



U.S. Customs and
Border Protection

TO: Darlene M. Sedwick
Director, Field Operations-East
Office of Diversity and Civil Rights

FEB 07 2012

FROM: Michael J. Wenzler *for [Signature]*
Director, Labor-Management Relations
Office of Human Resources Management

SUBJECT: Agency Head Review
Memorandum of Understanding – EEO Grievance Process, Article 47 of CBA

The attached Memorandum of Understanding (MOU) signed January 31, 2012, memorializes an agreement between the U.S. Customs and Border Protection (CBP) and the National Treasury Employees Union (NTEU) concerning Equal Employment Opportunity (EEO) Grievance Process Guidance for implementing Article 47 of the National CBP-NTEU Collective Bargaining Agreement (CBA). The negotiated terms have been reviewed in accordance with 5 U.S.C. §7114(c) and under Department of Homeland Security, Customs and Border Protection Delegation Order 10-001 dated February 23, 2010.

The MOU does not violate existing law, rule or regulation, and is hereby approved. This approval does not constitute a waiver of, or exception to, any existing law, rule, regulation, or policy.

If you have any questions or need additional assistance, you may contact Don Stakes, Chief Labor Negotiator, by telephone at (202) 863-6335, or by electronic mail at Donald.Stakes@dhs.gov.

CC: Colleen M. Kelley, National President, NTEU
Jonathan Levine, Assistant Counsel for Negotiations, NTEU
Franklin C. Jones, Director, Office of Diversity and Civil Rights
Deborah Eres, Deputy Director, Labor-Employee Relations Field Services

Attachment

**MEMORANDUM OF UNDERSTANDING
BETWEEN
U.S. CUSTOMS AND BORDER PROTECTION (CBP)
AND
NATIONAL TREASURY EMPLOYEES UNION (NTEU)**

I. Introduction

This Memorandum of Understanding (MOU) is entered into by, and between the United States Customs and Border Protection, (hereinafter referred to as "Agency") and the National Treasury Employees Union (hereinafter referred to as "Union").

II. Background

In early September 2011 the parties met to determine the necessary procedures, guidance and forms for implementing the EEO Grievance Process specified in Article 47 Equal Employment Opportunity of the National CBP-NTEU Contract. The parties came to an agreement and it is memorialized herein.


III. Terms or Provisions of Agreement:

1. This MOU constitutes the parties' agreement on all matters related to the EEO Grievance Process of Article 47 of the National CBP-NTEU Contract.
2. The attached procedures will be the proper procedures for processing EEO Grievances pursuant to Article 47 of the National CBP-NTEU Contract moving forward.

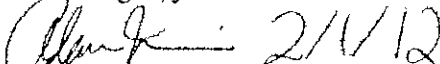
IV. Effective Date and Termination

This MOU will be submitted for Agency head review immediately after the final signature of the chief negotiators. This MOU will become effective thirty-one (31) days after the date it is signed by the last chief negotiator or after Agency head review, whichever occurs first. Either party may request to reopen this MOU for revision or modification in accordance with Article 26 (Bargaining) of the CBP & NTEU National Collective Bargaining Agreement.

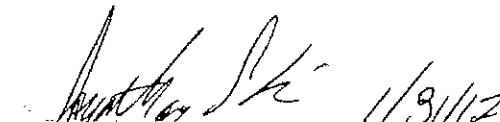
V. Signatures



For the Agency Date



For the Agency Date



For the Union Date



For the Union Date

**Procedures for Processing EEO Grievances
Pursuant to Article 47 of the May 11, 2011 Collective Bargaining Agreement
between U.S. Customs and Border Protection and the National Treasury
Employee Union**

1. Purpose

The following constitutes the U.S Customs and Border Protection's (CBP) procedures for processing EEO Grievances pursuant to Article 47 of the National Treasury Employees Union (NTEU) Collective Bargaining Agreement (CBA), date May 11, 2011. In accordance with Article 47 Section 1.A of the CBA, CBP must provide equal opportunity in employment for all qualified persons and prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or reprisal for filing a claim on one of these bases, except where required by statute or pursuant to bona fide occupational qualifications. A bargaining unit member who believes that he or she has been subjected to discrimination may file either an EEO grievance or a statutory EEO complaint, but not both.

2. Authority

Pursuant to regulations issued by the Equal Employment Opportunity Commission to implement section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b); section 15(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(b); section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1); the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*; Executive Order 12067, 43 Fed. Reg. 28,967 (1978); Executive Order 11478, 34 Fed. Reg. 12,985 (1969), as amended by Executive Order 12106 (1979) and the Collective Bargaining Agreement Between U.S. Customs and Border Protection and the National Treasury Employees Union, dated May 11, 2011.

3. Eligibility

Employees covered by the NTEU agreement may elect to file an EEO Grievance or traditional EEO complaint as set-forth under 29 C.F.R. part 1614 to prosecute claims of illegal employment discrimination, with or without a representative.

4. Scope

Pursuant to Article 47, Section 5.A, of the CBA any employee, covered by the CBA with the NTEU who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, age, disability, or reprisal for filing a claim on one of these bases, except where required by statute or pursuant to bona fide occupational qualifications may file one of the following:

- A. A grievance pursuant to the provisions of Article 47 of the CBA. (hereinafter "an EEO grievance");

- B. An appeal to the Merit Systems Protection Board (MSPB) where an action is otherwise appealable to the Board and the employee alleges that the basis for the action was discrimination prohibited by Federal law;
- C. A statutory EEO complaint pursuant to Equal Employment Opportunity Commission (EEOC) regulation 29 C.F.R. § 1614;
- D. A grievance under the procedures contained in Article 27 of the CBA; or
- E. A Complaint of Possible Prohibited Personnel Practice with the Office of Special Counsel.

5. Steps in the EEO Grievance Process

A. Pre-Complaint/Grievance Stage

1. To initiate a Pre-Complaint/Grievance, a CBP employee (complainant) assigned to a position covered by the CBA with the NTEU, with or without a representative, must seek informal EEO counseling within 45 calendar days of the date of the alleged discriminatory act or the effective date of a personnel action or, the date when the employee became aware or should have become aware of the alleged incident by:
 - a. Calling 1-877-MY-EEOHELP(1-877-693-3643),
 - b. Sending an e-mail to cbpeeocomplaintfiling@dhs.gov, or
 - c. Contacting the local DCR Officer.
2. Within three business days of receiving the request for pre-complaint/grievance EEO counseling, CBP will acknowledge the request for counseling in writing (an e-mail is acceptable) and assign a DCR Specialist (EEO Counselor) to conduct informal EEO counseling.
3. Upon being assigned to process the grievance, the EEO Counselor shall contact the grievant to conduct an initial interview.
4. At the initial interview with the grievant and his or her representative, the EEO Counselor will provide the grievant with the Notice of Rights and Responsibilities under CBP's EEO Complaint Process, the Acknowledgement of the EEO Complaint Process Notice of Rights and Responsibilities Form, the Anonymity Form and the Consent to Mediate Form
5. **If mediation is elected**, the grievant or his or her representative must complete and submit the Anonymity Form, Consent to Mediate Form and the Acknowledgement of Notice of Rights and Responsibilities Form to the EEO Counselor within five business days.

B. Scheduling and Convening the Mediation Session

1. **If mediation is elected**, the Mediation Coordinator will contact the Responsible Management Official (RMO)¹ no later than three business

¹ The RMO should be identified by the employee and assessed by the EEO Counselor and/or Mediation

- days after receipt of the Consent to Mediate Form to schedule a date, time and place for the mediation session.
2. If the RMO cannot participate in the mediation session, he/she must designate another management official with settlement authority to act on his/her behalf. The management official selected to participate in the mediation session must have either the authority to enter into settlement or the ability to contact the management official with settlement authority and receive verbal approval during the mediation session.
 3. The initial mediation session should take place no later than 30 calendar days after the initial request for EEO counseling. Subsequent mediation sessions shall be at the discretion of the parties, however they cannot exceed 90 Calendar days after the initial request for EEO Counseling in accordance with Article 47 Section 6.B and 6.C CBA.
 4. The Mediation Coordinator will assign a Mediator to conduct the mediation session.
 5. Once a Mediator is selected, he or she will contact the involved parties to confirm the date, time and location of the mediation session.
 6. The Mediator will then send a confirmation e-mail to the parties that will include the time and date of the session, names of attendees, as well as a brief description of the mediator's role and the mediation process.

C. The Mediation Session and Settlement Agreements

1. At the initial mediation session, the Mediator will explain the mediation process to the parties. If the parties mutually agree to any additional mediation sessions, the Mediator will schedule the sessions as necessary. Additional sessions should be scheduled as soon as possible.
2. If the mediation session produces a resolution, the Mediator will assist the parties in preparing the written settlement agreement.
 - a. The settlement agreement will be drafted using the appropriate settlement agreement template as a guide.
 - b. The Mediator will forward the signed agreement to the Mediation Coordinator.
 - c. The Mediation Coordinator shall ensure that all parties receive a copy of the signed agreement.
3. At the conclusion of the last mediation session, the Mediator will provide the parties with a Mediation Assessment Form. The purpose of the assessment is to obtain feedback from the participants on the effectiveness of the mediation session. The parties will either fill out the Mediation Assessment at the conclusion of the last mediation session or forward the completed Mediation Assessment Form to the Mediation Coordinator within three business days.

Coordinator to ensure that the RMO is able to respond to the employee's issue, effectuate some resolution and has settlement authority.

4. The Mediator will complete and submit the Mediator's Completion Form to the Mediation Coordinator, which should only reflect the time, date and location of the mediation session, the parties involved, the duration of the mediation session, and whether or not there was a settlement agreement.
5. No part of the discussions, deliberations, conclusions, offers or recommendations generated during mediation shall be binding in any way on either party once the matter in dispute has been advanced to arbitration; nor shall any of the information disclosed be used by either party as evidence in an arbitration hearing.

D. Election of Process

1. At the conclusion of the pre-complaint/grievance process, the EEO counselor will conduct a final interview at which time the employee may elect to withdraw the case, or request a Notice of Right to File a Formal Discrimination Complaint (NORTF). The employee will be required to sign for receipt of the NORTF. (E-mail transmission, with an acknowledgement of receipt, is an acceptable method of delivery).
2. Upon receipt of the NORTF, the Grievant has the option of either filing a Formal EEO complaint pursuant to 29 C.F.R part 1614 within 15 calendar days of receipt of the NORTF or filing a formal EEO grievance by submitting a grievance in accordance with Section 12.B. (Formal Submission Step) of Article 27 of the CBA within 15 calendar days of receipt of the NORTF.

E. Filing and processing a Formal EEO Grievance

1. Consistent with Article 27 of the CBA, if the EEO grievance is not resolved during the pre-complaint grievance process, the Grievant may file a written formal EEO grievance, which should include EEO based and non-EEO based allegations, by submitting a completed form **CBP Form 280**, to the local Port Director or equivalent management official or their designee within fifteen (15) calendar days of receipt of the NORTF and concurrently serve the Executive Director of CBP's Office of Diversity and Civil Rights(DCR) at the following e-mail box: cbpeeocomplaintfiling@dhs.gov, or by Fax to (202) 344-1476 in accordance with Article 47 section 6.D. The CBP Form 280 must contain a formal allegation of discrimination as defined in 29 C.F.R. part 1614.106. Additionally, any contractual violations concerning the same issue should be raised within fifteen (15) calendar days of receipt of the NORTF, consistent with Article 27 of the CBA.
2. Upon receipt of the filing of the formal EEO grievance, the Executive Director, DCR (or his/her designee) will provide a copy of the EEO Counselor's Report to the employee (or his/her representative) and the management official to which the grievance was filed under Section 6.D.

3. Upon receipt of the filing of the formal EEO grievance, the local Port Director or equivalent management official or their designee will meet with the employee and representative, if any, within seven (7) days of the filing and thereafter respond to all allegations raised (EEO Based and Non-EEO Based) within fourteen (14) days of the meeting in accordance with Article 27 section 12.B of the CBA concurrent with and independent of DCR's processing of the EEO Based issues.
4. If the employee is not satisfied with the Step 2 decision of the Port Director or equivalent management official (or designee) the employee may file a Step 3 grievance with the Director, Field Operations or equivalent management official (or designee) within fourteen (14) days of receipt of the Step 2 decision pursuant to the procedures of Article 27 section 12.C. of the CBP. The step 3 grievance must include the CBP form 280 and the Step 2 grievance decision.
5. Upon receipt, the Director, Field Operations or equivalent management official (or designee) will, upon request, meet with the employee and representative, if any, within seven (7) days of receiving the appeal and thereafter respond to all allegations raised (EEO Based and Non-EEO Based) within seven (7) days of the meeting, or if no meeting is held, within fourteen (14) days of the appeal, in accordance with Article 27 section 12.C of the CBA concurrent with and independent of DCR's processing of the EEO Based issues. In the event the employee does not request a meeting to discuss the grievance, the Director, Field Operations or equivalent management official (or designee) may request a meeting.
6. If the employee is not satisfied with the Step 3 decision, the Union may invoke arbitration within thirty (30) days of receipt of the decision, or if no Step 3 decision is provided within the time period set forth in Article 27 Section 12.C. (2), the Union may invoke arbitration within thirty (30) days of when a decision should have been issued, or, the Union may invoke arbitration within the time frame set forth in provision G. Arbitration, set forth below. Arbitration will be invoked using the process set forth in Article 28: Arbitration.

F. Processing of the Formal EEO Grievance by DCR

1. Dismissal of Formal EEO Grievance
 - a. Upon receipt of the formal EEO Grievance, DCR will acknowledge receipt in writing to the Grievant and the designated Union Representative.
 - b. If, based on the standards articulated in 29 C.F.R part 1614, the formal EEO grievance is dismissed in whole, the grievant shall have the right of appeal available under 29 C.F.R. § 1614.110.
2. Formal EEO Grievance Accepted for Investigation

- a. If the formal EEO grievance is accepted in whole, or part, DCR must complete the investigation within 150 calendar days after the filing of the formal EEO grievance.
- b. Upon completion of the investigation, DCR will send management, the Grievant and Union Representation an electronic copy of the Report of Investigation (ROI).
- c. If DCR fails to provide the Grievant and the Union with the ROI within 150 calendar days from the filing of the formal EEO grievance, the Union shall have the authority, but is not required, to proceed immediately to arbitration.
- d. Within 45 calendar days of receiving the ROI, the Responsible Management Official (RMO) and Union officials may attempt to mediate the dispute with the employee.
- e. If the parties reach resolution within the 45 calendar-day time frame, the terms of the agreement will be reduced to writing using the appropriate template.

G. Arbitration

1. If the parties are unable to produce a voluntary resolution during the 45 calendar period after receipt of the ROI, the dispute may be moved to arbitration by either party to this agreement within 15 days after the expiration of the forty-five (45) days referenced above pursuant to the procedures outline in Article 47 Section 6.E of the CBA.
2. In the event the EEO grievance alleges discrimination and a non-EEO based claim, the Arbitrator will hear and rule on both issues.
3. During the hearing and in his/her decision, the Arbitrator will follow and be bound by applicable laws, rules, regulations and case law precedent.
4. In addition to the involved parties, a copy of the arbitrator's award will be served on the Executive Director, DCR (or his/her designee).

H. NTEU and/or Management Declines to Invoke Arbitration

In the event the Employer and/or the Union declines to invoke arbitration within the timeframes specific in the CBA, the employee shall have the right to proceed as outlined in 29 C.F.R part 1614 (i.e., the right to request a hearing before an EEOC administrative judge or a final agency decision). The employee must notify the Executive Director, DCR (or his/her designee) of the decision not to invoke arbitration of any non-EEO based allegation no later than thirty (30) calendar days after the expiration of any of the time frames set forth in E.6 above or for any EEO based allegation, no later than 15 calendar days after the expiration of the forty-five (45) days set forth in G.1. After which, the Executive Director, DCR (or his/her designee) will then issue the employee their election notification.

I. Notice of Policy or Procedural Change

1. If, at any stage of the EEO grievance or statutory complaint process, the Employer determines to make changes to resolve the complaint with respect to personnel policies and practices or matters affecting the general working conditions of unit employees, the Union will be afforded reasonable notification and an opportunity to negotiate the matter prior to implementation of such changes in accordance with 5 U.S.C. Chapter 71 and Article 26: Bargaining.
2. Following adjudication under the EEO grievance or statutory complaint procedure, the decision will generally affect the complainant alone. However, when a formal discussion is held by the Employer with the complainant and/or the complainant's representative for the purpose of implementing a decision which impacts on employees in the bargaining unit, the Union will be given an opportunity to be represented at the meeting.