



21 December 2022

MEMORANDUM FOR SEE DISTRIBUTION

Subject: Interim Guidance to Supplement CNGBM 9601.01 - Reforms to Counter Sexual Harassment in the National Guard

1. References. See references enclosed.
2. Purpose. To recertify CNGBM 9601.01 as current as modified by this Interim Guidance and to Supplement CNGBM 9601.01 regarding how the National Guard (NG) will process Sexual Harassment complaints to address select findings and recommendations contained in references 1b and 1g.
3. Applicability. This Interim Guidance applies to all National Guard 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 fitness for duty in the reserve components.
 - a. This Interim Guidance 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 Interim Guidance does not apply to National Guard 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, and all National Guard field-operating locations.
4. Background.
 - a. Sexual harassment negatively affects our service members, erodes unit cohesion, and ultimately degrades combat readiness and mission success.
 - b. The Fort Hood Independent Review Committee provided recommendations regarding sexual harassment. One year later, the Department of Defense (DoD)-directed 90-day Independent Review Commission provided comprehensive recommendations across DoD to counter sexual assault and sexual harassment in the military. The National Guard is committed to addressing and implementing recommendations from both reports, where appropriate and/or permissible. This directive announces changes to how Title 32 sexual harassment complaints will be processed across the 54 States and Territories and the District of Columbia while a larger effort on systemic improvement continues. This directive does not apply to Title 10 service members.

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5. Policy.

a. Intake. Responsibility for intake of sexual harassment allegations remain with Equal Opportunity personnel. The Sexual Assault Response Coordinator (SARC) continues to perform a consultative role and/or receives referral of possible sexual assault complaints and sexual harassment allegations (from personnel who prefer not to file a Military Equal Opportunity (MEO) complaint).

b. Reporting. Commander, SARC, and Victim Advocate (VA) personnel are not required to report potential and/or confirmed sexual harassment to EO personnel unless and until requested by the victim. Victims have the right to maintain confidentiality while obtaining support services from SARC and VA personnel.

c. Sexual harassment complaint investigations. When a Title 32 MEO complaint is submitted, Commanders will appoint investigating officers (IOs) from outside the alleged offender's assigned brigade-sized element or wing to conduct sexual harassment complaint investigations in accordance with CNGBM 9601.01 during the informal process. Informal leadership inquiries for sexual harassment allegations are not appropriate unless requested/preferred by the member reporting the potential sexual harassment.

(1) Sexual harassment complaint investigations will comply with processing timelines established by Title VI and CNGBM 9601.01.

(2) EO personnel will inform The Adjutant General / Commanding General of all formal complaints of sexual harassment.

(3) IOs must be in the grade of WO1 (GS 13 if civilian) or higher.

(4) Exceptions. Exceptions requiring appointment of an IO from the same brigade-sized element or wing will be approved in writing by the first general officer in the chain of command and included as an enclosure to the investigation. This authority may not be delegated. Reasons for exceptions may include, but are not limited to, unit geographic location and type of mission.

d. Flagging. Commanders will ensure all alleged offenders in all MEO complaints, including sexual harassment complaints, are administratively "flagged" when a complaint is initially submitted to prevent any favorable personnel actions (e.g., promotions, attendance at schools, retirement, etc.) until the MEO process is complete (or the complaint is dismissed/withdrawn), in accordance DoD policy. Such flagging actions must be managed manually if the service component does not have a flagging system in place. Commanders who allow offenders to receive favorable personnel actions when said personnel should have been flagged will themselves be subject to possible disciplinary action.

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e. Notice.

(1) Commanders will publish the nature and results of all judicial, non-judicial, and/or administrative actions taken against the offender (including letters of reprimand) and disseminate this information to troops via unit newsletters, bulletin boards, and other communications channels. All actions will be appropriately redacted to comply with the Privacy Act of 1974 and to protect victim privacy. Prior to publication, redactions required by the Privacy Act will be approved by the servicing Office of the Staff Judge Advocate or appropriate legal advisor.

(2) If an MEO complaint is unsubstantiated, dismissed or withdrawn, the Commander will ensure the alleged offender is informed and the administrative flag discussed in paragraph 5d, above, is removed. The Commander will further make efforts to restore any lost favorable personnel actions during the period the alleged offender was flagged.

f. No Wrong Door.

(1) Commanders and EO personnel will ensure that NG service members who seek information on sexual harassment or file sexual harassment allegations may also seek assistance from SARC or VA and such assistance will be handled by a personal introduction IAW No Wrong Door DTM Procedures.

(2) Title 32 personnel who file a formal or informal sexual harassment complaint or believe they were subjected to sexual harassment are eligible to receive limited services through the SAPR program. These services will include crisis intervention, safety assessments, referrals to resources, assistance in filing retaliation complaints with either the IG or EO Offices, support in obtaining Military Protective Orders and Civilian Protective Orders, and Special Victims' Counsel consultation and representation.

g. Documentation Requirement. If an MEO complaint is substantiated at any point in the Title 32 Complaint Process (and no appeals are submitted or are otherwise exhausted), including sexual harassment complaints, Commanders will ensure the offender's evaluation is documented to show he/she did not support EO policies during the rated period. If the MEO process is completed and includes substantiated allegations that occurred during a prior rating period, the Commander will document the substantiated complaint in the current evaluation. In the event the service member is too junior to have an evaluation (e.g., E4 and below), Commanders will document the substantiated complaint in a reprimand filed in the offender's official military personnel file (OMPF). The requirements outlined in this paragraph are not discretionary, in accordance with applicable service regulations and DoD Policy. Commanders who do not comply with this requirement will themselves be subject to possible disciplinary action.

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h. Commanders will use the Report of Investigation (ROI) transmittal letter at Enclosure B when providing a copy of the ROI to the Complainant at the completion of the investigation and prior to NGB issuing an NPR following the formal phase of the MEO process in all complaints, including those involving allegations of sexual harassment.

6. Duration. This Interim Guidance to Supplement CNGBM 9601.01 remains in effect until rescinded, or upon publication of updated policies, whichever is earlier.

BARBRA S. BULS
Brigadier General, USAF
Director, Diversity, Equity, and Inclusion

REFERENCES

- a. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.
- b. CNGB Instruction 9601.01, "National Guard Discrimination Program," issued 27 September 2015
- c. CNGB Manual 9601.01, "National Guard Discrimination Complaint Process," issued 25 April 2017
- d. Army Directive 2022-13, Reforms to Counter Sexual Harassment/Sexual Assault in the Army, issued 20 September 2022
- e. Air Force Interim Guidance, Department of the Air Force Sexual Assault Prevention and Response Victim Advocacy Services and Confidential Reporting for Military Sexual Harassment, issued 6 July 2022
- f. DoD Guidance, Revised Guidance for Implementing Cross Cutting Recommendation 1 of the Tier 1 Recommendations of the Independent Review Commission on Sexual Assault in the Military, issued 14 September 2022
- g. Department of Defense (DoD), *Hard Truths and the Duty to Change: Recommendations From the Independent Review Commission on Sexual Assault in the Military*, 2 July 2021
- h. *Report of the Fort Hood Independent Review Committee*, 6 November 2020
- i. AFI 36-2406 14, Officer and Enlisted Evaluation Systems, November 2019, (Paragraph 1.8. Evaluator's Mandatory Considerations)
- j. AR 623-3, Evaluation Reporting System, 14 June 2019 (Paragraph 3-26)
- k. DOD Issuance 1350.02, DOD Military Equal Opportunity Program, 4 September 2020 (Paragraph 2.7 a (9))

ENCLOSURE B

MEMORANDUM FOR [COMPLAINANT]

Subject: Transmittal of Report of Investigation (ROI), NGB Case Number,
I-XXXX-XXX-XX-X-X

1. The investigation related to the Formal Resolution Request (FRR) of the subject complaint is complete. A lightly redacted copy of the ROI is enclosed.

2. In accordance with the National Guard Title 32 Military Equal Opportunity (MEO) complaint process, you have the following rights:

a. You may request an immediate Notice of Proposed Resolution (NPR) from NGB Office of Diversity, Equity and Inclusion (NGB-DEI). If so, an NPR will be issued as soon as possible. This decision on the merits of the complaint will be based on a preponderance of evidence. You may request a Hearing if you disagree with the NPR as described in para 4, below.

b. Alternatively, you may submit a Position Statement within 30 calendar days after receiving this notice. A Position Statement is your opportunity to address the allegations, the evidence, the sufficiency of the investigation and any other arguments you wish NGB to consider when making a decision. The Position Statement may be sent to NGB directly or through the SEEM to NGB. The State will be provided a copy of the Position Statement and may also submit a Position Statement outlining the State's position relative to the complaint.

3. You are reminded that the burden of proof is always on the Complainant in a Title VI case. It is important to understand what evidence is needed to prevail regarding an allegation of discrimination at the various stages of a complaint.

a. Prima Facie Allegation. At the outset of a case, the Complainant must initially establish that there is some substance to the allegations of discrimination. To meet that burden, the Complainant must establish a prima facie case of discrimination. This means that Complainant must present a body of evidence such that, if not rebutted, the trier of fact can conclude that unlawful discrimination did occur. This is normally accomplished by a properly framed allegation of discrimination.

b. Legitimate Nondiscriminatory Reason. If Complainant meets the burden of presenting a prima facie case, the State must articulate some legitimate, nondiscriminatory reason for its actions. This means the State must explain why it did what it did and that justification must clearly be nondiscriminatory in nature (e.g., they hired the best qualified person and race was not considered). The State always has the burden to gather all relevant evidence in a complaint of discrimination.

c. Pretext. If the State meets its burden, the Complainant then must demonstrate, by a preponderance of evidence that the reasons articulated by the State are, in actuality, a pretext for discrimination.

(1) This means that the Complainant must demonstrate that the proffered reason is false - that is, that the nondiscriminatory reason(s) the State provides for its (in)actions are not the true reasons and are actually a pretext for the exercise of prohibited discriminatory intent.

(2) A Complainant can show pretext by pointing to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the State's proffered legitimate reasons for its action, such that a reasonable fact finder could rationally find them unworthy of credence. Complainant can, for example, present evidence that the State's stated reasons for taking the adverse action were false; the State acted contrary to a written policy setting forth the action the Complainant should have taken under the circumstances; or the State acted contrary to an unwritten policy or practice when making the decision.

4. Either immediately if you request a NPR (as described in paragraph 2a, above) or after submitting a Position Statement (as described in paragraph 2b, above), NGB will issue a NPR.

a. If you are not satisfied with the NPR, you may appeal the decision by requesting a Hearing in accordance with CNGBM 9601.01, Enclosure B, paragraph 5b. The State may also request a Hearing.

b. Hearings are conducted by the Office of the General Counsel (NGB-GC). The Hearing Officer is a civilian employee of the GS-15 grade, employed by NGB-GC, with an admission to practice law before a Federal court, or the highest court of a State. NGB-DEI has no role in the Hearing Process.

5. You may also be contacted by State or National Guard representatives in an effort to resolve your complaint. You are encouraged to seek a resolution of the complaint at any stage of the complaint process. Likewise, you may always withdraw the complaint voluntarily if you no longer desire to pursue the Title 32 MEO complaint process.

NAME
State Equal Employment Manager

CF:
The Adjutant General of
National Guard SEEM
National Guard SJA