

APPENDIX 6-14: EQUAL OPPORTUNITY INVESTIGATION **GUIDANCE**

1. General. This chapter is meant to be a guide for the IO. It is not intended to be used as a checklist. Each complaint of discrimination is unique and the IO should tailor the investigation so that it can best determine the facts concerning the incident.

2. Purpose of the Investigation. The purpose of the investigation is to develop a written record of the facts surrounding the alleged incident. All statements should be sworn and documented and all pertinent evidence preserved. The IO's investigation product should serve as a decision-making tool and provide a reference point for justifying command action taken. The IO should foster trust in the investigative process by demonstrating command commitment and allowing affected personnel an opportunity to be heard. Establishing credibility and objectivity, providing a foundation for subsequent decision by the CO, and protecting the morale and productivity of both the recipient and accused are of paramount concern. Always be neutral and impartial. Develop opinions only after completion of fact-finding (communicate opinions only appropriate command authority; never to witnesses or parties).

3. Prior to the Investigation. Before beginning the investigation, ensure you understand all aspects of conducting an investigation. Familiarize yourself with policies, guidance, instructions, and supplemental material provided by your command. Contact the local SJA for further guidance and assistance throughout the entire investigation.

4. Know What Your Objectives Are

a. Understanding the policies and instructions will help you formulate the necessary frame of reference to pursue your primary objective of collecting all relevant facts and evidence.

b. Comply with any specific command requirements.

c. Your secondary objective is to develop logical and informed opinions and conclusions to assist the commander in making a qualified decision when disposing of the case.

5. Maintain Confidentiality To The Extent Practicable. During the investigation, do not identify the persons involved except as needed to obtain all necessary facts and evidence. Do not discuss the nature or progress of your inquiry with anyone without a "need to know."

6. Rights Advisement

a. Military personnel

(1) All forms of discrimination, including sexual harassment, constitute violations of the UCMJ. When a military member is suspected of having committed an offense, the offending person may only be questioned after: (a) they have been properly informed of

a11 applicable rights and, (b) knowingly and intelligently waive them. Military suspects must be advised of their rights even if they are not in "custody." The Suspect's Rights and Acknowledgment/Statement form (contained in Appendix F), should be used for this purpose. Other than advising the offending person of the rights as listed on the form, the IO should never give any other form of legal advice or promises to the offending person.

(2) If the offending person desires a lawyer, the IO should immediately terminate the interview and seek advice from the SJA or other legal counsel advising the command.

(3) After the offending person has properly waived all rights, the IO may begin questioning. After the offending person has made a statement, the IO may probe with pointed questions and ask the offending person about inconsistencies in the story or contradictions with other evidence. The IO should, with respect to their own behavior, keep in mind that the statement must be voluntary. A confession or admission which was obtained through the use of coercion, unlawful influence, deception, or unlawful inducement is not voluntary. Having an impartial witness present may initially appear as a way to prove the statement was voluntary, but this will have to be balanced on a case-by-case basis against the likelihood that the impartial witness may inhibit the interviewee's willingness to be interviewed.

(4) If the offending person initially waives all rights, but during the interview indicates a desire to consult with counsel or to stop the interview, immediately terminate the interview. The interview may not resume unless the offending person approaches the IO and indicates a desire to once again waive all rights and submit to questioning.

b. Civilian employees

(1) Civilian employees do not have the right to be informed of charges in an investigatory proceeding.

(2) An employee who is a member of a bargaining unit represented by a union has a right to be represented by that union if the employee reasonably believes that the interview may result in disciplinary action against him/her and the employee requests such representation. This right does not apply to a supervisor, nor to a non-supervisor who is not member of the bargaining unit.

(3) Civilian employees normally do not have the right to Government-provided counsel in an investigatory proceeding. The exception occurs during custodial interrogations where the employee is in custody, not free to leave, and has no resources to provide his/her own counsel. In this case, interrogations should only be conducted by appropriate law enforcement personnel.

(4) All U.S. citizens have the right to remain silent in an investigation, but only when there is a reasonable belief that statements taken will be used in criminal proceeding. A civilian employee may be disciplined for not replying to questions raised in an agency investigation if the employee is adequately informed both that he/she is subject to discipline for not answering and that the replies will not be used against him/her in a

criminal proceeding. However, many forms of discrimination and sexual harassment are also criminal violations. For example, the use of foul language may constitute "disorderly behavior" under local law. Unauthorized touching is a common law battery which can be prosecuted in criminal courts. New laws dealing with "stalking" may also apply to some sexual harassment cases. Where there is potential for criminal prosecution, simply telling the employee not to leave the room or escorting him/her to a confined area will result in a "custodial" interrogation triggering Miranda rights. Accordingly, even though a criminal offense may seem relatively minor, the employee may still be justified in refusing to answer questions.

(5) Employees filing a grievance have no statutory right to legal counsel, but only a right to representation. It is the employee's responsibility to secure legal counsel. The complainants are responsible for the actions of their representative.

(6) Prior coordination with the command's legal and/or labor relations advisors is essential.

7. Gather and Preserve All Evidence

a. Interview all persons who might possess relevant information.

(1) Interview the person initiating the allegations first in order to clarify the complaints.

(2) Interview any known witnesses followed by any other witnesses identified during these interviews.

(3) Next interview the offending person.

(4) Then interview any witnesses suggested by the offending person.

(5) Finally, re-interview as necessary.

(6) See paragraph 8 for general guidelines for conducting interviews.

b. Gather and preserve any documentary evidence. Documentary evidence, such as letters, notes, written or printed material, instructions, or watchbills, should be obtained and attached to the report. If unable to provide originals, explain why (and if possible attach copies).

c. Gather and preserve any real evidence. Real evidence is a physical object such as a picture, greeting card, token of affection, or phone records. Those items may be obtained from any source, including the recipient, offender, or witness. All evidence should be safeguarded until final disposition of the case. If the IO seeks to obtain evidence from an unwilling person, the IO should seek advice from the SJA or other legal counsel advising the command.

8. General Principles For Conducting Interviews

a. Treat everyone with dignity and respect.

b. Prepare your questions in advance. If possible, have someone take verbatim notes for you during the interview. If no one is available to take notes, consider taping each interview, but only for your future reference in the preparation of your report. If you tape the interview, you must inform the interviewee of the taping prior to the interview. Do not tape in secret. Inform the person that the tape will be used only for reference for the final report. Start the interview by stating on tape the date, time, and location, and have the interviewee acknowledge on tape that he/she understands the interview is being taped.

c. Tell each interviewee who you are, what you are doing, and why you are talking to them.

d. Maintain a reasonable tone of voice. Be careful not to use threatening mannerisms or body language.

e. Listen. Keep an open mind. Do not filter. Try to understand each person's point of view.

(1) Let each witness tell their story.

(2) List points to ensure that you elicit all necessary information.

(3) Interrupt for clarification.

(4) Interrupt or return later for details.

(5) Use written questions or phone interviews for absent witnesses.

(6) Ask short concise questions. Do not ask leading questions or questions requiring more than one answer.

f. Accord any person suspected of having engaged in discriminatory behavior all applicable rights.

g. Type your notes into statement, ensuring not to alter them. The IO may help the interviewee to express, accurately and effectively in a written form, relevant information. The substance of the statement must always be the actual thoughts, knowledge, or beliefs of the interviewee. Have the interviewee read, correct (pen and ink is preferable), initial any corrections, sign the statement and initial all pages other than the signature page. The interviewee should sign in the presence of a witness, and the witness should also sign the statement.

h. Oral statements, even though not reduced to writing, are also evidence. If an interviewee does not wish to reduce an oral statement to writing, the IO should note this in the report and attach a summary of the interview. Where the interviewee has made an incomplete written statement, the IO must add a summary of the matters made orally that were omitted from the written statement.

i. All statements should be sworn. Military personnel appointed to conduct an investigation are authorized to administer oaths in connection with the investigation. This

should be done both at the end of oral statements (on tape, if applicable) and when executing any subsequent written statements. See Appendix E for a sample Sworn Statement.

j. Before closing any interview

(1) Summarize key information.

(2) Solicit any additional information the interviewee wishes to provide.

(3) Ask the interviewee to identify other witnesses.

(4) Ask the interviewee to identify and/or provide any pertinent documents or other evidence.

(5) Schedule a follow-up meeting, if required (e.g., to obtain additional information, signature on written statement, etc.).

(6) Discuss how the interviewee can tell the IO any other information he/she might later obtain (or think of).

(7) Discuss the concept of reprisal and ensure the interviewee knows how and to whom to report any suspected instances of reprisal.

(8) Ensure the interviewee has a telephone number to contact you.

8. When Gathering the Facts the IO Should Find Out:

a. What exactly happened?

b. What was the stated intent behind the behavior? Apparent intent? What evidence supports this?

c. Where did the behavior occur?

d. Who was involved?

e. Were there any witnesses?

f. What was the impact on the recipient? How did the behavior affect the recipient or make the recipient feel?

g. Did the conflict disrupt the work environment? How? Did it affect the recipient's work performance, or relationship with co-workers?

h. Did the recipient discuss the situation with anyone at the time?

i. Has the objectionable behavior happened before? When? How many times?

j. Was the offending person told to stop? If so, when? How? What was the reaction? Any witnesses?

k. Was any of the foregoing documented? How? Is the documentation available? If not, why not? (If so, attach documentation (or true copy) to report.)

l. What type of example was set by supervisors?

m. Were supervisors aware of the offending behavior? Of the conflict? Should they have been? Why? Did they take action resolve the conflict? What action? Were the persons involved satisfied with any such action? Did the action have any effect? What effect? Did the supervisor follow-up and provide feedback?

n. Did all persons involved receive yearly training in Core Values? When? Was training documented? How? (Attach documentation to the report.)

o. If reprisal appears to be an issue, are there also legitimate reasons which would justify the treatment of the person(s) who made the report of discrimination or sexual harassment? What evidence supports these reasons? Were these reasons apparent and/or substantiated prior to the report of discrimination or sexual harassment? Is there evidence that legitimate reasons were, or were not, the controlling factors for the treatment?

p. Are the persons involved prepared to try to listen, understand, and resolve the conflict? To apologize? _To accept an apology? To accept responsibility?

q. What relief does the recipient desire? Will the recipient be completely satisfied with resolving the matter under the IRS? Does the recipient desire any further action? What are the recipient's feelings about the loss of confidentiality which may result in the event the command takes disciplinary action against the offender?

10. Related Issues. Sexual harassment is one type of discrimination. Just because conduct might not technically be sexual harassment doesn't necessarily mean it's OK. Other prohibited conduct may overlap with sexual harassment, or surface during a sexual harassment inquiry.

a. To constitute sexual harassment

(1) The behavior can be toward a person(s) of the same sex or opposite sex. It is generally not behavior which is addressed equally to both sexes (unless the impact is unequal).

(2) The behavior must be toward the recipient, except in situations where the inappropriate behavior is so severe or pervasive as to constitute a hostile environment.

(3) The behavior can be by a supervisor, coworker, senior, subordinate, or contractor.

(4) The behavior may be physical, verbal, or visual.

(5) The offer in "this for that" cases can be expressed or implied.

(6) The behavior does not have to involve actual monetary loss, or loss of job or benefits. The recipient does not have to suffer anxiety or debilitation or give evidence of psychological effect.

(7) The behavior must be of a sexual nature. Poor management practice or a personality conflict where there are no covert or overt sexual overtones is not sexual harassment.

(8) The behavior must be unwelcome.

(a) "Unwelcomeness" may be conveyed verbally or non-verbally.

(b) There does not have to be active resistance (especially in this for that situations).

d. To constitute a "hostile environment" the behavior must be severe or pervasive, not trivial or merely annoying. Whether this behavior creates a hostile environment must be viewed through the perspective of a reasonable person" of the same race, gender, religion, national origin, age, or disability, under similar circumstances in a similar environment, looking at:

(1) Whether the behavior was verbal, physical or visual;

(2) How frequently the behavior was repeated;

(3) Whether the behavior was patently offensive;

(4) Whether the offending person was a coworker or a supervisor;

(5) Whether others joined in perpetrating the behavior; and

(6) Whether the behavior was directed at more than one individual.

e. The key point to prove a hostile environment is whether the behavior unreasonably interferes with an employee's work performance or creates an offensive work environment.

f. It is not necessary to establish "hostile environment" in "this for that" cases.

g. Just because behavior is not sexual harassment, doesn't necessarily mean it's "OK." Behavior that doesn't meet the definition of sexual harassment can still be inappropriate or even criminal.

11. When Reviewing the Facts and Formulating Your Opinion Evaluate:

a. What factually happened? It is your role to evaluate agendas and credibility, sort fact from fiction, and draw an objective picture of what happened.

b. Would the alleged behavior have offended a reasonable person from the recipient's perspective? Would a reasonable person of the same race, gender, religion, national origin, age, or disability, in a similar environment perceive the behavior in the same manner, given the circumstances that occurred?

- c. Was the alleged behavior zone Red, Yellow, or Green? What zone does the behavior fall into when considering whether it is unacceptable or acceptable?
- d. What were the responsibilities of the persons involved? Were these responsibilities met?
- e. Did the supervisor condone or ignore the action(s)?
- f. Should the supervisor have known or have reason to know of the specific behavior in question?
- g. Did the supervisor fail to take reasonable measures to establish and maintain an equal opportunity climate and to adequately educate and train subordinates?
- h. Did all subordinates receive the mandatory accession training? Annual training? If not, was it the supervisor's fault? Why or why not?
- i. If it appears the allegation of discrimination or sexual harassment was false, was it made honestly and in good faith, or did the person who made it know it was false when made? What is the evidence on this issue?
- j. What are the possible resolution options? Are there any that would be acceptable to all? What option(s) do you recommend? Why? How will the recommended option(s) resolve the conflict?

12. Complete Your Report

- a. Comply with any specific requirements of your command.
- b. In general, your report should usually contain the following:
 - (1) List of persons interviewed.
 - (2) Signed written statements of persons interviewed preferably sworn) using the form at Appendix E. Also include your written summaries of any oral statement. Unless otherwise directed by your command, do not include your notes or tapes, but do retain them until the matter is resolved and your command advises you that retention is no longer necessary.
 - (3) Completed suspect's rights acknowledgment forms (Appendix F) if applicable.
 - (4) Any other evidence.
 - (5) Your discussion including background, allegations, findings, opinions, recommendations, signature, and date.
 - (6) Ensure your findings, opinions, and recommendations are supported by the evidence and documentation.