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FROM: DUE: / /

EDO CONTROL: G20010040
DOC DT: 01/19/01
FINAL REPLY:

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TO:

Agency Heads

FOR SIGNATURE OF :

** GRN **

CRC NO: 01-0071

DESC:

Guidance on Addressing Discrimination Based on
Status as a Parent in Federal Civilian Employment

ROUTING:

Travers
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DATE: 01/29/01

ASSIGNED TO:

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SPECIAL INSTRUCTIONS OR REMARKS:

For Appropriate Action.

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Jan 29, 2001 10:05

PAPER NUMBER: LTR-01-0071

LOGGING DATE: 01/29/2001

ACTION OFFICE: EDO

AUTHOR: JANICE LACHANCE

AFFILIATION: OPM

ADDRESSEE: DEPTS/INDEPENDENT ESTABLISHMENTS

SUBJECT: GUIDANCE ON ADDRESSING DISCRIMINATION BASED ON STATUS AS A PARENT IN
FEDERAL CIVILIAN EMPLOYMENT

ACTION: Appropriate

DISTRIBUTION: RF

LETTER DATE: 01/19/2001

ACKNOWLEDGED: No

SPECIAL HANDLING:

NOTES:

FILE LOCATION: ADAMS

DATE DUE:

DATE SIGNED:

EDO --G20010040

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UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

JAN 19 2001

OFFICE OF THE DIRECTOR

MEMORANDUM FOR HEADS OF DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS

FROM: JANICE R. LACHANCE
DIRECTOR

Subject: Guidance on Addressing discrimination based on status as a parent in Federal civilian employment

On May 2, 2000, President Clinton issued Executive Order 13152, stating explicitly for the first time that discrimination based upon an individual's status as a parent is prohibited within Executive Branch civilian employment. The Executive Order adds status as a parent to the list of categories for which discrimination is prohibited. The other categories are race, color, religion, sex, national origin, handicap, age, and sexual orientation.

It is the policy of the Federal Government to provide an equal opportunity to all of its employees. Federal employees should be able to perform their jobs in workplaces free from discrimination, including intentional discrimination based upon status as a parent. The President's Executive Order states, as a matter of Federal policy, that a person's status as a parent should not be the basis for the denial of a job or a promotion. As the Nation's largest employer, the Federal Government sets an example for other employers that discrimination based on status as a parent is not acceptable.

The Executive Order demonstrates the strength of the President's commitment to protect parents in the workplace and is one of several actions he has taken to protect the merit system, the pillar of an honest and effective government. In issuing this Executive Order, the President has reaffirmed a longstanding commitment that already is contained in programs instituted by the Office of Personnel Management (OPM) to protect parents in the workplace.

The new Executive Order further amends section 1 of Executive Order 11478 (1969) to read, in part, as follows:

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation, or status as a parent, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law.

PURPOSE

The purpose of Executive Order 13152 is to prevent intentional discrimination against employees because of their status as parents. The prohibition against this type of discrimination in a specific directive from the President demonstrates the strength of his commitment to safeguard our nation's most important institution – the family. The Executive Order is to be interpreted consistent with the authority of agencies to accomplish their missions on behalf of the American people. This Order does not create any new enforcement rights, such as the ability to proceed before the Equal Employment Opportunity Commission, or require accommodations to parents who are employees.

The Executive Order states that OPM shall be authorized to develop guidance on the order. The purpose of this guidance is to describe the scope of the Executive Order by means of examples and to make Federal employees who are parents aware of governmental initiatives by which they can obtain assistance. It is designed to reaffirm existing administrative and legal remedies available to Federal employees who believe they have been victims of discrimination based upon status as a parent. This guidance is not designed as a comprehensive guide, but as a general overview.

AGENCY COMMITMENT

Federal agencies, as well as their managers, should commit themselves to promoting a work environment that is free from intentional discrimination based upon a person's status as a parent in accordance with Executive Order 13152. Agencies should distribute the President's Executive Order to their employees and notify them about avenues of redress. Employees should be encouraged to report to their supervisor instances of discrimination. When supervisors are made aware of problems, they should consult with their human resources office or agency legal counsel to ensure that the agency takes appropriate steps. All reports of incidents of discrimination based on status as a parent should be taken seriously and addressed. The agency may take corrective steps or discipline those who discriminate, as appropriate.

LEGAL PROTECTIONS

Who is a Parent?

Section 6 of Executive Order 13152 defines status as a parent as “the status of an individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- (a) a biological parent
- (b) an adoptive parent
- (c) a foster parent
- (d) a stepparent
- (e) a custodian of a legal ward
- (f) *in loco parentis* to such other individual; or
- (g) actively seeking legal custody or adoption of such an individual.

A person stands “*in loco parentis*” when he or she has day-to-day responsibility to care for and financially support a child. A biological or legal relationship is not necessary. See 5 C.F.R. § 630.1202 (1999). The Executive order does not cover a person who simply provides daily childcare to a family.

EXISTING PARENT-RELATED PROGRAMS

The Federal Government is committed to addressing and promoting family-focused initiatives to help its employees balance work and family responsibilities. The Office of Personnel Management provides leadership in developing and implementing Governmentwide policies and programs to help Federal employees who need time off for family needs. The Executive Order is a continuation of the Administration’s commitment to protecting and enhancing the rights and benefits of Federal employees. Although no policy or program is designed exclusively for a single group, such as parents, the following Federal Government programs may greatly improve the working lives of parents:

- Alternative Work Schedules. Federal agencies may establish flexible or compressed work schedules, collectively referred to as “alternative work schedules.” Alternative work schedules allow for a variety of working arrangements tailored to fit the needs of individual employees.

- Annual leave. Employees may use annual leave for vacations, school activities, and other family activities.
- Sick leave for family care and bereavement purposes. Currently, most employees may use up to 13 days of sick leave each leave year to care for a family member who is incapacitated by a medical or mental condition; attends to a family member receiving medical, dental, or optical examination or treatment; or who makes arrangements necessitated by the death of a family member or attends the funeral of a family member. OPM recently issued final regulations to expand the use of sick leave for family care purposes. An employee may now use up to 12 weeks of sick leave each year to care for a family member with a serious health condition, including pregnancy and childbirth.
- Sick leave for adoption. Employees may use sick leave for purposes related to the adoption of a child, including court proceedings and required travel.
- The Family and Medical Leave Act of 1993 (FMLA). Under the FMLA, an employee is entitled to a total of 12 workweeks of unpaid leave during any 12-month period for the birth, adoption, or foster care of a son or daughter; for the serious health condition of the employee; or to care for an employee's spouse, son or daughter, or parent with a serious health condition. An employee may substitute annual leave or sick leave, as appropriate, for unpaid leave under the FMLA. An employee retains his or her health insurance while using leave under the FMLA.
- Extended Family and Medical Leave. On April 11, 1997, President Clinton issued a memorandum to the heads of departments and agencies urging them to take immediate action to allow Federal employees to take 24 hours of unpaid leave each year for the following activities:
 - to participate in school activities directly related to the educational advancement of a child, including early childhood education activities;
 - to accompany children to routine medical and dental examinations.
- Leave sharing. Employees who experience a personal or family medical emergency and who exhaust their available paid leave may receive donated annual leave from other Federal employees through the voluntary leave transfer or leave bank program. All agencies must have a leave transfer program. In addition, an agency may also choose to establish a leave bank for its employees.

- **Emergency Leave Transfer Program.** Employees who are adversely affected by a major disaster or emergency, as declared by the President, may receive donated annual leave from employees in their agency or other agencies without having to use their own paid leave.
- **Time Off for Volunteer Activities.** On April 22, 1998, President Clinton signed a memorandum for heads of departments and agencies requesting them to reexamine the ways in which the Federal Government can support employees' commitment to community service and ensure that all employees are aware of the existing flexibility that permits them to participate in volunteer activities. OPM issued guidance to agencies on existing authority to encourage employee participation in volunteer activities, including alternative work schedules, annual leave, leave without pay, credit hours under flexible work schedules, compensatory time off, and excused absence, where appropriate.

Information on these programs is available on OPM's web site at <http://www.opm.gov/oqa>.

Permitting employees maximum flexibility in scheduling work and time off demonstrates that the Federal Government recognizes the importance of each individual's needs. Employees who are able to take time off to deal with family responsibilities are likely to be more productive. These policies improve communication and instill a more cooperative attitude between supervisors and employees. Demonstrating support of employees through these means fosters good will and creates a more compassionate workplace, benefiting parents as well as all other employees.

PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 describes prohibited personnel practices. One of them prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the basis of conduct that does not adversely affect employee performance. 5 U.S.C. § 2302(b)(10). That means agencies may not discriminate against parents because that status has no bearing on employee performance.

The Executive Order is designed to prohibit intentional discrimination against parents solely because they are parents and thus puts all employees on an equal footing. Its purpose is not to put other employees at a disadvantage or to give parents a preference. It does not interfere with an employer's discretion to make decisions based upon an employee's job performance or ability to meet job requirements. Rather, the agency retains its full management authority to

ensure prompt and efficient services. That is, its primary duty is to carry out its mission.

- For example, if an agency prescribes flexible work hours, many employees may request the same working hours, such as 7:00 a.m. until 4:30 p.m. Some of them might base the request on the need to drop off or pick up their children at school or day care centers. Others who are not parents might provide other reasons. The Executive Order does not allow an agency to decide which employee requests for particular duty hours should be granted on the basis of the employee's parental status.
- An example of discrimination based upon status as a parent would be if an appointing official denies a promotion because he or she believes that parents with young children should not work or will lack commitment to the job. Management decisions may not be based upon such assumptions without reason to believe that a particular employee would actually be unable to perform the duties of the position.

On the other hand, the Executive Order does not permit preferential treatment to parents with respect to benefits that are available to all employees. It would not prevent an employer from firing an employee who is frequently late if the reason for the employee's lateness is his or her childcare responsibility. The Executive Order would allow an employer to reject an applicant for a job that requires travel if the applicant is unwilling to travel because of his or her parental responsibilities. But, if the applicant is willing to travel, the Order would not allow the employer to select someone else simply because the employer assumes the applicant who is a parent would be unable to fulfill that commitment.

WHERE TO SEEK HELP

When applicants or employees believe that a prohibited personnel practice has been committed against them that constitutes discrimination based upon status as a parent, they may seek assistance under certain circumstances from:

- I. Merit Systems Protection Board
- II. Office of Special Counsel
- III. Negotiated Grievance Procedure
- IV. Agency Grievance Procedure

Ordinarily, employees and applicants may not seek relief from the Equal Employment Opportunity Commission or file a discrimination complaint under title VII of the Civil Rights Act of 1964, as amended, because that law does not

prohibit discrimination based upon status as a parent. In some cases, however, the Equal Employment Opportunity Commission may hear a sex discrimination complaint that relates to parental issues. An example might be if an agency discriminates against women because they have young children but not men who have young children.

The following sections provide basic and general information about these procedures and the circumstances under which each may be used. Most of the available procedures require employees or applicants to raise the allegations within a specific time frame from the date that the alleged discrimination occurred. Under some circumstances, more than one procedure may be available, and in others the choice of one procedure may preclude the use of others.

You should review the rules and procedures specific to your agency and those issued by agencies that decide complaints and appeals before you decide whether and how to proceed.

Note: This guide is intended to be a general introduction to possible remedies for discrimination based upon status as a parent. It is not intended to be a substitute for legal advice on the best course of action for a particular employee. Although much of this information is available to you directly from either your agency or those agencies mentioned in this guide, you might also consult with an attorney experienced in Federal employment issues or, where applicable, a knowledgeable union officer.

I. Merit Systems Protection Board (MSPB)

The MSPB is an independent body that hears, among other things:

- Appeals from certain agency personnel actions, including removals, suspensions for more than 14 days, and reductions in grade and pay of certain tenured Federal employees. 5 C.F.R. § 1201.3.
- Cases brought by the Special Counsel involving alleged prohibited personnel practices.

These two procedures for bringing cases before the MSPB are more fully outlined below.

Generally, if you wish to appeal from an agency action, you should contact the MSPB at the addresses listed on pages 8 and 9 as soon as possible after the action was taken to determine whether it is an action upon which the MSPB may rule.

Appeals

When employees or applicants challenge one of the actions described above by filing an appeal within the jurisdiction of MSPB, they may also allege that the personnel action being appealed from was based upon a prohibited personnel practice. As explained above, a prohibited personnel practice may include discrimination based upon status as a parent. If the employee establishes that it is more likely than not that this was the basis for the agency's personnel action, the personnel action will not be sustained.

Very generally, an MSPB appeal proceeds as follows:

- A person files an appeal with one of the MSPB's regional offices. (The addresses of the regional offices are contained in MSPB's regulations.)
- The administrative judge assigned to the case determines whether an appeal is filed within the time limits and whether the agency personnel action complained of properly may be the subject of an appeal.
- If an appeal meets these requirements, the employee or applicant has the right to choose between a hearing or a decision on the written record.
- Either the employee, applicant or the agency may ask the full MSPB to review any part of an administrative judge's decision that is legally erroneous.
- Employees or applicants may seek judicial review of an MSPB decision. The United States Office of Personnel Management may seek judicial review of an MSPB decision only when the Director of OPM believes that the MSPB's decision is erroneous and will have a substantial impact on civil service law.

Cases Brought by the Special Counsel

If the personnel action is not appealable to MSPB, employees and applicants may seek the assistance of the Office of Special Counsel. The Office of Special Counsel has authority to investigate and to petition MSPB on behalf of the employee or applicant. The procedures for seeking the assistance of the Office of Special Counsel are described beginning on page 9.

The procedures that MSPB follows are contained in title 5, Code of Federal Regulations, Part 1201. The address of MSPB Regional Offices can be found at title 5, Code of Federal Regulations, Part 1201, Appendix II, at 56.

For Additional Information about the Merit Systems Protection Board

MSPB has a web site at <http://www.mspb.gov>. You may contact the MSPB's headquarters at (202) 653-7200 or (800) 209-8960, or by mail at: Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC, 20419. Copies of the MSPB's regulations are available at any MSPB office, agency personnel offices, most public libraries, and on the MSPB web site. The web site also makes available MSPB decisions, forms for filing appeals or petitions for review, and general information about the MSPB.

II. Office of Special Counsel

If you think you have been discriminated against based upon status as a parent, you may wish to contact the Office of Special Counsel. Complaints to the Office of Special Counsel must be in writing and should be sent to the Complaints Examining Unit at the address noted below.

The Office of Special Counsel is an independent investigative and prosecutorial agency within the Executive Branch that receives and investigates complaints alleging prohibited personnel practices, including those involving discrimination based upon status as a parent. See 5 U.S.C. § 2302(b)(10).

The Office of Special Counsel receives and investigates allegations from applicants, employees and former employees of prohibited personnel practices. It investigates these allegations to determine whether there are reasonable grounds to believe that the agency has committed a prohibited personnel practice or will do so.

The Office of Special Counsel may:

- Request MSPB to stop personnel actions from proceeding while it is investigating whether they were taken as a result of a prohibited personnel practice.
- Petition MSPB for corrective action to provide a remedy for the employee.
- Seek disciplinary action by MSPB against the individuals who committed a prohibited personnel practice.
- Achieve favorable results for employees without litigation before MSPB by settling complaints prior to filing at MSPB.
- Act as an intermediary between the employee and the agency to resolve issues.

- Seek an informal stay of a personnel action to prevent imminent harm when it has reasonable grounds to believe the employee has been subjected to a prohibited personnel practice.

The procedures for corrective action by the Special Counsel are set forth in detail in 5 U.S.C. § 1214. The procedures for disciplinary action are contained in 5 U.S.C. § 1215.

For Additional Information about the Office of Special Counsel

The Office of Special Counsel has a web site at <http://www.osc.gov>. The Office of Special Counsel's phone numbers are: Complaints Examining Unit (202) 653-7188 (TDD-ready); Toll Free (800) 872-9855 (TDD-ready); and Public Information (202) 653-7984. Information about how the Office of Special Counsel operates may be obtained from: Office of Special Counsel, Suite 300, 1730 M Street, NW, Washington, D.C. 20036-4505. Complaint forms may be downloaded from the Office of Special Counsel's web site or will be provided on request.

III. Negotiated Grievance Procedure

If you think you have been the victim of discrimination based upon status as a parent, you may also wish to contact the union that represents you. Employees who are in a certified bargaining unit, that is, who are represented by a duly recognized labor organization and covered by a collective bargaining agreement, may file grievances in accordance with 5 U.S.C. § 7121.

- The definition of a grievance generally permits an employee to complain about most matters relating to employment. 5 U.S.C. § 7103(a)(9).
- Certain subject matters are excluded from the negotiated grievance procedure. These include complaints related to retirement, life insurance, and health insurance.
- Unless specifically excluded from the grievance procedures by a collective bargaining agreement, a grievance may allege the commission of a prohibited personnel practice, including one related to discrimination based on status as a parent.
- The law pertaining to grievances provides that employees must elect to use one of the following avenues: the negotiated grievance procedure, the appellate procedures of MSPB (if the action is appealable to MSPB), or the procedures for asking the Special Counsel to seek corrective action from the MSPB. The rules governing the election are set forth in 5 U.S.C. § 7121(g).

- As part of the negotiated grievance procedure, the union that represents the employee may elect to place the dispute before an arbitrator who is usually jointly selected by the union and agency as provided in the collective bargaining agreement. Grievants may not take the case to arbitration on their own.
- Under current law, an arbitrator hearing a case concerning an alleged prohibited personnel practice may:
 - a. Stop any personnel action from taking place while he or she is hearing the case if the arbitrator determines that there are reasonable grounds to believe that a prohibited personnel practice has been committed or will be committed.
 - b. Order an agency to take certain disciplinary action against the person committing the prohibited personnel practice.
- The rules for appealing adverse arbitration decisions differ depending upon the subject of the grievance. Generally, matters that may be heard by MSPB may be appealed to the United States Court of Appeals for the Federal Circuit. Otherwise, they may be appealed to the Federal Labor Relations Authority.
- The Federal Labor Relations Authority is an independent body that provides leadership in establishing policies and guidance relating to the Federal labor law. Among its functions is to receive and rule on "exceptions," that is, appeals from arbitration awards resulting from grievances. Ordinarily, one may not appeal a decision of the Federal Labor Relations Authority arising from arbitration in the courts.

For Additional Information about the Federal Labor Relations Authority

The Federal Labor Relations Authority has a web site at <http://www.flra.gov>. You may contact the Federal Labor Relations Authority at (202) 482-6560.

IV. Administrative Grievance Procedure

Another possible area of redress if you believe an agency has discriminated against you based upon status as a parent is the agency's administrative grievance procedure. Many agencies have their own grievance systems to resolve disputes between employees and the agency that may not be heard elsewhere. In general, these systems try to achieve an informal resolution so that they do not have to be decided by higher levels of management. Specific procedures and time limitations vary from agency to agency.

An employee considering such a grievance must become familiar with the rules governing the particular agency's system. If you believe that you have been discriminated against due to status as a parent ask your human resource office for a copy of its agency grievance procedures to determine subjects they cover and the procedures to follow.

It is important to become informed about the proper appeals route in any particular circumstance.

CONCLUSION

This guidance provides some important information to employees who believe you have been discriminated against based on your status as a parent.

This guidance should be widely distributed to employees and should be made available for review in central locations. Dissemination of information on procedural remedies is of great importance to employees who may feel they have experienced discrimination as well as managers who seek to accomplish their agencies mission in accordance with law. Most important is creating an atmosphere of fairness to employees. Employees should be secure in the knowledge that the Federal agency for which they work will not treat them differently or less favorably on account of status as a parent or any other consideration unrelated to merit.

Through the equitable treatment of employees, the Federal Government can set an example for the nation that we serve.