

# Management Instruction

## Representation of Postal Service™ Employees in Administrative Proceedings

### Background

Federal law and regulations of the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), and the Postal Service combine to establish:

1. The standards governing each employee's choice of representation in administrative proceedings involving Equal Employment Opportunity (EEO) complaints;
2. Matters that are appealed to the MSPB; and
3. Internal procedures set forth in the Postal Service Employee and Labor Relations Manual (ELM) § 650, *Nonbargaining Disciplinary, Grievance, and Appeal Procedures*.

The representation of organized workers in grievances and collective bargaining is directly governed by the applicable collective-bargaining agreement.

The principles that emerge from these rules are clear. Employees generally have freedom in selecting a representative. But when the desired representative is also a government employee, he or she may be disqualified if acting as the representative creates a conflict of interest with the representative's normal duties.

### Regulations

Applicable law and regulations generally permit and encourage free choice in employee representation, so long as the representation does not present a conflict of interest for the representative.

The federal criminal code, which generally makes it a crime for a federal employee to act as a representative in a claim against the government, also makes it clear that it does not intend to restrict employees from representing other employees in disciplinary or other personnel proceedings without compensation, so long as their representation is "not inconsistent with the faithful performance," 18 U.S.C. § 205(d)(1), of their normal duties.

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### CONTENTS

<b>Background</b>	1
<b>Regulations</b>	1
<b>How to Determine Whether a Conflict of Interest Exists</b>	2
Position or Decision-Making	
Responsibility in Postal Service	
Precludes Representation	2
General Application	2
Specific Applications	3
Postal Service Advocates	3
Managers and Supervisors	3
Equal Employment Opportunity Employees	3
Undue Influence upon Subordinate Employees	4
<b>Procedures for Challenging Representative</b>	4
EEO Complaint Process	4
EEO Official or Professional	4
Conflict of Interest	4
Merit Systems Protection Board	5
ELM Subsection 650 Hearing	5
<b>Conclusion</b>	5

EEOC regulations state that employees commencing EEO complaints are entitled to be “accompanied, represented, and advised by a representative of [their] choice,” 29 C.F.R. § 1614.605(a), unless the representation “would conflict with the official or collateral duties of the representative” 29 C.F.R. § 1614.605(c).

MSPB regulations provide that an employee “may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position” 5 C.F.R. § 1201.31(b).

Finally, the ELM provides that “[s]ubject to prohibitions regarding Executive and Administrative Schedule (EAS)/Craft representation, employees have free choice of representation” ELM § 651.2.

## How to Determine Whether a Conflict of Interest Exists

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Use the following criteria to determine the existence of a conflict of interest:

### A. **Position or Decision-Making Responsibility in Postal Service Precludes Representation**

#### (1) **General Application**

Factors to consider in assessing the presence of a conflict include:

- (a) The reporting relationship between the employee and his or her designated representative;
- (b) The effect such representation may have on other reporting relationships;
- (c) The appearance of undue influence;
- (d) The functional area (Human Resources, including Labor Relations, EEO Compliance and Appeals (EEO) and Talent and Diversity Management (T&DM));
- (e) The placement of Headquarters, Area, or District policies in conflict by such representation; and
- (f) Other factors that may constitute or create the appearance of impropriety.

Make determinations of conflict of interest on a case-by-case basis, looking at the facts of each case.

For a determination of the Postal Service’s position on a conflict-of-interest question, refer to one of the following:

- (a) The Manager, EEO Compliance and Appeals (Region) or their designee; or
- (b) For Headquarters and Headquarters field offices, the Manager EEO Programs.

(2) **Specific Applications**

(a) **Postal Service Advocates**

It is inappropriate for employees acting as advocates or agents for the Postal Service in labor and employee relations to represent another employee in an administrative process. This creates a conflict of interest because representatives are put in the position of challenging Postal Service policies that they are charged to enforce and defend. However, this restriction does not limit the rights of Human Resources employees to challenge (either individually or in a class action) personnel policies or actions taken against them and which they believe to be in violation of their own statutory or regulatory rights.

(b) **Managers and Supervisors**

It creates a conflict of interest for a Postal Service manager or supervisor to represent a bargaining unit employee in any administrative proceeding. Such representation creates a conflict of interest because the supervisor or manager is put in the position of challenging Postal Service policies that they are charged to enforce and defend.

(c) **Equal Employment Opportunity Employees**

Pursuant to EEOC regulations, the role of EEO staff is to be neutral and not act as advocates for either Postal Service managers or employees. The EEO complaint processing staff, at both the pre-complaint counseling and formal complaint steps, is expected to:

- (i) Attempt to resolve EEO cases, or
- (ii) Develop a neutral and accurate factual record by which an objective decision can be made.

The role of the T&DM program staff is to act as a bridge or liaison between managers and employees in addressing gaps in employment representation and upward mobility.

To maintain their credibility and to protect the integrity of the EEO processes, EEO and T&DM staff may not represent other employees in any part of the EEO, MSPB, or ELM 650 forums. If EEO and T&DM staff act as representatives, it would defeat their role as neutral mediators and objective fact finders. This prohibition applies to EEO and T&DM executives, managers, and staff, but does not diminish their right to pursue their own claims in administrative forums.

**B. Undue Influence upon Subordinate Employees**

It creates a conflict of interest for a Postal Service manager or supervisor, regardless of functional area, to influence or require a subordinate employee to act as a representative in the manager or supervisor's own administrative case. It is equally inappropriate for a Postal Service manager or supervisor to influence or require an employee to act as a representative for another manager or supervisor.

The appearance and possibility of undue influence or coercion is present whenever an employee acts as a representative for a manager or supervisor. The representative may believe he or she will benefit from agreeing to the representation. Conversely, the representative may believe the representation is required or that the representative will suffer adverse consequences if the representation is declined.

## Procedures for Challenging Representative

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The following are procedures for challenging an employee's representative.

**(1) EEO Complaint Process**

**(a) EEO Official or Professional**

EEOC regulations prohibit representation by any EEO counselor, investigator, official, or program manager. As a result, if an EEO or T&DM official or professional is selected as a representative, the Postal Service may make an objection to the EEOC Administrative Judge, who will advise the complainant that such an individual may not serve as a representative and that other arrangements should be made.

If the matter is not yet before an EEOC Administrative Judge, the objection should be submitted in writing to the National EEO Investigative Services Office (NEEOISO) or the National Manager, EEO Compliance and Appeals, which will advise the complainant that the selected representative is disqualified and that other arrangements should be made.

**(b) Conflict of Interest**

In cases where the representation of a complainant or agency appear to conflict with the official or collateral duties of the representative under the guidelines contained in the "How to Determine Whether a Conflict of Interest Exists" section, either the EEOC Administrative Judge, NEEOISO or the National Manager, EEO Compliance and Appeals may consider disqualification. In such cases, the employee and his or her designated representative should be provided a reasonable opportunity to explain why a conflict does not exist under the guidelines.

(2) **Merit Systems Protection Board**

If a matter is pending before the MSPB, any party may seek the removal of another party's employee-representative based on the existence of a conflict of interest under the guidelines contained in the "How to Determine Whether a Conflict of Interest Exists" section.

(3) **ELM Subsection 650 Hearing**

Challenges to a representative on the grounds of conflict of interest or conflict of position should be referred to the National Manager, EEO Compliance and Appeals.

## Conclusion

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Free choice of representation adds credibility to the administrative process. However, that credibility is destroyed if the adequacy of the selected representative is questioned by a conflict of interest. In that case, it is appropriate to challenge the representative and seek to have him or her replaced with a representative of the employee's choice that is not conflicted.

In cases where a determination must be made, the decision should be based on sound judgment and a thorough assessment of the circumstances of each situation, applying the factors listed herein.

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