employment Opportunity (EEO) Complaints

**To:** Deputy Chiefs, Regional Foresters, Station Directors, Area Director, IITF Director and WO Staff

This is interim Forest Service policy on the use of official time and resources by employees who file EEO complaints. It is based on Federal EEO Regulations as found in 29 CFR 1614, Equal Employment Opportunity Commission (EEOC) Management Directive (MD)-110, as well as applicable case law. Pertinent sections of the 1614 regulations and MD-110 are enclosed for ease of reference. By way of operational policy, agency EEO Counselors have been instructed to provide information contained in this letter to employees who initiate the complaint process. Our intent is to incorporate this direction into the Forest Service directives system in the near future.

### **Official Time**

*Summary of Regulations:* The EEOC requires that agencies allow complainants who are employees to use "a reasonable amount of official time, if in duty status, to prepare the complaint," and "to respond to agency and EEOC requests for information" (29 CFR 1614.605(b)). That section of the regulations further states, "the agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer." EEOC's (MD)-110, defines "reasonable" as "whatever is appropriate under the circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information" (Chapter 6, Section VIII C). Although the actual number of hours provided to complainants and their representatives will vary according the circumstances of the case and the agency's need to have its employees available to perform work on a regular basis, MD-110 states, "the complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used *prior* to the complainant's use of such time."

#### *Policy:*

##### *1. Precomplaint (Informal) and Complaint Preparation and Presentation:*

A reasonable amount of official time *will be* allowed for an employee to make contact, discuss, and meet to attempt resolution of precomplaint issues with EEO Counselors, Human Resources Specialists and/or Early Intervention Program (EIP) officials. A reasonable amount of time, not to exceed four (4) hours, may be granted for an employee to prepare for an initial precomplaint contact, including time to discuss issues with the employee's representative.

Forest Service officials *will* allow employees a *reasonable* amount of official time to *prepare and present* an EEO complaint. Official time for such purposes will typically include time to assemble documents to be submitted in conjunction with the complaint; time spent at the

employee's official duty station or by phone to meet or consult with the employee's representative to assist in complaint preparation; and time to write up the complaint.

Official time *will* be granted to employees to prepare responses to questions or information requests from government officials responsible for processing and or attempting to resolve EEO complaints including precomplaints (e.g. EEO Counselor, EIP manager, Human Resource Specialist, agency designated mediator, designated EEO investigator, USDA-Office of General Council, EEOC, USDA-Office of Civil Rights, etc.)

Overtime, including administratively uncontrollable overtime, *is not* be authorized for either complainants or their employee representatives to prepare or present complaints.

## 2. *Meetings and Hearings:*

Official time *will* be permitted for employees to travel and attend meetings initiated by EEO Counselors, EEO complaints investigators, EIP mediators and other agency officials to discuss and/or attempt complaint resolution. A reasonable amount of official time *may* be permitted for employees to prepare for such meetings.

A reasonable amount of official time *will be* afforded complainants and their employee representatives to prepare for meetings and hearings associated with complaint processing as initiated by the agency or EEOC. Although individual circumstances will vary by case, the need for large amounts of time to prepare for meetings and hearings is expected to be rare, being defined in terms of hours (versus days or weeks).

Official time *will be* permitted for employees to attend agency- or EEOC initiated meetings or hearings. If such meetings or hearings are held outside the normal work hours of the complainant or representative, work schedules *will be* adjusted or credit hours earned so as to minimize or eliminate the number of uncompensated hours while attending those sessions.

Official time *will be* granted to complainants and their employee representatives for travel to agency- or EEOC-initiated meetings in conjunction with complaint processing if such travel is otherwise compensable under Title 5 of the U.S. Code, and the Fair Labor Standards Act (FLSA).

## 3. *Official Time Authorization:*

Since all hours reported on the Time and Attendance Record must be certified by the employee's supervisor as being hours worked or leave used, employees and their employee representatives seeking to use official time in conjunction with preparing an EEO complaint must obtain *prior approval* from their supervisors to ensure such requests are consistent with agency policy. The employee will be expected to provide the supervisor with sufficient information to determine if the amount of time being requested is *reasonable*.

Other than Union representatives whose use of official time is established under contract provisions, supervisors may set limits on the aggregate amount of time their employees may spend representing others to insure continued normal work operations. Supervisors are encouraged to consult with their Employee Relations staffs with any questions pertaining to setting limits on the amount of time, especially if such requests exceed 8 hours.

In obtaining information to establish a reasonable amount of time, the employee *will not* be required to reveal confidential case information.

If any official time is denied, a written statement *will be* prepared by the supervisor containing the reasons for the denial. A copy *will be* provided to the complainant and servicing Human Resource Management office for the complaint case file.

#### *4. Miscellaneous*

Use of official time *is not* authorized for employees, whether acting on their own behalf or as a member of an outside organization/employee group, to publicize or solicit contacts from employees who may be seeking representation.

Official time *will not* be authorized for employees or their employee representatives to prepare, present, or travel in conjunction with civil actions filed in Federal District Court.

Official time *is not* authorized for employees to represent external applicants in conjunction with complaints against the Forest Service, or preparing and presenting a class complaint that arose in another agency.

### **Agency Provided Resources and Travel**

#### *Summary of Regulations:*

The EEOC Management Directive (MD)-110 sets forth the general rule regarding a complainant's use of government property in pursuing a discrimination complaint. "The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors) must be authorized by the agency and must not cause undue disruption of agency operations." (Chapter 6, Section VIII E).

Given the responsibility of the agency to establish policy on the use of its resources in conjunction with EEO case processing, the Forest Service policy for *both* individual and class complaints will be based on MD-110 guidance cited above.

#### *Policy:*

##### *1. Resources:*

*Supervisory approval* must be obtained prior to an employee's use of any Forest Service facilities or equipment by employees in conjunction with preparation and processing of complaints.

When an amount of official time has been authorized as described in the previous section, the employee should be provided reasonable access to and use of *existing* government personal computers, e-mail, mail, copiers, fax machines and to phones. Such use *must* be limited to performing those complaint related activities for which use of official time has been authorized, and must not disrupt work unit operations.

Consistent with the prohibition on the use of official time to solicit employee or complainant contacts, use of government resources (e.g. computer system, phones, fax machines, etc.) is not permitted for such purposes.

In responding to complainant or class agent requests for agency information to which they are not otherwise entitled under 29 C.F.R. 1614 (e.g. responding to questions from an complaint investigator, to prepare for hearings, etc.) the Forest Service may charge for reproduction costs. When costs are assessed, the Forest Service will apply the same standard it uses in determining whether to charge for requests made under the Freedom of Information Act.

## *2. Travel:*

Unless determined to be in the best interest of the government as determined by the local line manager, payment of travel and per diem for complainants or class agents in conjunction with complaint preparation *will not* be made. In making the determination whether to authorize travel at government expense, line managers are encouraged to consult their Employee Relations or Civil Rights staff.

Travel and per diem to attend EEOC hearings which are outside the complainants' or representative's commuting area *must be* authorized. All requests for travel authorization must be made in advance of the travel, and to the agency official having authority to approve it.

## **Relationship to Other Dispute Resolution Forums**

The policy contained in this letter pertains only to complaints filed under the EEOC regulations contained in 29 C.F.R. 1614. It does not change agency policy regarding official time and use of agency resources in conjunction with other dispute forums (e.g. negotiated grievance procedures, hotline complaints, etc.) which are similar to, but controlled by other regulations and Collective Bargaining Agreements.

If you have any questions on information contained in this letter, please contact either Pete Rockx, Branch Chief, Labor Management, Employee Relations and Performance, HRM-WO at (703) 605-5200 extension 3078 or Elizabeth Butler, Program Manager, ECP, CR-WO at (202) 205-1053.

*/s/ Clyde Thompson*

CLYDE THOMPSON  
Deputy Chief for Business Operations

Enclosures  
cc: Detached ECP Service Centers

Code of Federal Regulations  
Federal Sector Equal Employment Opportunity  
Title 29 Part 1614

29 CFR 1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage under 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of all official correspondence shall be made on the attorney and the complainant, but time frames for receipt of materials shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

# The U.S. Equal Employment Opportunity Commission Management Directive 110

## CHAPTER 6 - DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

### C. Official Time

Section 1614.605 provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty. § 1614.605(b). Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of § 1614.605, and their representatives, if they are current employees of the agency, are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

#### 1. Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their federal employment on their own time.

#### 2. Meeting and Hearing Time

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime.

#### 3. Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the

formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes.

Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

#### 4. Aggregate Time Spent on EEO Matters

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, § 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the Commission encourages agencies to provide such official time.

#### 5. Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who may need official time, such as witnesses, of the process and how to claim or request official time.

#### 6. Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant's subsequently files a complaint.

#### D. Duty Status/Tour of Duty

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work. It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings. If meetings, conferences, and hearings are scheduled outside of the complainant's or the

representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file. Witnesses who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

#### E. Use of Government Property

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors) must be authorized by the agency and must not cause undue disruption of agency operations.

## **CHAPTER 8 - COMPLAINTS OF CLASS DISCRIMINATION IN THE FEDERAL GOVERNMENT**

### VIII. HEARING - §§ 1614.204(h) and (i)

#### C. Travel Expenses

If the Administrative Judge sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel and per diem expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of complainant's witnesses who are not federal employees.

The agency's obligation is limited to those costs which are legally payable in advance by the agency. See Decision of the Comptroller General, Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982); see also Decision of the Comptroller General, Matter of: John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 310 (1990).

#### D. Official Time for Agency Employees

Any employee testifying at a hearing is entitled to official time for the time s/he spends testifying as well as a reasonable amount of time for travel to and from the hearing. The class agent and agent's representative, if employees of the agency where the complaint arose and was filed, are entitled to official time for actual time spent at the hearing and for a reasonable amount of time spent preparing for the hearing. An agency may permit its employees to use official time in preparing and presenting a class complaint which arose in another agency.