

CHAPTER 7

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Authority

N.J.S.A. 10:5-12, 11A:1-3(d), 11A:2-6(b), 11A:7-1 through 7-9, 7-11 through 7-13.

Source and Effective Date

R.1997 d.437, effective September 22, 1997.
See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Executive Order No. 66(1978) Expiration Date

Chapter 7, Equal Employment Opportunity and Affirmative Action, expires on September 22, 2002.

Chapter Historical Note

Chapter 7, Equal Employment Opportunity and Affirmative Action, was adopted as R.1987 d.403, effective October 5, 1987. See: 19 N.J.R. 1020(a), 19 N.J.R. 1827(a). See, also, Title Historical Note prior to N.J.A.C. 4A:1.

Pursuant to Executive Order No. 66(1978), Chapter 7 was readopted as R.1992 d.420, effective September 22, 1992. See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Pursuant to Executive Order No. 66(1978), Chapter 7 was readopted as R.1997 d.437, effective September 22, 1997. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. EQUAL EMPLOYMENT OPPORTUNITY

4A:7-1.1 General provisions

(a) There shall be equal employment opportunity for all persons in, or applicants for, the career, unclassified and

senior executive services, regardless of race, creed, color, national origin, sex, affectional or sexual orientation, age, marital status, religion, or disability, except where a particular qualification is specifically permitted and is essential to successful job performance. See N.J.A.C. 4A:4-4.5 on bona fide occupational qualifications.

(b) Equal employment opportunity includes, but is not limited to, recruitment, selection, hiring, training, promotion, transfer, work environment, layoff, return from layoff, compensation and fringe benefits. Equal employment opportunity further includes policies, procedures and programs for recruitment, employment, training, promotion, and retention of minorities, women and persons with disabilities. Equal employment opportunity but not affirmative action is required with respect to persons identified solely by their affectional or sexual orientation.

(c) Persons with disabilities shall include any person who has a physical or mental impairment which substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. See 29 U.S.C. 706 and 42 U.S.C. 12101 et seq. Persons with disabilities shall also include persons who are defined as handicapped under N.J.S.A. 10:5-5(q). See also N.J.A.C. 4A:4-2.14 for accommodation and waiver of examinations for persons with disabilities.

(d) The following race/ethnic categories shall be used by the Department of Personnel:

1. W: "White, not of Hispanic origin" means persons having origins in any of the original peoples of Europe, North Africa or the Middle East;
2. B: "Black, not of Hispanic origin" means persons having origins in any of the Black racial groups of Africa;
3. H: "Hispanic" means persons of Mexican, Puerto Rico, Cuban, Central or South America or other Spanish culture or origin, regardless of race;
4. I: "American Indian or Alaskan Native" means persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition; and
5. A: "Asian or Pacific Islander" means persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands and Samoa.

Administrative Correction to (a): Changed cross-reference cites from "4:1-12.7, 4:2-6.3 and 4:3-6.4" to "4A:4-4.5".
See: 22 N.J.R. 2266(a).
Amended by R.1992 d.420, effective October 19, 1992.
See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).
Revised (a)-(c).
Amended by R.1994 d.72, effective February 7, 1994.
See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-2.2.

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Hackensack Meadowlands Development Commission, disability discrimination grievance procedure, see N.J.A.C. 19:3A-3.3.

Case Notes

Review of selection process; use of written test as qualifying and ranking device requires testing only in areas where higher scores relate to better job performance; adverse impact of test on minorities demonstrated; violation of consent decree by State on firefighter promotion selection process; examination inadequate to select fire captain/lieutenant (citing N.J.A.C. 4:1). *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Service*, 625 F.Supp. 527 (D.N.J.1985) affirmed 832 F.2d 811.

Temporary restraining order granted to prohibit the appointment of entry level firefighters based on statistical showing of race discrimination should hiring take place as planned (citing former N.J.A.C. 4:1). *U.S. v. State of New Jersey*, 23 F.E.P. Case 1717, 22 EPD # 30, 287, 473, 473 F.Supp. 1199 (D.N.J.1980).

Sex Discrimination. *Terry v. Mercer Cty. Freeholder Bd.*, 173 N.J.Super. 249, 414 A.2d 30 (App.Div.1980) modified 86 N.J. 141, 430 A.2d 194 (1981).

Sex discrimination claim. *Kiss v. Community Affairs Dep't*, 171 N.J.Super. 193, 408 A.2d 450 (App.Div.1979).

Sex discrimination in regard to veteran's preference. *Ballou v. State Department of Civil Service*, 75 N.J. 365, 382 A.2d 1118 (1978).

Race discrimination claims dismissed after individuals hired were determined to be more qualified for position than complainant. *Parker v. Glassboro State College*, 96 N.J.A.R.2d (CRT) 24.

4A:7-1.2 Discriminatory inquiries

(a) A preemployment application shall not require an applicant to provide information covering subject matters which may be discriminatory, except where related to a job requirement or required by law. See Division on Civil Rights rules at N.J.A.C. 13:7-1.1.

(b) Preemployment and employment information which is required by the State or Federal government for statistical purposes may be obtained by an appointing authority or the Department of Personnel.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-1.3 Prohibition of sexual harassment in State government

(a) Sexual harassment is defined as unwelcomed sexual advances, requests for sexual favors and other verbal or physical conduct based on the gender of the employee affected when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of employment;

2. Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting the employee; or

3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an unreasonably intimidating, hostile or offensive working environment. This type of sexual harassment includes, but is not limited to:

- i. Generalized gender-based remarks and behavior;
- ii. Inappropriate, unwanted, offensive physical or verbal sexual advances and comments;
- iii. Solicitation of sexual activity or other sex-linked behavior by promise of reward;
- iv. Coercion of sexual activity by threat of punishment; and
- v. Gross sexual imposition such as touching, fondling, grabbing or assault.

(b) The employee need not be a personal target of harassment to file a complaint. The employee instead may show that other employees of the same sex were sexually harassed.

(c) Conduct under (a)3 above by a supervisor, other superior or by coworkers constitutes prohibited sexual harassment when a reasonable person of the same sex in the employee's position would consider it sufficiently severe or pervasive to alter the conditions of employment or to create an intimidating, hostile or offensive working environment.

(d) In local service, an appointing authority may establish procedures for processing complaints of sexual harassment.

(e) The sexual harassment of any State employee by any other State employee or person doing business with the State shall constitute prohibited discrimination under this chapter.

(f) It shall be the responsibility of each appointing authority to:

1. Ensure that the working environment is free from acts of sexual harassment by its supervisors, employees and non-employees;
2. Take immediate and corrective action when sexual harassment has occurred; and
3. Make all employees aware of the policy against sexual harassment and of the procedure for filing complaints when sexual harassment has occurred.

(g) Employee complaints of sexual harassment in the State career, unclassified and senior executive services shall be processed in accordance with N.J.A.C. 4A:7-3.2 through 4A:7-3.4.

Amended by R.1994 d.618, effective December 19, 1994.
See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

SUBCHAPTER 2. DIVISION OF EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

4A:7-2.1 Division responsibilities: State service

(a) The Division of Equal Employment Opportunity and Affirmative Action (Division of EEO/AA) shall develop, implement and administer an equal employment opportunity and affirmative action program for all State employees in the career, senior executive and unclassified services. Such program shall:

1. Ensure that each State agency's equal employment opportunity and affirmative action goals for minorities, women and persons with disabilities are in accordance with the Standard for Determining Underrepresentation of Women and Minorities in New Jersey State Government, and are related to their population in the New Jersey labor market as determined by the relevant Federal census;
2. Ensure that each agency complies with all laws and rules relating to equal employment opportunity and oversee that the purposes of this subchapter are implemented through the agency affirmative action officers;
3. Seek correction of discriminatory policies, practices and procedures;
4. Recommend appropriate sanctions for non-compliance to the Commissioner;
5. Review State personnel policies, practices and procedures, and where appropriate, eliminate artificial barriers to equal employment opportunity;
6. Act as liaison with Federal, state and local enforcement agencies;
7. Perform such other duties as prescribed by law and these rules.

Amended by R.1992 d.420, effective October 19, 1992.
See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).
Revised (a)1.
Amended by R.1994 d.72, effective February 7, 1994.
See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.2 Department of Personnel responsibilities: State service

(a) The Department of Personnel, through the Division of EEO/AA, shall:

1. Ensure that minorities, women and persons with disabilities are among the pool of applicants for all vacant positions in the career, unclassified and senior executive services;
2. Review its rules, selection devices and testing procedures to eliminate those which are discriminatory;
3. Analyze job specifications to eliminate artificial barriers to employment;
4. Review all certification dispositions for compliance with this chapter;
5. Review all discrimination complaints under Title VII of the Civil Rights Act of 1964, evaluate trends and recommend appropriate policy changes;
6. Transmit to the Governor, at least semi-annually, progress reports on affirmative action in all State agencies; and
7. Perform such other duties as prescribed by law and these rules.

Amended by R.1992 d.420, effective October 19, 1992.
See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).
Revised (a)1.
Amended by R.1994 d.72, effective February 7, 1994.
See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.3 Equal Employment Opportunity Advisory Commission: State service

(a) An Equal Employment Opportunity Advisory Commission shall be established and shall consist of 11 members appointed by the Governor, at least six of whom shall be minorities, women and persons with disabilities, and shall meet at least quarterly.

(b) The Commission shall advise the Division of EEO/AA and make recommendations on improving the State affirmative action plan.

Amended by R.1994 d.72, effective February 7, 1994.
See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

SUBCHAPTER 3. COMPLIANCE AND APPEALS

4A:7-3.1 Appointing authority responsibilities

(a) In local service, an appointing authority may establish equal employment opportunity and affirmative action programs. Upon request, the Division of EEO/AA shall advise and assist local appointing authorities in the development of such programs.

(b) Each State agency shall:

1. Ensure equality of opportunity for all of its employees and applicants seeking employment;

2. Appoint at least one person as the affirmative action officer with the responsibility for affirmative action and equal employment opportunity, who shall serve on a full-time basis, unless otherwise requested by the agency head and approved by the Commissioner and Director of the division of EEO/AA;

3. Submit an affirmative action plan to the Director for approval, which shall include, but not be limited to, a policy statement, organization of the agency, a description of how the plan is communicated to its employees, an analysis of the workforce and job categories, goals and timetables and specific remedial action to meet its goals;

4. Submit to the Director quarterly affirmative action reports and an annual update of its affirmative action plan which shall include an evaluation of the goals set for the prior year, the goals for the upcoming year and the number, subject matter, time for processing and disposition of all discrimination complaints filed with the agency;

5. Make a good faith effort to meet the affirmative action goals and timetables set forth in its affirmative action plan and updates. Any agency which fails either to achieve or make a good faith effort to achieve its goals may be subject to sanctions and penalties;

6. Ensure that minorities, women and persons with disabilities are considered for employment opportunities where the need for aggressive efforts have been identified.

7. Explore and, where appropriate, implement innovative personnel policies to enhance equal employment opportunity and affirmative action.

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (b)6; stylistic changes in (b).

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-3.2 Discrimination appeals: State service

(a) Appeals which raise issues for which there is another specific appeal procedure must utilize those procedures. See N.J.A.C. 4A:2-1.7.

(b) A discrimination complaint may also be simultaneously filed with the New Jersey Division on Civil Rights and filed with the United States Equal Employment Opportunity Commission. Any complaint which is simultaneously filed will be referred to the proper agency for processing.

(c) In local service, an appointing authority may establish procedures for processing discrimination complaints.

(d) Employees in the State career, senior executive and unclassified services who claim unlawful discrimination may appeal such action using the procedures set forth in N.J.A.C. 4A:7-3.3 and 3.4.

1. The Commissioner may require any appeal, which raises issues of alleged discrimination and other issues, such as examination appeals, to be processed using the procedures set forth in N.J.A.C. 4A:7-3.3 and 3.4 or such combination of procedures as the Commissioner deems appropriate.

2. The appellant shall have the burden of proof in all discrimination appeals.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-3.3 Departmental review: State service

(a) A discrimination complaint shall be presented to the affirmative action officer of the appointing authority, or at the option of the complainant to an authorized designee of the department head in the case of a sexual harassment complaint, with a copy to the Director of the Division of EEO/AA, within 30 days of either the discriminatory action or the date on which complainant should reasonably have known of its occurrence. This time limitation, however, does not preclude the appointing authority from exercising its discretion to conduct its own investigation of a discrimination complaint. The complaint shall be in writing and specify the basis for the complaint.

1. The authorized designee shall have appropriate training in conducting such investigations.

2. The complainant may present a discrimination complaint directly to the Division of EEO/AA, if filing a complaint with the affirmative action officer would pose a conflict of interest, for example, where the individual against whom the complaint is made is involved in the intake, investigative or decision-making process.

(b) The affirmative action officer, or, in the case of a sexual harassment complaint, either the authorized designee if so directed by the department head or the affirmative action officer, shall investigate the complaint and prepare a report to the department head. The department head shall render a written decision within 45 days of the receipt of the complaint by the affirmative action officer or the authorized designee, as the case may be, unless a longer period is agreed to by the complainant.

1. The decision shall advise of the right of appeal to the Merit System Board.

2. The complainant, the individual against whom the complaint is made, the affirmative action officer and/or the authorized designee who conducted the investigation and the Division of EEO/AA shall be furnished with a copy of the final decision by the department head.

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Amended by R.1997 d.437, effective October 20, 1997.

See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

In (b)1, substituted "Merit System Board" for "Division of EEO/AA".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-3.4 Department of Personnel proceedings: State service

(a) A complainant may appeal a final decision of the department head to the Merit System Board within 20 days of receipt of the decision.

1. If no decision is received within the timeframe specified in N.J.A.C. 4A:7-3.3(b), the complainant may request, in writing, that the Merit System Board assume jurisdiction of the complaint. The Department of Personnel shall notify the appointing authority of its action.

2. If probable cause is found, the individual against whom the complaint is made may appeal the decision to the Merit System Board within 20 days of receipt of the probable cause determination but only if no disciplinary action is recommended therein.

3. The appeal shall be in writing and include all materials presented at the department level and the written decision of the department head.

4. The Board shall decide the appeal on a review of the written record or such other proceeding as it deems appropriate. See N.J.A.C. 4A:2-1.1(d).

5. The Director, Division of EEO/AA, shall be a party in all such appeals.

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Amended by R.1997 d.437, effective October 20, 1997.

See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Deleted (a)4, (b), (b)1 and (b)2; recodified existing (b)3 as (a)4; added (a)5; and substituted "Merit System Board" for "Division of EEO/AA" throughout the section.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.