

**OFFICE OF ATTORNEY RECRUITMENT AND MANAGEMENT
PROCEDURES FOR FBI WHISTLEBLOWER REPRISAL CLAIMS
BROUGHT PURSUANT TO 28 C.F.R. PART 27**

1. **PURPOSE:** This directive establishes Office of Attorney Recruitment and Management (OARM) policies and procedures for processing whistleblower reprisal cases brought under 28 C.F.R. part 27 by former or current employees of, or applicants for employment with, the Federal Bureau of Investigation (FBI). This directive is OARM policy and shall be applied accordingly. Exceptions and/or modifications to this policy may be made at the discretion of the Director or Assistant Director of OARM.

2. **SCOPE:** This directive applies to:
 - A. OARM in its delegated authority to adjudicate whistleblower reprisal cases brought under 28 C.F.R. part 27, by current and former employees of, or applicants for employment with, the FBI; and
 - B. The parties to a whistleblower reprisal case before OARM (Complainant or Complainant's designated representative, if any, and the FBI).

3. **AUTHORITIES:**
 - A. 5 U.S.C. § 2303
 - B. 28 C.F.R. part 27

4. **DEFINITIONS:**
 - A. Appeal: When a party (Complainant or the FBI) files a request for review by the Deputy Attorney General (DAG) of the Director of OARM's Final Determination and/or Corrective Action Order, pursuant to 28 C.F.R. § 27.5.
 - B. Classified Information: Official information or material that requires protection in the interest of national security and is classified for such purpose by an appropriate classification authority in accordance with the provisions of Executive Order 12958, Classified National Security Information.
 - C. Clear and Convincing Evidence: The measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence.
 - D. Complainant: A former or current employee of, or applicant for employment with, the FBI who has filed a request for corrective action with OARM.

- E. Conducting Office: The Investigating Office that conducts the investigation into Complainant's reprisal allegations, either the Department of Justice's Office of the Inspector General (OIG) or Office of Professional Responsibility (OPR).
- F. Corrective Action: Generally, the placement of Complainant, as nearly as possible, in the position Complainant would have been in had the whistleblower reprisal not occurred. Corrective action may include: reimbursement for attorney's fees, reasonable costs, medical costs incurred and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages. Compensatory damages for emotional distress, *i.e.*, pain and suffering, are not included.
- G. Investigating Office: The office that receives the report of an alleged reprisal, either OIG or OPR. Once received, the office that received the report of reprisal consults with the other Investigating Office to determine which office is more suited, under the circumstances, to conduct an investigation into the allegation (*i.e.*, to serve as the Conducting Office).
- H. Mediation: Mediation is an informal collaborative problem-solving process in which a neutral third party, the mediator, assists the opposing parties in reaching a voluntary, negotiated resolution of a complaint. Mediation is different from other forms of dispute resolution in that Complainant's participation is voluntarily, and the mediator has no authority to make a decision.
- I. Nonfrivolous Allegation: An allegation of fact which, if proven, could establish a prima facie case that OARM has jurisdiction over the matter at issue.
- J. Personnel Action: A personnel action means an appointment; a promotion; an adverse action or other disciplinary action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.
- K. Preponderant Evidence: The degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue.
- L. Protected Disclosure: A disclosure of information to specified individuals or offices listed under 5 U.S.C. § 2303(a)(1)(A)-(H) which Complainant reasonably believes evidences any violation of any law rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

- M. Request for Corrective Action (RCA): A request by Complainant that the Director of OARM order the FBI to remedy or "correct" the consequences of the FBI's alleged unlawful reprisal.

5. **BURDENS OF PROOF:**

- A. Jurisdiction: In order to establish OARM's jurisdiction over his RCA, Complainant must:
1. Show that he exhausted his administrative remedies with the Conducting Office (by first filing a complaint of reprisal with either OIG or OPR); and
 2. Make a nonfrivolous allegation that he made a protected disclosure that was a contributing factor in the FBI's decision to take or fail to take, or threaten to take or fail to take, a personnel action against him.
- B. Timeliness: Complainant must show that his RCA was timely filed with OARM. Complainant's RCA must be received by OARM either:
1. Within 60 calendar days of receipt of notification of termination of an investigation by the Conducting Office; or
 2. At any time after 120 calendar days from the date Complainant first notified an Investigating Office of an alleged reprisal if Complainant has not been notified by the Conducting Office that it will seek corrective action.
- C. Merits: If Complainant shows that OARM has jurisdiction over his RCA, Complainant must then prove the merits of his case by preponderant evidence. If Complainant meets this burden, the Director of OARM will order corrective relief that is deemed appropriate and authorized by 28 C.F.R. § 27.4(f), unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action(s) against Complainant in the absence of his protected disclosure(s).

The case law of the U.S. Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit, although not binding on OARM, is instructive and looked to for guidance.

6. **PROCEDURES:** The procedures set forth herein apply to FBI whistleblower reprisal cases brought under 28 C.F.R. part 27:

- A. Filing of Pleadings: All pleadings filed with OARM must meet the following requirements:
1. Length Limitations: An RCA or response to an RCA, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words,

whichever is less. A reply to a response to an RCA is limited to 15 pages or 3750 words, whichever is less. Computer-generated and typed pleadings must use no less than 12-point typeface and 1-inch margins and must be double-spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. OARM may grant a motion for leave to exceed the requisite page limits for good cause shown. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by OARM at least 3 days before the filing deadline. Such requests must give the reasons for a waiver, as well as the desired length of the pleading, and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length.

2. Paper Size: Pleadings and attachments must be filed on 8½ by 11-inch paper, except for good cause shown. All electronic submissions must be formatted so that they will print on 8½ by 11-inch paper.
3. Date of Filing: All pleadings must be filed by the date set by the applicable regulations, 28 C.F.R. part 27, or OARM. The date of filing is the date on which the submission is postmarked, faxed, or emailed (if submitted electronically). Extensions of filing dates will be granted only if requested in writing and if good cause is shown.
4. Service: All pleadings filed with OARM must be served upon the opposing party and/or designated representative, if any.
5. Certificate of Service: All pleadings filed with OARM must be accompanied by a certificate of service stating the:
 - a. Method of service (*e.g.*, by mail, facsimile, or email);
 - b. Date of service; and
 - c. Name and address of the individual(s) served.
6. Organization:
 - a. Hardcopy: When a pleading submitted by postal mail or facsimile includes three or more documentary attachments, the attachments should be "tabbed." A "tab" is a dividing page, a portion of which extends beyond the normal 8½-inch width of paper, and which contains a description or label. Pages in a pleading should be sequentially numbered or Bates stamped, and the attachments should be preceded by a table of contents describing each attachment and indicating the page on which it starts.

b. Electronic: Electronic tables of contents take the place of physical "Tabs" in pleadings filed by traditional/hardcopy means. When an electronic pleading contains three or more electronic supporting documents, each attachment must be identified in the accompanying table of contents and designated with a brief descriptive label (e.g., "Exh. 4b, Decision Notice"). Each pleading should be assembled into a single PDF document, to include all electronic attachments, and will contain sequential page numbers. Pleadings are subject to a 10 megabyte size limit. If what would otherwise be a single pleading must be broken into multiple pleadings because of size limit, each should contain the same descriptive title, together with a "Part" designation in parentheses (e.g., "Brief on the Merits of Complainant's RCA (Part A)," "Brief on the Merits of Complainant's RCA (Part B)," etc.).

7. Classified Information: The parties shall not file any classified information with OARM. In the event such information becomes relevant to proceedings before OARM, appropriate arrangements for the protection, transmission, and handling of such materials must be in compliance with FBI and other applicable requirements regarding classified materials.

8. Rejection for Failure to Comply: OARM may reject a submission that does not have a certificate of service or does not substantially conform to the procedural requirements set forth above by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission. Any deadlines affected by the rejection will be addressed in the rejection letter.

B. Motions:

1. Form: All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with OARM and served upon the other party. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

2. Objection: Unless OARM provides otherwise, any objection to a written motion must be filed within 10 calendar days of the date of service of the motion.

3. Motions for Extension of Time: Motions for extension of time will be granted only on a showing of good cause. Motions for extension of time must be made before the original due date. Any motion made after the

due date will be denied absent extraordinary circumstances. OARM, in its discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

C. Stay Requests by Complainant:

1. Authority: Where a complainant has presented an RCA to the Director of OARM, Complainant may at any time request that OARM order a stay of a personnel action allegedly taken or to be taken in reprisal for a protected disclosure. See 28 C.F.R. § 27.4(d).
2. Burden of Persuasion: The request for a stay must be in writing. To establish entitlement to a stay, Complainant must produce evidence or argument showing that there is a substantial likelihood that Complainant will prevail on the merits of his claim of whistleblower reprisal – *i.e.*, that Complainant made a disclosure that is protected under 5 U.S.C. § 2303(a), and the disclosure was a contributing factor in the FBI's decision to take or fail to take (or threaten to take or fail to take) a personnel action covered by 28 C.F.R. § 27.2(b) against Complainant.
3. Procedures: The FBI shall have 10 business days to respond to the stay request. The Director of OARM shall grant the stay request within 10 business days of receipt of the FBI's response if the Director determines that such a stay would be appropriate. A stay request will be denied if the FBI demonstrates a substantial likelihood that it will prove by clear and convincing evidence that it would have taken the same action even in the absence of the whistleblowing activity or that granting the stay would result in extreme hardship. A stay of a personnel action shall remain in effect for such period as the Director deems appropriate. The Director may modify or dissolve a stay at any time the Director determines that such modification or dissolution is appropriate.

D. Discovery:

1. Purpose: Proceedings before OARM will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. Parties are expected to start and complete discovery with a minimum of OARM intervention. Discovery requests and responses thereto are not to be filed in the first instance with OARM. They are only filed with OARM in connection with a motion to compel discovery or as substantive evidence to be considered in the case.
2. Scope: Discovery covers any non-privileged matter that is relevant to the issues involved in the request for corrective action, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of

persons with knowledge of relevant facts. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence.

3. Methods: Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories to parties, depositions, requests for production of documents or things for inspection or copying, and requests for admission. The Federal Rules of Civil Procedure may be used as a general guide for discovery practice in proceedings before OARM. Those rules, however, are instructive rather than controlling.
4. Initiating Discovery: A party seeking discovery must start the process by serving a request for discovery on the representative of the other party or, if there is no representative, on the party themselves within 30 calendar days of OARM's jurisdictional Opinion and Order. The request for discovery must state the time limit for responding (*i.e.*, no later than 20 calendar days of the date of service of the discovery request), and must specify the time and place of the taking of the deposition, if applicable.
5. Responses to Initial Discovery Requests: Responses to initial discovery requests must be served no later than 20 calendar days after the date of service of the other party's discovery request or OARM order. Any discovery requests following the initial request must be served within 10 calendar days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition, unless the parties agree on another time or place. Unless the parties file a motion to compel, no discovery requests or responses are to be served on OARM. If they are, they will be rejected and returned to the parties. OARM expects the parties to assist in the expeditious processing of the case by honoring requests for relevant documents and producing material witnesses without additional OARM intervention.
6. Motions to Compel Discovery: If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. The requesting party must file the motion with OARM, and must serve a copy of the motion on the other party from whom the discovery was sought. The parties must attempt to resolve a discovery dispute before filing a motion to compel with OARM. Thus, the moving party shall discuss the anticipated motion with the opposing party either in person or by telephone and the parties shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion to compel shall include:
 - a. A copy of the original request for discovery and a statement showing that the information sought is relevant and material;

- b. A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement supporting the statement; and
- c. A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party, and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

Any motion for an order to compel discovery must be filed with OARM within 10 calendar days of the date of service of objections, or, if no response is received, within 10 calendar days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with OARM within 10 calendar days of the date of service of the motion.

7. Limits on the Number of Discovery Requests:

- a. Absent prior approval by OARM, interrogatories served by parties upon another party may not exceed 25 in number, including all discrete subparts.
- b. Absent prior approval by OARM or agreement by the parties, each party may not take more than 10 depositions.
- c. Requests to exceed the aforementioned limitations may be granted at OARM's discretion. In considering such requests, OARM shall consider whether:
 - (i) The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
 - (ii) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or
 - (iii) The burden or expense of the proposed discovery outweighs its likely benefit.

8. Time for Discovery: Discovery must be completed within the time OARM designates.

E. Case Suspension Procedures:

1. Suspension Period: In some situations, the parties may conclude that they need more time than is provided for discovery or settlement discussions. If so, the parties may request that OARM suspend the case. OARM may issue an order suspending the processing of an RCA for up to 30 calendar days. OARM may grant a second order suspending the processing of an RCA for up to an additional 30 days.
2. Early Termination of Suspension Period: OARM may terminate the suspension period upon joint request of the parties or where the parties request OARM's assistance and OARM's involvement is likely to be extensive.
3. Termination of Suspension Period: If the final day of any suspension period falls on a day on which OARM is closed for business, adjudication shall resume as of the first business day following the expiration of the period.
4. Mediation: Whenever an RCA is accepted into the FBI Whistleblower Mediation Program, the processing of the RCA and all deadlines are suspended until the case is returned to OARM (in cases where mediation is unsuccessful).

F. Dismissal Without Prejudice: A case may not be suspended for more than 60 calendar days. However, the case may be dismissed without prejudice to refiling for good cause shown (*e.g.*, where the parties agree that additional time for settlement discussions or discovery is necessary, Complainant needs time to retain counsel, etc.). Generally, the parties will be given 90 calendar days to refile a case dismissed without prejudice. In the event the parties need additional time, the parties shall provide OARM with a written case status update and establish good cause for the time requested.

1. In General: Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an RCA.
2. Procedure: Dismissal without prejudice may be granted on OARM's own motion or upon request by either party. The decision whether to dismiss an RCA without prejudice is committed to the sound discretion of OARM, and may be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.
3. Refiling: A decision dismissing an RCA without prejudice will include a date certain by which the RCA must be refiled.

4. Waiver: When a dismissed RCA must be refiled by Complainant, requests for waiver of a late filing based upon good cause will be liberally construed.

G. Hearings:

1. No Automatic Right: Neither party has an automatic right to a hearing. A hearing may be held at the discretion of OARM where Complainant has presented a cognizable legal claim supported by sufficient evidence of a triable issue of fact.
2. Request for an Evidentiary Hearing Before OARM: Any request for an evidentiary hearing must be made in writing, submitted no later than 25 calendar days after the close of discovery, and shall:
 - a. Include a list of agreed-upon material facts;
 - b. Identify any disputed issues of material fact that need resolution through testimonial evidence; and
 - c. State that the other party has been consulted and either agrees or disagrees with the need for a hearing.

If neither party requests a hearing, or if a hearing is requested but not granted, OARM will set a schedule for briefing on the merits.

3. Closed to the Public: Hearings before OARM shall be closed to the public.
4. Option for In-Person, Videoconference, or Telephone: Generally, the parties, the witnesses, and the Director/Assistant Director of OARM shall attend hearings in-person. However, OARM, in its discretion, may hold the hearing in whole or in part by telephone, videoconference, or in-person at OARM's hearing/conference room (or designated alternate hearing site). Among the factors OARM will consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone are:
 - a. The distance that Complainant and/or Complainant's representative must travel to access video conferencing equipment;
 - b. A comparison of the total costs of holding an in-person, video, or telephonic hearing;
 - c. The distance the parties and their witnesses would have to travel to appear in person; and

- d. Whether appearance by videoconference or telephone of the parties and their respective witnesses would unduly prejudice Complainant and/or the FBI.
5. Motion for Postponement: Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement. The affidavit or sworn statement must describe the reasons for the request. OARM will grant the request for a continuance of the hearing only upon a showing of good cause.

H. Closing the Record:

1. When a Hearing is Held: When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When OARM allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as OARM grants for that purpose.
2. Decision Based on the Written Record: If no hearing is held, the record will close on the date OARM sets as the final date for the receipt or filing of submissions of the parties.
3. When the Record Closes: Once the record closes, additional evidence or argument will ordinarily not be accepted unless:
 - a. The party submitting it shows that the evidence or argument was not readily available before the record closed; or
 - b. It is in rebuttal to new evidence or argument submitted by the other party just before the record closed.

OARM will include in the record any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

I. Claims of an Alleged Breach of a Settlement Agreement: Any party to a settlement agreement resolving all or part of a whistleblower reprisal claim brought under 28 C.F.R. part 27 may file a claim of breach of that settlement agreement with OARM. The party alleging a breach of the agreement may seek to have the agreement set aside or enforced by OARM.

1. Time for Filing: Any claim of an alleged breach of the settlement agreement must be filed with OARM within 30 calendar days of actual knowledge of the alleged breach.

2. Burden of Proof: The party asserting a breach of a settlement agreement bears the burden of proving by preponderant evidence that there was a failure by the other party to fully comply with its obligation under the specific terms of the agreement.
3. OARM Adjudication: OARM shall adjudicate any timely claim of a breach of a settlement agreement under procedures the Director of OARM deems appropriate for the efficient administration and management of the adjudication of the breach claim.
4. DAG Review: A party may request, within 30 calendar days of a decision on a claim of a breach of a settlement agreement by OARM, review of that decision by the DAG.

7. **MEDIATION:** In an effort to provide an alternative to the regulatory investigative and adjudicative processes under 28 C.F.R. part 27, the Department of Justice, through the FBI's Office of Equal Employment Opportunity Affairs (FBI OEEOA), offers the parties to an FBI whistleblower reprisal complaint the option to resolve their dispute through mediation.

A. General Information: The FBI Whistleblower Mediation Program is a confidential process in which the parties meet with a trained mediator in a non-litigious, non-adversarial setting. The option is cost-free to Complainant. The option to pursue mediation is voluntary for Complainant; however, if Complainant elects the option, FBI Office of General Counsel (FBI OGC) participation is mandated by Bureau policy. Mediation may not be appropriate in some circumstances, however – e.g., if there is an ongoing criminal investigation or if the claim involves an issue the FBI has no authority to decide.

B. Election: If Complainant elects mediation, he shall so notify OARM and the FBI in writing. If Complainant elects to pursue mediation, OARM will then refer the matter to FBI OEEOA's Alternative Dispute Resolution Manager, who will assign a mediator to the case and handle the scheduling of, and administrative procedures related to, the mediation.

C. Mediation Procedures:

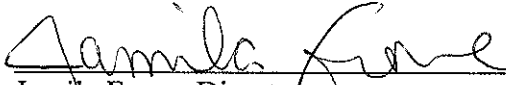
1. Timing: The goal of the FBI Whistleblower Mediation Program is to conduct mediation within 45 calendar days of the date on which Complainant elects mediation. This will depend, however, on the schedules of the parties.
2. Duration: A typical mediation session lasts from 4-6 hours.
3. Location: Mediations are generally held in a neutral location and not within the workplace of the parties.

4. Determination of Time and Date of Mediation: The mediator will contact all parties prior to the session to coordinate a date and time convenient to all parties.
5. Hours: Mediations will be conducted during normal business hours and parties are allowed official time to attend and participate in the mediation.
6. Format:
 - a. Joint Session:
 - (i) When: Typically, the mediator meets first with both parties together in a joint session.
 - (ii) Purpose: At the joint session, the mediator will initially ask Complainant to briefly describe the facts leading up to the reprisal allegation. Then, the mediator will ask the representative from FBI OGC to do the same. The mediator may also ask each party what they are seeking to accomplish in the mediation (*i.e.*, what it will take to resolve the matter).
 - b. Caucus or Private Session:
 - (i) When: The mediator will typically meet with each party separately in what is called a caucus or a private session at the conclusion of the joint session.
 - (ii) Purpose: A caucus or private session affords the parties an opportunity to privately discuss interests, needs, and/or other issues. These sessions also allow the parties to provide confidential responses to more direct questions posed by the mediator. Anything discussed during the private sessions is completely confidential, unless the mediator is given permission to disclose the information to the other party.
 - c. Additional Sessions: At the conclusion of the separate sessions, it is up to the mediator whether to convene additional separate sessions or whether to bring the parties back together for another joint session.
7. Suspension or Termination of Proceedings Pending Mediation:
 - a. Effect on Complainant's RCA Before OARM: If mediation is elected after an RCA is filed with OARM, the case will be

suspended or dismissed without prejudice to refiling so the parties have time to pursue mediation. Mediation will not affect Complainant's rights before OARM, and Complainant will have the ability to continue to pursue his or her claims before OARM if mediation is unsuccessful.

- b. Refiling of RCA with OARM: In the case of a dismissal without prejudice, Complainant may refile his or her RCA with OARM within 30 calendar days of the conclusion of the mediation session.
- c. Closing of the Matter: If mediation is successful, OARM's case processing will conclude and the matter will be closed.

8. **EFFECTIVE DATE AND IMPLEMENTATION**: This policy is effective immediately upon signature of the Director of OARM.



Jamila Frone, Director
U.S. Department of Justice
Office of Attorney Recruitment and Management

1/24/2017
Date