

§ 268.207 Investigation of complaints.

(a) The investigation of individual complaints shall be conducted by an investigator appointed by the EEO Programs Director.

(b) Consistent with guidance proffered by the Commission, the Board, through the EEO Programs Director, shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. The investigator may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. The EEO Programs Director may incorporate alternative dispute resolution techniques into the investigation in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c)(1) through (4) of this section apply to the investigation of complaints:

(1) The complainant, the Board and any employee of the Board shall produce such documentary and testimonial evidence as the investigator deems necessary, consistent with applicable laws, regulations and policies of the Board.

(2) The investigator may administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the Board or its employees, fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits or the attendance of witness(es), the investigator may note in the investigative record that the Board when rendering a final decision should, or the Commission on review may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(4) If documentary or testimonial evidence is needed by the investigator, and such documentary evidence is known to be contained in the files of another federal agency, or the testimony of an employee of another federal agency is needed, the EEO Programs Director shall, if necessary, contact the Commission for assistance in obtaining such documentary or testimonial evidence.

(d) The investigation shall be conducted by an investigator with appropriate security clearances.

(e)(1) The Board shall complete its investigation within 180 days of the date of the filing of an individual complaint or within the time period contained in the determination of the Commission on review of a dismissal pursuant to § 268.206 of this part. By written agreement within those time periods, the complainant and the Board may voluntarily extend the time period for not more than an additional 90 days. The Board may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize an investigative file that may contain information classified pursuant to Executive Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the Board notifies the complainant of the extension.

(2) Confidential supervisory information, as defined in 12 CFR 261.2(b), and other confidential information of the Board may be included in the investigative file by the investigator, the EEO Programs Director, or another appropriate officer of the Board, where such information is relevant to the complaint. Neither the complainant nor the complainant's personal representative may make further disclosure of such information, however, except in compliance with the Board's Rules Regarding Availability of Information, 12 CFR part 261, and where applicable, the Board's Rules Regarding

Access to and Review of Personal Information in Systems of Records, 12 CFR part 261a.

(f) Within 180 days from the filing of the complaint, within the time period contained in a determination of the Commission's Office of Federal Operations on review of a dismissal, or within any period of extension provided for in paragraph (e) of this section, the Board shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of the receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge from the Commission or may receive an immediate final decision pursuant to § 268.209 of this part from the Board. In the absence of the required notice, the complainant may request a hearing under § 268.208 of this part at any time after 180 days has elapsed from the filing of the complaint.

[59 FR 16098, Apr. 6, 1994, as amended at 61 FR 252, Jan. 4, 1996]

§ 268.208 Hearings.

(a) *Requests.* When a complainant requests a hearing, the EEO Programs Director shall request the Commission to appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the Board has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with § 268.204 of this part or for such other processing as may be ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative

judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may reasonably limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, privileged, or that production would be unlawful.

(c) *Conduct of hearing.* The Board shall provide for the attendance at a hearing of all Board employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in hearings raising claims of discrimination any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct. The Board in such circumstances may take whatever action it deems appropriate to suspend or disqualify any such attorney or representative from appearing or practicing before the Board.

(d) *Evidentiary procedures.* The procedures in paragraphs (d) (1) through (3)