

TITLE 10: CIVIL SERVICE COMMISSION

CHAPTER 10-10 EXCEPTED SERVICE PERSONNEL REGULATIONS

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Chapter Authority: 1 CMC §§ 8116, 8117; N.M.I. Const. art. XX; Executive Order 94-3 § 214 (effective August 23, 1994).

Chapter History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Civil Service Commission (CSC) was created by the Constitution of the Northern Mariana Islands, art. III § 16, (ratified 1977, effective 1978). Second Const. Conv. Amend 41 (effective Nov. 3, 1985) repealed article III § 16. Amendment 41 created the present art. XX. Article XX charges the CSC with the establishment and administration of personnel policies for the Commonwealth government. The Commission’s authority extends “to positions other than those filled by election or by appointment of the governor in the departments and agencies of the executive branch and in the administrative staffs of the legislative and judicial branches.” N.M.I. Const. art. XX.

Title 1, division 8 of the Commonwealth Code contains the public employment laws of the Commonwealth. PL 1-9 (effective August 11, 1978), the “Commonwealth Civil Service Act,” codified as amended at 1 CMC §§ 8101-8153,

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implemented the original constitutional provisions and created a civil service system. 1 CMC § 8111 creates a Civil Service Commission within the Commonwealth government.

The Civil Service Commission is charged with assuring compliance with personnel administration policy, proposing personnel policies of the Commonwealth to the Governor and the legislature, and carrying out its duties under the Civil Service Act. 1 CMC § 8116. 1 CMC § 8117 confers on the Civil Service Commission the authority to issue reasonable rules and regulations to carry out the provisions of the Civil Service Act, including regulating appointments, promotions, removals, and other personnel matters.

PL 1-9 also created the Personnel Office, headed by a Personnel Officer, within the Civil Service Commission, charged with implementing the personnel plans and policies of the CSC and conducting day-to-day Commonwealth personnel management functions. See 1 CMC § 8121.

Executive Order 94-3 (effective August 23, 1994) reorganized the Commonwealth government executive branch, changed agency names and official titles and effected numerous other revisions. According to Executive Order 94-3 § 214:

Section 214. Personnel Management.

- (a) There is hereby established an Office of Personnel Management, which shall have at its head a Director of Personnel, who shall be appointed by the Governor with the advice and consent of the Senate and who shall have the rank of special assistant to the Governor.
- (b) The Personnel Office is abolished and, except as otherwise provided in this section or in Section 307, its functions transferred to the Office of Personnel Management.
- (c) Boards and commissions (including the Civil Service Commission for its own employees), the Marianas Public Land Trust, the Board of Education/Public School System, the Northern Marianas College, and the Legislative and Judicial Branches (for their administrative staffs) may, to the extent of budgetary resources, retain or establish personnel management functions within their organizations, or they may, by agreement, arrange with the Office of Personnel Management to perform such functions on their behalf.
- (d) The following functions of the Personnel Office shall be retained by the Civil Service Commission (which may establish an appropriate administrative structure for such purpose) and may be delegated in whole or in part to any or all of the appointing authorities:
 - (1) Exemption of positions from Civil Service classifications.
 - (2) Development, evaluation, and improvement of the Personnel Service Performance Standards and Appraisal System.
 - (3) Recommendation and promulgation of regulations relating to Personnel matters.
- (e) Notwithstanding any other provision of law, the function of taking any personnel action is, subject to the policies set for the by the Civil Service Commission, vested in the respective appointing authorities and shall not require further approval. Such actions shall be documented by the Office of Personnel Management (or by any office or employee conducting a personnel management functions pursuant to subsection (b) of this section); and a copy of such documentation forwarded to the Civil Service Commission.
- (f) The functions of the Personnel Office relating to training programs for government employees are transferred to the Northern Marianas College. The Board of Regents of the Northern Marianas College shall consult as necessary with the Director of Personnel regarding such programs. Government agencies and instrumentalities may, after consultation with the College, supplement such programs as budgetary resources may permit.
- (g) Nothing in this section shall be taken to derogate from the constitutional authority of the Civil Service Commission.

The full text of Executive Order 94-3 is set forth in the commission comment to 1 CMC § 2001; see also the commission comment to 1 CMC § 8116.

PL 12-54 (vetoed by Governor on April 20, 2001 and veto overridden June 18, 2001) repealed Executive Order 94-3 §§ 214 and 509, and reenacted and restored “the provisions of law affected by Sections 214 and 509...as they existed

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prior to the effective date of Executive Order 94-3.” PL 12-54 § 2. PL 13-1 (effective February 13, 2002) repealed PL 12-54 in its entirety and reenacted and reinstated Executive Order 94-3 § 214 in its entirety. PL 13-1 §§ 2 and 3.

Until November 1997, the Civil Service Commission promulgated and administered Excepted Service Personnel Regulations, which the CSC applied to all government personnel excepted from the civil service system. In 1998, the Office of Personnel Management within the Office of the Governor began issuing amendments to the Excepted Service Personnel Regulations under a delegation of authority by the Governor to develop and promulgate regulations for the excepted service personnel system.

Attorney General Legal Opinion 04-05 (March 3, 2004), 26 Com. Reg. 22196 (Mar. 23, 2004), addressed the legal authority of the Civil Service Commission to promulgate regulations applicable to government employment positions exempted by law from the civil service system. AG Opinion 04-05 concluded:

“The ESCR proposed and adopted by the CSC...are valid only as applied to personnel service employees whose positions are exempt from Personnel Service System classifications. The ESCR as applied to those exempted from the Personnel Service System by the N.M.I. Constitution and CNMI law have no force and effect because the CSC had no statutory or constitutional authority to proposed or adopt them.”

AG Opinion 04-05, pg. 10; 25 Com. Reg. at 22205 (Mar. 23, 2004).

The regulations codified in this chapter are those originally issued by the Civil Service Commission, which according to Attorney General Opinion 04-05, remain applicable to government employment positions exempted by CSC from personnel service system classifications. Later amendments issued by the Office of Personnel Management are not included in this chapter. For Excepted Service Personnel Regulations administered by the Office of Personnel Management applicable to government employment positions exempted from the civil service by law, see NMIAC, title 120, chapter 10.

PL 17-80 (effective August 31, 2012) repealed and reenacted PL 13-1 § 3, the Commonwealth Civil Service Act of 1979 [1 CMC §§ 8101, et seq.]. PL 17-80 also repeals Chapter 10-10 of the CSC Rules and Regulations, and Chapter 120-10 of the Office of Personnel Management Rules and Regulations, but neither agency followed the procedure for repeal of these regulations in accordance with the APA. See 1 CMC § 9104(a).

The update history for the pre-2012 version of these regulations is as follows: Amdts Adopted 19 Com. Reg. 15748 (Nov. 15, 1997); Amdts Proposed 19 Com. Reg. 15638 (Sept. 15, 1997); Amdts Adopted 19 Com. Reg. 14891 (Jan. 15, 1997); Amdts Emergency and Proposed 18 Com. Reg. 14370 (Oct. 15, 1996) (effective for 120 days from Sept. 18, 1996); Amdts Adopted 17 Com. Reg. 13918 (Dec. 15, 1995); Amdts Emergency and Proposed 17 Com. Reg. 13631 (Aug. 16, 1995) (effective for 120 days from Aug. 16, 1995); Amdts Adopted 17 Com. Reg. 13398 (May 15, 1995); Amdts Proposed 16 Com. Reg. 11771 (Mar. 15, 1994); Amdts Adopted 12 Com. Reg. 7139 (June 15, 1990); Amdts Proposed 11 Com. Reg. 6148 (Apr. 15, 1989); Amdts Adopted 11 Com. Reg. 6156 (Apr. 15, 1989); Amdts Proposed 11 Com. Reg. 5854 (Feb. 15, 1989); Adopted 8 Com. Reg. 4695 (Oct. 22, 1986); Proposed 8 Com. Reg. 4643 (Sept. 15, 1986); Emergency and Proposed 6 Com. Reg. 2970 (July 16, 1984) (effective retroactive to November 25, 1983).

Part 001 - General Provisions

§ 10-10-001 General

(a) This chapter provides the regulations to appoint, reassign or transfer, promote or demote, or otherwise change status of, and to remove from the government service employees who are excepted from the Commonwealth Civil Service System pursuant to 1 CMC §8131(a). This chapter also provides the full range of personnel administration for the service of personnel employed under the excepted service.

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(b) Public Law 17-80, enacted August 31, 2012, placed the Office of Personnel Management within the Civil Service Commission. Public Law 17-80 gives the Civil Service Commission the authority to promulgate rules and regulations to regulate personnel matters, including for positions where civil service status is not attained. 1 CMC §8117(j). Pursuant to this authority, the Civil Service Commission promulgates the following Excepted Service Personnel Regulations, to be administered by the Office of Personnel Management under 1 CMC §8124(b).

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-005 Applicability

(a) The regulations in this chapter shall apply to employment of personnel in all excepted service positions within the Commonwealth government. However, nothing in these regulations shall be construed to apply to the payment of compensation and benefits, termination or service of elected officials, executive branch department heads, resident department heads, members of boards, commissions and councils, or other gubernatorial appointments. These regulations do not apply to the administrative staff of the judicial and legislative branches of the government. Agencies within the executive branch can be exempted from these regulations if the agency is specifically authorized by law to administer and regulate its personnel system. The executive branch includes resident departments, offices, and agencies in the First and Second Senatorial Districts, including the Offices of the Mayors and Municipal Councils. These regulations are not applicable to any agency or activity specifically authorized by law to establish its own personnel rules and regulations.

(b) These regulations are not applicable to any agency or activity specifically authorized by law to establish its own personnel rules and regulations, unless the agency chooses to abide by these regulations.

(c) It is not the intention of the regulations in this chapter to create any legally protected property interests in excepted service employment or any employment right or benefit not explicitly stated in these regulations or the employment contract. All excepted service employment may be terminated at the will of the employee and/or employer pursuant to the terms of the contract and these regulations.

(d) Publicly elected officials, department heads, including resident department heads, other constitutional or statutory gubernatorial or mayoral appointments, and individuals on independent service contracts or other contracts processed through the procurement system are not excepted service employees. Appointed members of boards and commissions are not members of the excepted service.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission corrected the capitalization of the words “judicial,” “legislative,” and “branches” in subsection (a) pursuant to 1 CMC § 3806(f).

§ 10-10-010 Purpose

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The regulations in this subchapter establish regulatory direction for employing, compensating, providing employee benefits, and effecting other personnel actions for excepted service employees. These regulations shall be construed and applied to promote the following underlying purposes and policies:

- (a) Simplify, clarify, and modernize the excepted service employment policies and practices of the Commonwealth government.
- (b) Establish consistent excepted service employment policies and practices among various departments, offices, agencies, and activities of the Commonwealth government.
- (c) Create increased public confidence in the procedures followed in excepted service employment.
- (d) Ensure the fair and equitable treatment of employees within the Excepted Service Personnel System.
- (e) Provide safeguards for the maintenance of an excepted service personnel system of quality and integrity.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted commas after the words “benefits” in the initial paragraph and “agencies” in subsection (b) pursuant to 1 CMC § 3806(g).

§ 10-10-015 Definitions

For purposes of this subchapter, the following terms shall be defined as follows:

- (a) “Dependent(s):” Spouse, minor children, unmarried and under 21 years of age, physically or mentally handicapped children incapable of supporting themselves, regardless of age, wholly dependent parents of employee or spouse, or minor children by previous marriage, unmarried and under 21 years of age, for whom the employee or spouse have legal custody. Children by a previous marriage who are primarily domiciled by court order in other than the employee’s household are not considered dependents.
- (b) “Employee:” As used in this subchapter, an excepted service employee.
- (c) “Employer:” Any executive branch official with hiring authority; a hiring official.
- (d) “Excepted Service Contract:” Employment contract entered into by the employee and employer for a term not to exceed two years, subject to the availability of funds, budgeted FTEs, and any statutory limitations.
- (e) “Excepted Service Employee:” A contracted employee holding a position that is exempted from the Civil Service System, pursuant to the laws of the Commonwealth.

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- (f) “Excepted Service Employment:” Employment contracted for a position that is exempted from the Civil Service System, pursuant to the laws of the Commonwealth.
- (g) “FTE:” Full-time employee.
- (h) “Willful Abandonment:” When an excepted service employee is absent without authorized leave for a combined total of ten days without valid reason during a twelve month period.
- (i) “Termination for Cause:” Termination for cause before the end of the contract term may be for any of the following reasons:
- (1) Failure or inability to perform competently;
 - (2) Willful misconduct;
 - (3) Willful abandonment of job;
 - (4) Substantial or repeated violation of law, or of this subchapter, or of department or agency rules or policies;
 - (5) Willful failure or inability to plan, manage, or evaluate employee or unit performance in a timely or effective manner;
 - (6) Conviction of a felony or other crime involving moral turpitude;
 - (7) Other good cause that adversely affects the employee’s ability to perform the job or that may have an adverse effect on the department or agency if employment is continued.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted quotation marks around terms defined. The Commission inserted commas after the words “FTEs” in subsection (d) and “manage” in subsection (i)(5) pursuant to 1 CMC § 3806(g). The Commission inserted punctuation at the ends of subsection (i)(1) through (i)(7) pursuant to 1 CMC § 3806(g).

Part 100 - Staffing and Administration

§ 10-10-101 Recruitment and Selection Procedures

- (a) An employer who seeks to fill a vacant position will initiate a request for personnel action (RFPA) for recruitment. Upon certification of the availability of funds by the Department of Finance and the availability of a FTE by the Office of Management and Budget, the Director of Personnel will authorize a vacancy announcement to initiate a search for a qualified and suitable person. The terms for the position shall be in accordance with the position description. The recruitment and selection process will follow procedures established by the Director of Personnel.
- (b) An existing position is deemed to be vacant upon expiration of the present or last employment contract. The position can be announced sixty days before the end-date of the current employment contract if the intent is not to renew the incumbent.
- (c) There is no requirement for the employer to renew an excepted service employment. If the employer elects to renew the employment contract of an excepted service employee, the employer may request the Director of Personnel to waive the announcement of the position,

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unless the incumbent is a non-resident employee and the announcement is required by the Nonresident Workers Act, as amended.

(d) Newly established or otherwise unfilled positions will be announced. Provided, however, when necessary for the provision of essential services, as justified by the employer with concurrence of the Governor, the Director of Personnel may waive the requirement of a vacancy announcement for selection of a candidate for any position within the excepted service. However, prior to waiving the vacancy announcement, the Director of Personnel shall require certification of the availability of funds by the Secretary of Finance and availability of a FTE by the Office of Management and Budget for the position to be filled. Such waivers cannot be granted for non-resident workers, as per the Nonresident Workers Act, as amended.

(e) Deputy secretaries, special assistants, and executive secretaries to the heads of the principle executive branch departments, ungraded directors of offices or agencies, and the special assistants and executive secretaries to the heads of commissions, boards, councils, government corporations, and autonomous agencies may be employed without announcement. These unannounced employees must meet reasonable minimum qualification requirements recommended by the hiring authority and approved by the Director of Personnel, if requirements have not already been established by statute or regulation.

(f) Upon selection of an applicant the employer will submit a request for personnel action. The selected candidate will not be authorized to begin work until the action and contract have been fully routed and approved, a negative report has been received for the pre-employment drug test, all other requirements have been met, and the Director of Personnel has made payroll certification that the employee has been employed in accordance with relevant statutes and regulations.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted commas after the words “assistants” and “corporations” in subsection (e) and “met” in subsection (f) pursuant to 1 CMC § 3806(g).

§ 10-10-102 “Special and Unique” Excepted Service Positions

(a) “Special and Unique” excepted service positions, authorized by Public Law 18-05 and cited in 1 CMC § 8131(a)(13), are those where the appointing authority certifies and the Director of Personnel concurs that the service to be performed is special and unique and is essential to the public interest because of the level of expertise or special knowledge required and the essential nature of the services to be approved. In general these exemptions from the Civil Service will be restricted to those positions that:

- (1) Are not listed in the approved Civil Service Master List of Classified Positions;
- (2) Are not easily or readily available through local recruitment; and
- (3) Either require a bachelor’s degree level of education or higher; require highly technical skills not necessarily attained through higher education; or require U.S. or CNMI licensure or certification.

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(b) The Director of Personnel will make the final determination of a position's excepted service status under this exemption taking into consideration the public interest.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission corrected the capitalization of the words "excepted service" and "appointing authority" in subsection (a) and the words at the beginning of subsections (a)(1) through (a)(3) pursuant to 1 CMC § 3806(f).

§ 10-10-105 Nepotism

There shall be no limit to the number of members of the same household who may be employed under other excepted service appointments, provided:

- (a) No member of the same household may supervise another.
- (b) All other qualifications for employment are met.
- (c) No costs, other than for salary and employment benefits as provided by regulation, shall accrue to the government as a result of hiring persons from a household containing another employee.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-110 Effective Dates

- (a) **Employment Start Date.** Employment for all excepted service employees, whether residing inside or outside the Commonwealth at the time of hire, shall be effective on the first day the employee reports to work. Expatriation travel time is outside the employment period and will not be compensated.
- (b) **Contract Completion.** Completion of the term of employment shall be effective on the last day of the term of the employment contract.
- (c) **Early Termination.** Early termination of employment, with or without cause, shall be effective on the date of termination stated in the termination letter. Repatriation travel time is outside the employment period and will not be compensated.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-115 Duty Station and Work Assignment

- (a) Duty stations are defined as Saipan, Rota, Tinian, the Northern Islands, or as otherwise assigned.
- (b) The employee is employed for the specific position and assigned to a specific duty station as identified in the employment contract. However, with the employees consent, the employee

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may be assigned to another related employment position and to another duty station, based upon the needs of the government.

(c) If the transfer of employment and duty station involves a permanent move for a period in excess of six months to another island, the employee shall be entitled to transportation for self and dependents, if any, and shipment of household effects, not to exceed 1,500 pounds for a single status employee or 3,000 pounds for an employee with dependents. This benefit is available only in cases where the transfer is initiated by the government.

(d) Temporary assignments to another duty station for periods of not more than ten consecutive workdays do not require the employee's approval, if the assignment is required by the needs of the government.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-120 Compensation and Work Schedules

(a) The salary will be subject to budget appropriations and will be expressed in terms of the gross amount to be paid during a twelve-month annual period, and for each of the twenty-six bi-weekly pay periods.

(b) Periods of compensable time shall include time worked during the assigned work schedule, overtime for overtime-eligible employees, legal holidays, and approved annual, sick, administrative and other leaves, as defined herein. Periods of absence without leave (AWOL) and leave without pay (LWOP) will not be compensated and will be subject to appropriate timekeeping and administrative action.

(c) The standard government workweek is Monday through Friday with the standard workday from 7:30 a.m. to 4:30 p.m. The employee's specific workday and workweek may differ from the standard workweek on a permanent basis, or vary from time to time, according to the needs of the government. Every effort shall be made to maintain a reasonable five-day, forty-hour work schedule, but the schedule is subject to variation, to include required overtime for overtime-eligible employees, extra hours for overtime-exempt employees, shifts of differing duration, and broken periods of duty, according to the needs of the government.

(d) All employees are covered by the Federal Fair Labor Standards Act (FLSA). Under the FLSA, the Commonwealth is considered to be a single employer. Employees cannot waive their rights under FLSA. An employee will be designated by the Director of Personnel as overtime-eligible or overtime-exempt based upon the duties performed and in accordance with the federal FLSA. Such designated executive, administrative, and professional employees are exempt from, and shall not be paid, overtime payment. These terms have the meanings given them in the federal Fair Labor Standards Act. The employee's overtime eligibility status is stated in the expected service contract.

(e) Overtime for overtime-eligible employees shall be approved in accordance with a procedure established by the department or activity. The employer shall also establish a policy to

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address administrative actions for unauthorized overtime work. However, prohibition of unauthorized overtime does not relieve the employer of the requirement to pay for time actually worked. Overtime is that time a non-exempt employee is directed or permitted to work in excess of the 40 hours during a standard work week (40 hours in seven consecutive days). Employers may apply different work periods for health care employees, or different work periods and overtime thresholds for law enforcement and fire employees, as permitted by federal law. Such overtime hours are paid at 1.5 times the regular rate of pay, as defined in the Fair Labor Standards Act.

(f) Compensatory time-off can be used to replace monetary payment for overtime-eligible employees, at the discretion of the employer. In such cases replacement will be at the rate of one and one-half hours of compensatory time-off for each one hour of overtime worked. The employee's acceptance of excepted service employment serves as an agreement to receive compensatory time-off in lieu of paid overtime. The employer can require the employee to use the compensatory time-off that they have earned, rather than allowing it to excessively accumulate or paying it as overtime. Restated, this means that the employer can schedule compensatory time-off periods and require the employee to take that time-off. This does not prevent an employee from also scheduling time off at a time of his or her choosing, as long as approving the request does not unduly disrupt government operations.

(g) The Director of Personnel may approve compensatory time or extra payment to an overtime-exempt employee, at the recommendation of the employer, in exceptional situations. Such situations will be considered the exception, not the rule, and will be limited to declared emergencies and extraordinary work requirements. In such cases compensatory time-off or extra payment will be on a one-to-one regular base pay basis.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission struck a superfluous "0" from subsection (c) pursuant to 1 CMC § 3806(g). The Commission inserted commas after the words "deviation" in subsection (c) and "administrative" in subsection (d) pursuant to 1 CMC § 3806(g).

Part 200 - Employee Benefits

§ 10-10-201 Expatriation and Repatriation

Expatriation and repatriation benefits are only provided to excepted service employees hired from outside the Commonwealth or those excepted service employees hired within the Commonwealth and transferred to a post outside the Commonwealth. Benefits will not be duplicated in situations where both spouses are employed by the government, regardless of employing entity. The government does not provide any insurance coverage for periods of expatriation or repatriation travel and assumes no liability for injury or loss or damage of property.

(a) Expatriation. Travel and transportation expenses shall be paid by the employer as follows:

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- (1) Coach or tourist class air transportation costs by a direct route for the employee and the dependents from the point of recruitment to the CNMI.
- (2) No salary will be paid during the period of travel.
- (3) Upon request by the employer and approval by the Director of Personnel, shipment of household goods and personal effects may be authorized for positions that are considered hard to fill. This authorization shall be limited to the following:
 - (i) The employer shall pay the cost for one shipment by sea of household goods and personal effects, not to exceed 3,000 pounds net weight for an employee with accompanying dependents, or 1,500 pounds for an employee without accompanying dependents, from the employee's point of recruitment to his or her duty station.
 - (ii) The employer is not responsible for any amount exceeding the authorized benefit or for any additional personal shipments made by the employee.
 - (iii) The shipment must originate within six months of the date of entry on duty, unless extended by the Director of Personnel for just cause. In the event temporary storage of household goods and personal effects intended for shipment to the duty station is necessary at the point of recruitment after pick-up by the carrier and prior to departure by sea, the government will pay the cost of such temporary storage.
 - (iv) Only those items may be shipped which are not restricted by Commonwealth or federal laws or regulations. Household goods and personal effects are defined as personal property of the employee and his immediate family at the time of shipment that can be transported legally in interstate commerce. The term may include household furnishings, equipment and appliances, clothing, and other personal or household items. It does not include automobiles, boats, motorcycles, any other vehicle or trailer, or any pet or animal. It also does not include property that is for resale or disposal, for use in conducting a business or other commercial enterprise, or for any purpose other than the direct use of the employee and his or her immediate family.
 - (v) The employee is encouraged to self-pack and to ship his or her household effects by the United States Postal Service (USPS) by first class mail. If this option is elected, no sea shipment will be authorized. All limits and restrictions of the sea shipment otherwise apply. The employee is advised that USPS receipts showing weight and cost of each package must be provided for reimbursement.
 - (vi) The employer shall reimburse up to \$300.00 for an air shipment (USPS) or accompanied baggage to an employee with accompanying dependents, and up to \$150.00 to an employee without accompanying dependents, upon presentation of receipts. If the employee self-packs and ships the main shipment through USPS, this amount will be in addition to the 3000 or 1500 pound limit.
 - (vii) The employer is not responsible for the cost of insurance or for any damage or loss of shipped items, whether transported by sea shipment or USPS.
- (b) Repatriation. Upon completion of the agreed upon period of service under this contract or any subsequent excepted service contract entered into after the expiration of this contract, the government shall pay the benefits set out above in subsection (a) with the following conditions:
 - (1) The employer will provide a one-way coach-class ticket to the point of recruitment for the employee and each authorized dependent. Employees may also receive their return ticket in cash at the lowest economy excursion fare to their point of hire, unless ticketing of the employee is required by law. This ticketing benefit will only be provided upon the employee's full separation from government employment.

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(2) If a minor child of an employee reaches the age of 21 years, such dependent, at government expense, will be eligible for repatriation to point of recruitment upon his or her consent. However, the employer will be discharged of this responsibility if repatriation benefits are not utilized within one year of the dependent attaining the age of 21 years.

(3) No salary will be paid during the period of travel.

(4) The repatriation shipment of household goods and personal effects will be subject to the conditions of subsection (a)(3), and limited to the actual weight shipped upon recruitment. The employer will be discharged of the responsibility for repatriation of household goods if the benefit is not utilized within one year from the termination date.

(c) Check-out. Before repatriation benefits are afforded and the final paycheck is issued, the employee must complete check-out procedures as established by the Office of Personnel Management.

(d) Carry Over of Benefits. An employee who has earned the contractual repatriation benefits may carry over these benefits to any subsequent employment within the executive branch or to any other employer within the Commonwealth government and will be eligible to receive them at the end of employment with the Commonwealth government. No benefit will be duplicated, regardless of the number of contract periods.

(e) Early Termination of Contract. Early termination occurs where the employee resigns or willfully abandons his/her position or is terminated for cause prior to the end of the contract term.

(1) If an employee terminates the contract within the first year:

(i) The employer will not be liable for any repatriation expenses.

(ii) The employee must repay the cost to the employer of the expatriation benefits enumerated in this section, and other costs paid by employer related to recruitment.

(iii) The Director of Personnel, with the recommendation of the employer, may waive (e)(1)(i) or (e)(1)(ii) and provide repatriation benefits including shipping and airfare to point of recruitment on a compassionate basis.

(2) If an employee on a two-year contract terminates the contract after completing one year of service, the employer will not be liable for any repatriation expenses.

(f) Re-employment. An employee who has separated from government service and has utilized contractual repatriation benefits will not be eligible for expatriation or repatriation benefits in a new contract if rehired by the Commonwealth government within six months from the date of separation.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission corrected the capitalization of the word “federal” in subsection (a)(3)(iv) pursuant to 1 CMC § 3806(f). The Commission inserted a comma after the word “clothing” in subsection (a)(3)(iv) pursuant to 1 CMC § 3806(g).

§ 10-10-205 Housing

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- (a) Housing benefits shall apply only to excepted service employees whose point of recruitment is outside the Commonwealth of the Northern Mariana Islands and those excepted service employees hired within the Commonwealth and transferred to a post outside the Commonwealth. An excepted service employee recruited outside the Commonwealth shall receive either housing or housing allowance at the election of the employee, but not the two simultaneously. If the employee elects housing, it is provided pursuant to a revocable license and not as a tenancy or leasehold. The housing allowance shall not exceed \$600 per month for an employee without dependents and \$800 per month for an employee with dependents.
- (b) If government housing is unavailable and private housing has not been arranged for the employee, the employer shall pay a temporary lodging allowance to the employee not to exceed the governments established per diem rate for travel at the duty station, for a period not to exceed thirty days. When the Director of Personnel has determined that this period is insufficient to move into permanent housing, a longer period may be authorized.
- (c) Government housing is intended for the use of the employee and his or her dependents. No person who is not a dependent may reside in government housing for more than thirty days, unless it is approved in writing by the Director of Personnel.
- (d) No employee whose contract has been terminated or has expired shall remain in the provided quarters longer than fourteen days after that termination or expiration, unless continued residence is approved by the Director of Personnel upon request of the employer.
- (e) The employee is responsible for utility and trash collection costs.
- (f) The employee is responsible for returning government furniture/appliances to the employer at the termination of the contract of employment, in a similar condition as that at the beginning of the occupancy of the government housing, ordinary wear and tear excepted. At the termination of the contract, subsequent to the departure from the premises, the employer or their designee shall inspect the premises. If cleanup or repairs, due to the employees actions or neglect are required, the employee will be assessed the cost of the corrective action.
- (g) The employee is responsible for taking reasonable action to protect government housing entrusted to the employee from damage caused by a storm. Election of housing creates an assumption of risk by the employee and creates no warranty of habitability or quiet enjoyment.
- (h) Any housing allowance or housing benefit for employees recruited outside the Commonwealth shall remain in effect for not more than five years.
- (i) The housing benefit will not be duplicated in situations where both spouses are employed by the government, regardless of the employing entity.
- (j) The employee shall comply with all housing regulations promulgated by the Office of Personnel Management.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

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§ 10-10-210 Annual Leave

(a) Annual leave, or vacation, shall be granted for the purpose of rest and relaxation. Except as provided in this section, employees who have less than three years of creditable service shall earn annual leave at the rate of four hours per pay period. Employees with three but less than six years of creditable service shall earn annual leave at the rate of six hours per pay period. Employees with six or more years of creditable service shall earn annual leave at the rate of eight hours per pay period.

(b) Activity heads, division directors, deputy secretaries, executive secretaries, special assistants of the Governor, Lieutenant Governor and department heads, medical doctors, practicing attorneys, and executive directors of principal boards and commissions shall earn annual leave at the rate of eight hours per pay period.

(c) Annual leave accrual rate per pay period for health care professionals, engineers, and other professionally qualified excepted service employees with advanced degrees and/or exceptional skills or experience shall be at a rate not to exceed eight hours, and:

(1) Based, specific to each employee, upon:

(i) The critical need to fill the position;

(ii) The availability of qualified applicants; and

(iii) The amount and quality of related education, training, and experience possessed by the employee.

(2) An employee employed in the first year of the initial contract shall not be entitled to use annual leave during the first ninety days of employment. Annual leave earned during this period will be credited to the employee upon completion of this initial period. This restriction does not apply to employees employed on an immediately subsequent contract.

(d) Excepted service employees shall accrue annual leave at the rate set forth in their employment contract. If the employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status there will be no leave accrual for that pay period.

(e) Annual leave may be used only upon prior written approval of the employer and will be scheduled based upon the needs of the employer. Annual leave requests must be made in advance, except in cases of bona fide emergencies, on a leave request form provided by the Office of Personnel Management. All annual leave requests must be approved by the immediate supervisor and division director. In smaller organizations where division may not exist, the heads of such organizations shall approve annual leave. The employer will approve all properly submitted leave requests unless the needs of the government prevent the absence of the employee.

(f) Employees serving on government boards and commissions who elect to take leave without pay during their performance of duties on a board or commission shall accrue annual leave for that service time.

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(g) Annual leave must be utilized during the contract period. Except as provided in subsections (h), (j), and (k) below, any annual leave not utilized will be converted to sick leave at the end of the employment term. No cash payment will be made for unused annual leave, except as provided for in subsections (j) and (k) below.

(h) If an offer and acceptance for a new employment contract is agreed upon, or if an excepted service employee accepts conversion to civil service status, accrued and unused annual leave credits from the prior period of employment, not to exceed 160 hours, shall be carried over to the new employment contract, or status in cases of conversion to civil service status. Notwithstanding this limit on leave, in order to comply with the 160-hour limit, due to the critical nature and need for the services by the Commonwealth government, the employer may allow, with the approval of the Director of Personnel, the employee to accumulate up to 240 hours of annual leave and carry this amount over into a subsequent employment period. Unused annual leave in excess of the limits cited above will be converted to sick leave.

(i) Employees converting from the civil service to excepted service status will be authorized to carry over not more than 160 hours of annual leave. Hours in excess of this amount will be converted to sick leave if not used prior to conversion.

(j) The Director of Personnel may, upon the recommendation of the employer and with the concurrence of the Governor, approve a lump-sum cash payment of up to 160 hours of unused annual leave in cases of involuntary separation due to reasons of bona fide personal emergency beyond the control of the employee.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted commas after the words “attorneys” in subsection (b), “engineers” in subsection (c), “training” in subsection (c)(1)(iii), and “(j)” in subsection (g) pursuant to 1 CMC § 3806(g).

§ 10-10-215 Sick Leave

Sick leave shall accrue to the employee at the rate of four hours per pay period, provided the employee has been in pay status as required by the excepted service employment contract. If the employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status there will be no leave accrual for that pay period. Government employees serving on government boards and commissions who elect to take leave without pay (LWOP) during such performance shall accrue leave for that service time.

(a) The employee is entitled to use accrued sick leave from the time sick leave is first earned.

(b) Any absence on sick leave where the employee misses more than three continuous days of work must have the illness verified by a note from a medical doctor in order to claim sick leave.

(c) The employee is not entitled to any payment for accrued and unused sick leave upon completion of an employment contract or termination of employment.

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(d) If an offer and acceptance for a new period of employment is agreed upon under a new employment contract/appointment, all accrued and unused sick leave credits from the prior contract/appointment will be carried over, provided that if the employee is separated from government service for a period longer than three years, the employee shall be divested of accumulated sick leave.

(e) If the employer has reasonable grounds to believe that the employee is misusing sick leave, or requesting sick leave for purposes other than illness, the employer may request proof of illness from a health care professional for any period of illness. If the certification is not provided, or is unpersuasive, the supervisor may deny the sick leave request.

(f) Sick leave may be accumulated without limit.

(g) Excepted service employees are eligible for the sick leave bank program pursuant to applicable regulations adopted on October 16, 1997 and published in the Commonwealth Register, Vol. 19, No. 11, on November 15, 1997, at pages 15748-15757. (See NMIAC title 100, chapter 50).

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-220 Leave Without Pay

Leave without pay for 90 days or less may be taken only after obtaining the written approval of the department director. Leave without pay in excess of 90 days must be approved by the Director of Personnel upon recommendation by employer.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-225 Administrative Leave with Pay

Administrative leave with pay may be granted by the Governor for a public purpose. Administrative leave with pay may be granted by the employer to an employee serving on government boards, councils, and commissions, provided the employee does not receive compensation from the board, council, or commission, and, if deemed for an employment related purpose, for a period of not to exceed ten days per annum.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-230 Holidays

The employee shall be released from work on all legal holidays, except during emergencies, without loss of pay or charge to leave account.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-235 Advance Leave

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Where, for good reason, the employee requires an advance of annual or sick leave, the Director of Personnel may grant leave in advance up to a maximum of one-half of the total earnable leave credits for one year from the date the request is approved or for the remainder of the employment contract/appointment, whichever is shorter. Subsequent leave earnings shall serve to replace the amount of advance leave taken. In the event an employee resigns from his or her employment, any annual or sick leave overdraft must be paid as part of the final clearance.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-240 Court Leave

The government encourages its employees to fulfill their obligations as citizens and residents of the Commonwealth and the federal government. Thus, employees who are called upon to serve as jurors and witnesses may, at their option, be granted court leave for such period as required by the court. Employees who are called to jury duty or as witnesses shall present their summons to their immediate supervisor together with a completed request for leave for his signature and processing. Employees using court leave to cover the period of absence shall turn over to the Commonwealth Treasurer such jury or witness fees (as distinct from expense allowances) as they receive from the court or summoning party. Expense allowances paid the employee for whatever purpose may be retained by the employee to defray the expenses for which granted.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-245 Compassionate Leave

Full-time excepted service employees may be granted compassionate leave of no more than five workdays, not necessarily consecutive, in cases of death in the immediate family of the employee. For the purpose of this section, the term immediate family shall include a mother, father, brother, sister, spouse, immediate offspring (natural and culturally or legally adopted), stillborn child, grandfather, grandmother, grandchild, mother-in-law, or father-in-law. Compassionate leave must be taken within eighteen days after the death of the immediate family member.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-250 Miscarriage Leave

Miscarriage leave shall be granted to an excepted service employee who is absent from work because of miscarriage or the subsequent convalescence. Such miscarriage leave shall not exceed five work days, and shall be in addition to any accumulated sick leave. An employee who wishes to claim miscarriage leave must have the miscarriage verified by a note from a medical doctor in order to claim miscarriage leave. Any additional leave taken after five work days shall be charged against accumulated sick leave.

§ 10-10-255 Pregnancy Disability Leave

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Pregnancy disability leave shall be granted to an excepted service employee who is absent from work because of childbirth or the subsequent convalescence. Such pregnancy disability leave shall not exceed thirteen work days, shall be in addition to any maternity leave or accumulated sick leave, and shall be any thirteen work days encompassing the date of childbirth. Any additional leave taken for such childbirth purposes shall be charged against accumulated sick leave. Pregnancy disability leave shall be available to an excepted service employee who suffers a still birth.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-260 Maternity and Paternity Leave

Maternity or paternity leave shall be granted to an excepted service employee who is absent from work because of the employee (maternity leave) or the employee's wife (paternity leave) giving birth. Such maternity or paternity leave shall not exceed two work-days and shall be taken within one week of the date of childbirth. Paternity leave will only be granted in cases of legal marriage.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission corrected the spelling of "employee's" pursuant to 1 CMC § 3806(g).

§ 10-10-265 Military Leave

Military leave with pay may be granted to excepted service employees for a period not to exceed fifteen working days in any calendar year, regardless of the number of training periods in the year.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-270 Extended Military Leave

Extended military leave shall be granted to excepted service employees pursuant to the federal Uniformed Services Employment and Reemployment Act (USERRA).

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-275 FMLA Leave

Leave under the federal Family and Medical Leave Act of 1993 (FMLA) shall be granted to excepted service employees as provided in FMLA.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-280 Part-time Accrual

Part-time or intermittent employees with regular scheduled tours of duty of forty to less than eighty hours during a biweekly period will accrue annual leave and sick leave at a prorated

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amount of the full time benefit, rounded off to the nearest quarter hour per pay period, and will be eligible for other paid leaves, provided is* this part, at this rate. Part-time or intermittent employees with regular scheduled tours of duty of less than forty hours during a biweekly pay period will not accrue annual or sick leave or be eligible for the other paid leave benefits. If a part-time or intermittent employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status for a scheduled duty period there will be no leave accrual for that pay period.

* So in original.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-285 Transfer within the Executive Branch

If an excepted service employee transfers to another excepted service position within the executive branch, the new employer will assume any liability for the payment or transfer of all earned contractual benefits. Transfers to similar positions within the executive branch with no change in salary may be affected by the employer with or without the employee's permission.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-290 Transfer to Other Government Entity

If an excepted service employee transfers to another government entity, the receiving entity will assume any liability for the payment or transfer of all earned contractual benefits. Similarly, the executive branch will assume a similar liability for the payment or transfer of all earned contractual benefits if it accepts the transfer of an employee contractually entitled to such benefits from another government entity.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Part 300 - Employee Conduct and Obligations

§ 10-10-301 Mediation Procedure

Excepted services employees may seek dispute resolution to resolve conflicts and disputes by means of a mediation procedure as provided by the Office of Personnel Management and pursuant to available resources.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-305 Termination of Services to the Government

(a) The government may terminate the employee without cause upon written notice sixty days in advance of the date of termination of employment. This time may be shortened only by specifying in the employment contract a lesser period of advance notice. Such notice shall

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specify the date of termination and be delivered in person to the employee, or by certified mail if the employee is otherwise unavailable for personal delivery.

(b) The government may terminate the employee with cause upon written notice seven days in advance of termination of employment.

(c) When resigning, the employee must give sixty-days advance written notice in terminating employment. When considered to be in the best interests of the government, this time may be shortened or lengthened by the employer stating in the space provided in the employment contract the specific period of advance written notice that will be required. At the time of resignation, the employer may waive the advance written-notice requirement.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-310 Non-discrimination Policy

(a) It is the policy of the Commonwealth government that discrimination, for or against any employee, because of race, creed, color, gender (including sexual harassment), sexual orientation, national origin, age, religion, political affiliation, organizational membership, veterans status, disability, or genetic information is prohibited and will not be tolerated.

(b) All agencies shall maintain every workplace free from unlawful harassment, including sexual harassment. Any employee or official who engages in any act of discrimination or harassment on the basis of any of the above factors violates government policy, and such misconduct will subject the employee to corrective action ranging from counseling to disciplinary action up to and including termination. Such harassment by a non-employee (for example, a client or contractor) is also prohibited. Employers shall not tolerate any such outside harassment and shall take necessary action to prevent its continuation or recurrence.

(c) Any employee who feels that he or she has been discriminated against on the basis of any of the above factors, or sexually harassed, should immediately report such incidents to a supervisor at any level without fear of reprisal. In cases of sexual harassment, procedures should be followed in accordance with § 10-10-315. Confidentiality will be maintained to the extent permitted by the circumstances.

(d) An employer who receives a claim of discrimination or harassment in violation of this policy shall take such complaint seriously and immediately advise the Director of Personnel or the Commonwealth Equal Employment Opportunity (EEO) Coordinator of the situation. The employer, with the assistance of the EEO Coordinator, will ensure that it is investigated promptly, privately, and with as much confidentiality as possible, consistent with the need to determine the facts. The investigation will be documented by an investigative report that will be retained in a confidential file by the EEO Coordinator. Any person accused of a violation shall be allowed the opportunity to rebut the charges.

(e) After determining the facts through the investigation, the employer shall take corrective action as required by the circumstances. This may include counseling any employee, whether or

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not a violation has occurred; imposing an appropriate sanction, including disciplinary action; making sure that this policy is reiterated to all employees or any group. An employer, or any supervisory staff, who does not take appropriate action also violates this policy and exposes the Commonwealth government to liability.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

§ 10-10-315 Non-tolerance of Sexual Harassment

(a) Applicability

This policy and procedure applies to all excepted service employees of the Commonwealth government.

(b) Purpose

This policy and procedure will establish the Commonwealth government's policy of non-tolerance of sexual harassment of any form, by its employees, toward its employees, or by non-governmental agents against the government's clients or employees. It will also provide guidance for the education and training of employees to recognize, avoid and prevent sexual harassment in the workplace. This policy and procedure will provide steps for reporting, investigating, and taking administrative action in situations involving sexual harassment.

(c) Definitions

(1) Sexual harassment is an unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature. Sexual harassment occurs when:

- (i) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or
- (ii) Submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or
- (iii) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostility*, or offensive work environment.

* So in original.

(2) Sexual harassment can be divided into two basic types of misconduct:

(i) When an employee suffers or is threatened with a quid pro quo (this for that) situation. This form of sexual harassment occurs when a supervisor or someone else with authority over the victim makes a put out or get out demand, such as submit to my sexual requests or you will be fired, demoted, passed over for promotion, or in some other way made miserable on the job. This type of sexual harassment can be committed only by someone in the organization structure who has the power to control the victim's job destiny.

(ii) When behavior in the workplace creates a hostile environment. This form of sexual harassment occurs when a supervisor, co-worker, or someone else with whom the victim comes into contact on the job creates an abusive work environment or interferes with the employees work performance through words or deeds because of the victim's gender. The following kinds of behavior have been recognized by the courts as contributing to a sexually hostile environment:

- (A) Discussing sexual activities;
- (B) Telling off-color jokes;

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- (C) Unnecessary touching;
 - (D) Commenting on physical attributes;
 - (E) Displaying sexually suggestive pictures;
 - (F) Using demeaning or inappropriate terms, such as babe, honey, etc.;
 - (G) Using indecent gestures;
 - (H) Sabotaging the victims work;
 - (I) Engaging in hostile physical conduct;
 - (J) Granting job favors to those who participate in consensual sexual activity; or
 - (K) Using crude and offensive language;
 - (L) Wearing provocative, sensual attire, i.e. tight, skimpy, short-length, etc.
- (iii) The above listed behaviors can create a liability for the government and any such conduct must be addressed and corrected at its earliest stage before it becomes severe or pervasive.
- (3) A workplace environment is considered sexually hostile when conduct occurs that meets the following two conditions:
- (i) It must be subjectively perceived as abusive by the person(s) affected, and
 - (ii) It must be objectively severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive.
 - (iii) A determination of whether or not a situation would be construed as sexual harassment should also take into consideration the following factors:
 - (A) The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex;
 - (B) The harasser can be the victims supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee;
 - (C) The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct;
 - (D) Unlawful sexual harassment may occur without economic injury to the victim;
 - (E) The harassers conduct must be unwelcome.
- (4) Sexual discrimination is distinguished from sexual harassment in that it reflects biases in employment actions based upon gender, but does not involve the abusive behavior described in subsection (b) above.
- (d) Policy
- (1) It is the policy of the Commonwealth government that all employees shall enjoy a work environment free from sexual harassment and all forms of discrimination. Sexual harassment is illegal, under Title VII of the Civil Rights Act of 1964, as amended and as implemented by 29 CFR 1604.11, and is prohibited under this chapter and article 1, section 6, of the Commonwealth Constitution.
 - (2) Sexual harassment is specifically prohibited and will not be tolerated in any form, regardless of whether the offensive conduct is committed by supervisors, managers, non-supervisors (co-workers), or nonemployees (consultants, contractors, general public).
 - (3) All employees are encouraged to report any violation of this policy. If management is not aware of specific incidents of sexual harassment in the workplace it cannot properly address them. If an employee observes or is subjected to sexually discriminatory or harassing behavior in the workplace, it should be reported immediately to the departmental EEO counselor or coordinator so it can be resolved at the earliest possible time. Employees will not be retaliated against for making truthful statements about perceived harassment.

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- (4) No employee will be denied or will receive employment opportunities and/or benefits because of a sexual relationship with a co-worker or supervisor. No employee or non-employee shall imply to an employee, an applicant for employment, or a client of a government activity, that conduct of a sexual nature will have an effect on that person's employment, assignment, advancement, other condition of employment, or any other relationship with the government. Any incidents of this type, upon verification by investigation, will be subject to disciplinary and corrective action.
- (5) The employer, at all supervisory levels, is responsible for the occurrence of acts of sexual harassment in the work place when they know or should have known of the prohibited conduct. As an official of the Commonwealth government, a supervisor's improper action or failure to act creates a liability on the part of the government. All incidents of sexual harassment will be immediately reported to the Equal Employment Opportunity Coordinator, division director, or department head/employer for guidance. Supervisors and managers who knowingly allow harassing behavior to occur, or participate in such behavior, will be subject to disciplinary action.
- (6) The Director of Personnel, as the Deputy Commonwealth Equal Employment Officer, will be immediately informed by all department and activity heads of any incident of sexual harassment reported within their organization, or of any charges received from the Equal Employment Opportunity Commission (EEOC).
- (7) The Director of Personnel will ensure that all sexual harassment complaints receive swift and thorough investigations. Appropriate action will be taken in situations where the complaint is validated to correct the situation and appropriately discipline the harasser. Complaints determined to be deliberate false accusations will also be treated as potential disciplinary situations. Situations where the victim requests that no investigation be conducted or action taken must also be investigated and acted upon to avoid future liability and to effect consistent enforcement of the Commonwealths policy of non-tolerance for sexual harassment.
- (8) Complaints of sexual harassment should be filed immediately upon occurrence to facilitate a timely response and to minimize the time that an employee would be subjected to such treatment. However, per EEOC statutes complaints may be filed anytime within one-hundred and eighty days of an incidents occurrence.
- (9) Incidents of harassment due to an employee's sexual orientation, while not covered by law as an Equal Employment Opportunity violation, are a violation of the Commonwealth's policy of ensuring that every employee is provided with a work environment that is safe, non-threatening, and non-discriminatory. Incidents of this nature comprise misconduct and will be subject to disciplinary action.
- (10) The hiring of an employee with a known history of sexual harassment or misconduct could result is government liability for negligent hiring. No applicant for employment with such a history will be employed without a complete background investigation and the specific approval of the Director of Personnel.
- (11) Each employer is required to distribute this policy to every employee under his or her authority and to ensure that this policy is posted in an accessible location at all times.
- (12) All supervisors will be provided training on identifying and preventing sexual harassment in the workplace. They will also receive training on how to conduct a limited administrative investigation and the reporting procedures far* allegations of harassment.

* So in original.

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(e) Procedures

(1) Any government official who is aware of an incident or situation involving sexual harassment must report it immediately to his or her Equal Employment Opportunity Coordinator, division director, department head/employer. The Commonwealth government has legal liability for any action where a government official subjects an employee to sexual harassment, or is aware that an employee subjects another employee to sexual harassment and fails to take corrective action.

(2) Any employee who is personally subjected to sexual harassment, or is aware that other employees are being subjected to sexual harassment, should report the incident or situation immediately to his or her departmental Equal Employment Opportunity Coordinator, division director or department head/employer. If the employee does not feel comfortable bringing it to the attention of any of these parties, or the division director or department head/employer is somehow involved in the harassment, he or she should immediately contact the Commonwealth Equal Employment Coordinator at the Office of Personnel Management, or the Director of Personnel directly. The initial contact does not have to be in writing.

(3) If the sexual harassment incident involves a physical assault, such as rape, attempted rape, assault, or other actions involving physical contact, either the employee or the official who becomes aware of the incident should report it immediately to the Department of Public Safety for immediate processing and investigation. Any physical evidence should not be disturbed until the arrival of the Department of Public Safety.

(4) All incidents of alleged sexual harassment must be immediately reported to the Commonwealth Equal Employment Opportunity Coordinator at the Office of Personnel Management or directly to the Director of Personnel as soon as the employer, or other senior official in case of the employers unavailability, becomes aware of it. The complaining employee should be interviewed by the departmental Equal Employment Coordinator, legal counsel, division director, or the department head/employer to determine the basic facts of the allegation. The Director of Personnel or the Commonwealth Equal Employment Opportunity Coordinator will then be consulted to determine if the investigation will be conducted at the departmental level or if an outside investigator will be appointed.

(5) Due to the potential legal liabilities resulting from sexual harassment situations, the Director of Personnel will assume responsibility for the investigation and assign the investigating official (selected EEO official, manager, or legal counsel) or unit (Office of the Attorney General or Department of Public Safety).

(6) All allegations of sexual harassment from employees or perceptions of sexual harassment from third parties or management staff will be reported to the Director of Personnel and will be investigated. Those situations where the victim requests that no investigation be conducted or action taken must also be investigated and acted upon to avoid future liability and to effect consistent enforcement of the Commonwealths policy of non-tolerance for sexual harassment.

(7) The department(s) involved in the complaint and the official or unit appointed to conduct the investigation will cooperate fully with the Office of Personnel Management in the process of investigating, reporting, and resolving the complaint.

(8) The department(s) involved in the complaint and the Office of Personnel Management will ensure that no retaliation is taken against the complainant or any witnesses by the alleged harasser or by any other employees.

(9) In the process of investigating the complaint, the following guidance will be followed at all times:

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- (i) All complaints will be taken seriously.
- (ii) Guilt should not be presumed on either party. The rights of both parties must be protected.
- (iii) Both parties should be afforded the opportunity to state their side.
- (iv) Confidentiality must be maintained at all times.
- (10) An administrative investigation will be completed as expeditiously as possible. The final report will be delivered to the Director of Personnel in the following format:
 - (i) Summary of Incident
 - (ii) Findings of Fact
 - (iii) Discussion
 - (iv) Conclusions
 - (v) Recommendations
- (11) The Director of Personnel will review the investigative report to ensure that the facts support the conclusions and that the recommendations are reasonable and consistent with the Commonwealths disciplinary policy. The Office of the Attorney General will be consulted to ensure that the resolution is legally appropriate.
- (12) The Director of Personnel will forward the final report to the Department/employer with the Office of Personnel Managements recommendations for the resolution of the complaint.
- (13)(i) Depending upon the severity of the incident of sexual harassment, the resolution of the situation could involve the following administrative actions:
 - (A) Conference/counseling
 - (B) Oral or written warning
 - (C) Letter of reprimand
 - (D) Suspension
 - (E) Demotion
 - (F) Termination
- (ii) Any administrative actions are separate from and not contingent upon any civil or criminal court actions.
- (14) The employer will resolve the complaint/grievance based upon the investigation and the recommendation of the Office of Personnel Management. If the department head/employer disagrees with the recommended resolution, he or she must immediately meet with the Director of Personnel to resolve their differences. If both parties cannot reach agreement, the case will immediately be brought before the Governor for a final decision.
- (15) Either the complainant or the respondent may appeal the final resolution to the Director of Personnel, not later than fifteen days after receiving notice of the final resolution. If the complainant or the respondent are excepted service employees and are not gubernatorial or mayoral appointees, they may appeal the final resolution to the Director of Personnel, not later than fifteen days after receiving notice of the final resolution. Complainants or the respondents who are gubernatorial or mayoral appointees may formally request in writing for the employer to review the decision in their case, but final resolutions approved by the Governor or Mayors on cases involving their respective appointees are not subject to appeal.
- (16) The Director of Personnel will conduct a hearing on the appeal and make a final decision on the matter.
- (17) Incidents or situations of sexual discrimination that do not involve acts of harassment will be processed through the normal grievance procedure utilized for other Equal Employment Opportunity complaints.

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(f) Records and Reports

- (1) The Office of Personnel Management will maintain records of all allegations of sexual harassment to include copies of investigative reports.
- (2) Records of on-going investigations will be kept in a confidential file separate from the official personnel folder. Upon resolution of the complaint, appropriate records of the resolution or disciplinary action will be placed in the appropriate official personnel folder.
- (3) The Office of Personnel Management will report to the Governor annually in its annual personnel report on the number of sexual harassment cases and their resolution.

(g) Responsibilities

- (1) All employees will be familiar with the Commonwealths Equal Employment Opportunity and Non-tolerance of Sexual Harassment Policies and will comply with these policies to create a safe, non-threatening, and non-discriminatory workplace.
- (2) All supervisors, managers, and directors will develop and maintain a work environment that is safe, non-threatening, and non-discriminatory. They will ensure that all employees know that sexual harassment will not be tolerated and will ensure that any incident of sexual harassment is reported as directed by this policy.
- (3) All Equal Employment Program counselors must be knowledgeable concerning equal employment opportunity laws, regulations and policies, both federal and Commonwealth, and will strive to remain up-to-date on current EEO trends and activities. They will make themselves readily available to listen to EEO-related complaints in* their department or activity and provide counseling and assistance to affected employees. They will coordinate with the department/activity EEO Coordinator.

* So in original.

- (4) All Department/Activity Equal Employment Coordinators must be knowledgeable concerning Equal Employment Opportunity laws, regulations, and policies, both federal and Commonwealth and will strive to remain up-to-date on current EEO trends and activities. The coordinators will provide EEO expertise and assistance to the department/activity EEO counselors and management staff. They will coordinate with the Commonwealth EEO Coordinator.
- (5) All department or activity heads, as activity Equal Employment Officers, will issue an Equal Employment Opportunity policy statement and establish a departmental Equal Employment Opportunity Program that includes a policy of non-tolerance of sexual harassment. They will hold their supervisors, managers, and directors accountable for developing and maintaining a work environment that is safe, nonthreatening, and nondiscriminatory. They will enforce the Commonwealths policy of non-tolerance of sexual harassment and take reasonable and consistent action in resolution of any sexual harassment situation.
- (6) The Director of Personnel, as the Deputy Equal Employment Officer for the Commonwealth, will ensure the development and maintenance of a viable Commonwealth wide Equal Employment Opportunity Program that includes training at all levels in prevention and resolution of sexual harassment situations. The Director of Personnel will initiate administrative investigations for all allegations of sexual harassment and will ensure their appropriate resolution in accordance with this policy and procedure.

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(7) The Governor, as the Equal Employment Officer for the Commonwealth, will establish and promote a policy of non-tolerance of sexual harassment in any form. The Governor will hold all Department and Activity Heads accountable for their active support of the Commonwealths Equal Employment Opportunity and non-tolerance of sexual harassment policies, and for their fulfillment of the responsibilities assigned in this policy and procedure.

(h) Equal Employment Opportunity Commission

(1) If an employee's sexual harassment complaint is not acted upon to his or her satisfaction, the employee has the option of filing a complaint with the Equal Employment Opportunity Commission (EEOC). Complainants also have the option of filing their complaint directly with the EEOC. It should be noted that there is a statutory limitation of 180 days from the harassing/discriminatory incident during which the complaint may be filed.

The EEOC in Hawaii is located at:

300 Ala Moana Blvd.

Room 7 1 23A

Box 50082

Honolulu, Hawaii, 96850

(808) 541-3120

The EEOC in San Francisco, California, is located at:

901 Market Street

Suite 500

San Francisco, California, 94103

(415) 356-5100

(2) Although the Commonwealth government would like to resolve all complaints through its administrative processes, employees will not be subjected to any retaliatory actions for filing a complaint with the Equal Employment Opportunity Commission.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The original paragraphs of subsection (e)(10) were undesignated. The Commission designated them as subsections (e)(10)(i) through (e)(10)(v) pursuant to 1 CMC § 3806(a). The Commission corrected the capitalization of the words "division director" in subsections (d)(5), (e)(1), (e)(2), and (e)(4), and "department head" in subsections (d)(5), (e)(1), (e)(2), (e)(4), and (e)(14) pursuant to 1 CMC § 3806(f). The Commission inserted commas after the words "investigating" in subsection (b), "favors" in subsection (c)(1), "hostility" in subsection (c)(1)(iii), "co-worker" in subsection (c)(3)(iii)(B), "co-workers" in subsection (d)(2), "department" and "activity heads" in subsection (d)(6), "non-threatening" in subsection (d)(9), "assault" in subsection (e)(3), "manager" in subsection (e)(5), "reporting" in subsection (e)(7), "non-threatening" in subsection (g)(1), "managers" in subsection (g)(2), "non-threatening" in subsection (g)(2), "regulations" in subsection (g)(4), and "managers" and "nonthreatening" in subsection (g)(5) pursuant to 1 CMC § 3806(g).

§ 10-10-320 Anti-Bullying Policy

(a) The Commonwealth is committed to providing all employees a healthy and safe work environment. It is the policy of the government that workplace bullying will not be tolerated. All agencies shall maintain every workplace free from bullying. This policy shall apply to all excepted service employees, regardless of his or her employment status.

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(b) Bullying is defined as persistent, malicious, unwelcome, severe, and pervasive mistreatment that harms, intimidates, offends, degrades, or humiliates an employee, whether verbal, physical, or otherwise, at the place of work and/or in the course of employment.

(1) The following types of behavior have been interpreted to constitute workplace bullying. This list is not meant to be exhaustive and is only offered by way of example:

- (i) Staring, glaring, or other nonverbal demonstrations of hostility;
- (ii) Exclusion or social isolation;
- (iii) Excessive monitoring or micro-managing;
- (iv) Work-related harassment (work-overload, unrealistic deadlines, meaningless tasks);
- (v) Being held to a different standard than the rest of an employee's work group;
- (vi) Consistent ignoring or interrupting of an employee in front of co-workers;
- (vii) Personal attacks (angry outbursts, excessive profanity, or name-calling);
- (viii) Encouragement of others to turn against the targeted employee;
- (ix) Sabotage of an employee's work product or undermining of an employee's work performance;
- (x) Stalking;
- (xi) Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets;
- (xii) Conduct that a reasonable person would find hostile, offensive, and unrelated to the employer's legitimate business interests.

(2) Workplace bullying must be addressed and corrected at its earliest stage before it becomes severe or pervasive.

(c) Any employee who feels that he or she has been bullied should immediately report such incidents to a supervisor at any level without fear of reprisal.

(d) An employer who receives a claim of bullying in violation of this policy shall take such complaint seriously and immediately advise the Director of Personnel or the Commonwealth Equal Employment Opportunity (EEO) Coordinator of the situation. The employer, with the assistance of the EEO Coordinator, will ensure that it is investigated promptly, privately, and with as much confidentiality as possible, consistent with the need to determine the facts. The investigation will be documented by an investigative report that will be retained in a confidential file by the EEO Coordinator. Any person accused of a violation shall be allowed the opportunity to rebut the charges.

(e) After determining the facts through the investigation, the employer shall take corrective action as required by the circumstances. This may include counseling any employee, whether or not a violation has occurred; imposing an appropriate sanction, including disciplinary action; making sure that this policy is reiterated to all employees or any group. An employer, or any supervisory staff, who does not take appropriate action also violates this policy and exposes the Commonwealth government to liability.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted commas after the words "severe," "degrades," and "physical" in subsection (b), "glaring" in subsection (b)(1)(i), and "insults" in subsection (b)(1)(xi) pursuant to 1 CMC § 3806(g).

§ 10-10-325 Alcohol and Drug Free Workplace Policy

(a) Policy

As an employer, the government recognizes it has a responsibility to its employees and the public it serves to take reasonable steps to assure safety in the workplace and in the community. Furthermore, the government is concerned about the adverse effect alcohol and drug abuse has on safe and productive job performance. It also recognizes that any employee, who's* ability to perform safely and productively is affected by the use of alcohol and other drugs, jeopardizes the integrity of the workplace and the achievement of the government's mission. The government realizes that alcoholism, problem drinking, and drug addiction are treatable illnesses. The government, therefore, encourages employees who have problems with drugs or alcohol to utilize all available resources to resolve their problems before those problems affect their job performance.

* So in original.

(b) Definitions

For the purposes of this section, the following definitions apply:

- (1) "Accident." An event which causes
 - (i) A fatality,
 - (ii) An injury to a person requiring professional medical treatment beyond simple at-scene first aid, or
 - (iii) An economic loss, including property damage, greater than \$2,500.00.
- (2) "Assessment." A determination of the severity of an individual's alcohol or drug use problem and an analysis of the possible courses of treatment, made by an expert in the field of substances abuse.
- (3) "Breath Alcohol Concentration" ("B.A.C."). The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath testing device (E.B.T.).
- (4) "Breath Alcohol Technician" ("B.A.T."). An individual authorized to collect breath specimens under subsection (g)(2) and who operates an E.B.T.
- (5) "Consulting Physician." A licensed physician retained or employed by the government to advise on drug testing.
- (6) "Drug." A substance
 - (i) Recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, or the official National Formulary, or any supplement to any of them; or
 - (ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; or
 - (iii) Other than food, minerals, or vitamins, intended to affect the structure or any function of the body of a human or other animal; or
 - (iv) Intended for use as a component of any micle specified in subsection (b)(6)(i), (ii), or (iii) above.Devices or their components, parts, or accessories are not considered drugs under this definition.
- (7) "Evidential Breath Testing Device" ("E.B.T."). A device which is

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- (i) Approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath; and
 - (ii) Is on the NHTSAs Conforming Products List of E.B.T.s; and
 - (iii) Conforms with the model specifications available from the NHTSA, Office of Alcohol and State Programs.
- (8) “Illegal Drug.” A drug that
- (i) Is not obtained legally; or
 - (ii) Is knowingly used for other than the prescribed purpose or in other than the prescribed manner; or
 - (iii) Is a designer drug or drug substance not approved for medical or other use by the U.S. Drug Enforcement Administration or the U.S. Food and Drug Administration.
- (9) “Invalid Test.” A breath or urine test that has been declared invalid by a Medical Review Officer (M.R.O.), including a specimen that is rejected for testing by a laboratory for any reason. An invalid test shall not be considered either a positive or a negative test result.
- (10) “Medical File.” The file containing an employee’s medical examination form, mental health referrals, alcohol and drug test results, and other health related documents, maintained by the Office of Personnel Management separate from an employee’s official personnel folder.
- (11) “Medical Review Officer” (“M.R.O.”). A licensed physician, appointed by the government, with specialized training in substance abuse disorders and in the use and evaluation of drug test results. The M.R.O. shall be the only person authorized to receive laboratory drug test results and shall be the primary contact for technical inquiries to the drug testing laboratory.
- (12) “Reasonable Suspicion.” A perception based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of an individual or on specific facts, circumstances, physical evidence, physical signs and symptoms, or on a pattern of performance or behavior that would cause a trained supervisor to reasonably conclude that the individual may be under the influence of alcohol or illegal drugs while on duty.
- (13) “Safety-sensitive.” A word describing activities which directly affect the safety of one or more persons, including the operation of motor vehicles or heavy machinery or the carrying of firearms. Each department, entity, or organization head, in conjunction with the Director of Personnel Management, shall identify all positions to be considered safety-sensitive positions due to the amount of time the employee spends performing safety sensitive functions.
- (14) “Statement of Fitness for Duty.” A written statement from a substance abuse professional (S.A.P.), certifying that the named employee is not dependent on alcohol or any drug to the extent such dependence will affect safe and productive work.
- (15) “Substance Abuse Professional” (“S.A.P.”). A physician, psychologist, psychiatrist, or social worker with knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol related disorders; or a counselor certified by the National Association of Alcoholism and Drug Abuse Counselors.
- (16) “Under the Influence.” A condition where a person’s behavior, attention, or ability to perform work in the usual careful fashion has been adversely affected by the use of alcohol or drugs; intoxicated.
- (17) “Vehicle.” A device in, upon, or by which any person or property is or may be propelled or moved on a highway, on a waterway, or through the air.

(c) Prohibited Conduct

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(1) Sale, Purchase, Possession with Intent to Deliver, or Transfer of Illegal Drugs. No employee shall

- (i) Sell, purchase, or transfer;
- (ii) Attempt to sell, purchaser* or transfer; or

* So in original.

(iii) Possess with the intent to deliver, any illegal drug while on government property, in any government vehicle or on any government business. It is a defense to this provision that the employee is employed by a law enforcement agency and the conduct occurs as part of the employees assigned duties for the purpose of investigating illegal drug trafficking.

(2) Possession of Illegal Drugs. No employee shall possess any illegal drug on government property, in any government vehicle, or while on government business. It is a defense to this provision that the employee is employed by a law enforcement agency and the conduct occurs as part of the employees assigned duties for the purpose of investigating illegal drug trafficking.

(3) Possession of Open Containers of Alcohol. No employee shall possess an open container of alcohol in any vehicle while on duty or in any government vehicle at any time. No employee shall possess an open container of alcohol while at his or her workplace.

(4) Under the Influence of Alcohol or Illegal Drugs. No employee shall be under the influence of alcohol or any illegal drug when at work, or reporting to work with the intention of working. As used in this subsection, alcohol includes any alcohol found in any prescription or non-prescription drug such as cough syrup. An employee is presumed to be under the influence of alcohol or an illegal drug if

- (i) The employee has a B.A.C. of 0.02 or more;
- (ii) The employee has a detectable amount of any illegal drug in his or her urine;
- (iii) The employee uses alcohol or any illegal drug while on call when the employee knows he or she may be called upon to perform safety-sensitive functions;
- (iv) The employee uses alcohol or any illegal drug within four hours prior to reporting to work and expects to perform a safety-sensitive duty.

(5) Refusal to Be Tested. No employee required to be tested for drugs or alcohol under any provision of this section shall refuse to be tested. The following conduct shall be considered a refusal to be tested:

- (i) Refusing in writing to submit to testing after receiving clear and specific written notice of the requirement to be tested;
- (ii) Refusing verbally, in front of at least two witnesses, to submit to testing after receiving clear and specific written notice of the requirement to be tested;
- (iii) Failing to timely provide an adequate specimen for testing, without a valid medical explanation, after receiving clear and specific written notice of the requirement to be tested. An M.R.O. or consulting physician shall determine if there is any medical reason for failure to provide an adequate urine sample (shy bladder) or an adequate breath sample (shy lung);
- (iv) Engaging in conduct that clearly obstructs the specimen collection process;
- (v) Failing to remain available for post-accident testing, or leaving the scene of an accident before a testing decision is made. An employee may leave the scene of an accident only to obtain necessary medical care or assistance in responding to the accident. If the employee leaves the scene the employee must notify his or her supervisor as soon as possible of his or her location and reason for leaving the scene;

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- (vi) Consuming alcohol or illegal drugs after an accident and before a testing decision is made;
 - (vii) Failing to report, during the work shift in which an accident occurred, an accident which could have resulted in a testing decision; and
 - (viii) Failing to report to the specimen collection site timely after being informed of the requirement to be tested.
- (6) Giving False Information. No employee shall give false information about a urine specimen or attempt to contaminate or alter the specimen.
- (7) Refusal to Comply with Treatment Recommendations. No employee shall fail to comply with recommendations for treatment or after-care made by an M.R.O. or S.A.P. as a consequence of a prior positive drug* or alcohol test result.

* So in original.

- (8) Failure to Notify Government of Conviction. No employee shall fail to notify the Director of Personnel Management of any criminal drug statute conviction, within five days of such conviction, if the violation of the criminal drug statute occurred while the employee was conducting Commonwealth business, or while on or using Commonwealth property.
- (9) Supervisors Responsibility for Confidentiality. No employer shall knowingly disregard an employee's right to confidentiality in matters relating to alcohol or drug testing or otherwise neglect his or her responsibilities under this section.

(d) Penalties and Consequences

- (1) Disciplinary Action. An employee committing any act prohibited by subsection (c) shall be subject to an appropriate form of discipline, depending on the circumstances.
- (i) Generally. Where an employee commits an act prohibited by subsection (c) without valid reason, the employee shall be disciplined up to and including removal. At a minimum, the employee shall receive a formal reprimand. If the prohibited act committed by the employee relates to the use or possession of alcohol or illegal drugs, the employee shall be referred to an S.A.P. for assessment and treatment.
- (ii) First offense, under the influence. An employee found to be under the influence; of alcohol or illegal drugs in violation of subsection (c)(4), for a first offense, shall not be subject to removal solely for being under the influence of alcohol or illegal drugs. However, if the person is also involved in an accident depending on the circumstances, the employer may decide to initiate a disciplinary action for removal, even on a first offense.
- (iii) Serious offenses. The following acts, even for a first offense, will result in an immediate disciplinary action for removal:
- (A) The sale, purchase, possession with intent to deliver, or transfer of illegal drugs, or the attempt to sell, purchase, or transfer illegal drugs in violation of subsection (c)(1);
 - (B) Being involved in an accident resulting in a fatality while under the influence of alcohol or illegal drugs, in violation of subsection (c)(4);
 - (C) While performing and about to perform duties in a safety sensitive position, being under the influence of alcohol or illegal drugs, in violation of subsection (c)(4);
 - (D) An unexcused refusal to be tested, in violation of subsection (c)(5);
 - (E) Giving false information, contaminating, or attempting to contaminate a urine sample, in violation of subsection (c)(6);

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(F) Failing to notify the proper authority of conviction for a drug offense in violation of subsection (c)(8);

(G) Testing positive for alcohol or illegal drugs within five years of a prior positive test; and

(H) Breaching any term of a return to duty contract executed under the provisions of subsection (e)(2).

(2) Information Concerning Treatment Options. Those employees not removed from government service after committing any act prohibited by subsection (c) shall be informed of resources available for evaluating and resolving problems associated with the use of alcohol and illegal drugs. At a minimum, the Office of Personnel Management's Alcohol and Drug Free Workplace Coordinator shall give the names, addresses, and telephone numbers of local S.A.P.s and substance abuse counseling or treatment programs. The employees will then be required to fulfill all the specified steps of treatment before being considered ready for return to duty.

(3) Report to Department of Public Safety. An employee committing any act prohibited by subsection (c)(1) or (c)(2) shall be reported, by the employer, to the Department of Public Safety for the purpose of possible criminal prosecution.

(4) Duty/Pay Status Pending Disciplinary Action. Unless the employee was involved in an accident resulting in a fatality, an employee subject to a disciplinary action for committing any act prohibited by subsection (c), except for subsection (c)(7), shall be allowed to remain on the job pending resolution of any proposed disciplinary action but shall not be allowed to perform a safety-sensitive function, even if that means assigning the employee duties the employee would not otherwise be performing. An employee subject to a disciplinary action for committing any act prohibited by subsection (c) who was involved in a fatal accident shall be placed on leave without pay pending resolution of the disciplinary action for removal.

(e) Return to Work Procedures

(1) Prerequisites to Returning to Duty. No employee who has tested positive for the presence of alcohol or illegal drugs shall be allowed to return to work until the employee has:

(i) Complied with treatment recommendations of an M.R.O. or S.A.P. and been released for work by an S.A.P. in consultation, when appropriate, with the M.R.O. or a consulting physician;

(ii) Tested negative in a subsequent test paid for by the employee for the presence of alcohol, if the removal from duty was due to alcohol use; or cocaine, marijuana, opiates, amphetamines, and phencyclidine, if the removal from duty was due to drug use; and

(iii) Agreed to execute a return to duty contract.

(2) Return to Duty Contract. The return to duty contract shall include the following provisions:

(i) Aftercare. An agreement to comply with aftercare and follow up treatment recommendations for one to five years, as determined appropriate by the employees S.A.P.;

(ii) Follow-up testing. An agreement to unannounced alcohol or drug testing, depending on the substance which resulted in the removal from duty, paid for by the employee, for one to five years, as determined appropriate by the employees S.A.P., but there shall be no fewer than six tests in the first year after the employee returns to work;

(iii) Compliance with rules. An agreement to comply with government rules, policies, and procedures relating to employment;

(iv) Term. An agreement that the terms of the contract are effective for five years after the employees return to duty; and

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(v) Breach of contract. An agreement that violation of the return to duty contract is grounds for termination.

(f) Testing Occasions

(1) Pre-employment Testing. At the time of application, persons applying for any position within the excepted service will be notified that any offer of employment is contingent upon a negative urine test. After receiving an offer of employment, the candidate shall be tested for the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine in the urine. The test shall be paid for by the candidate. Testing shall be in compliance with subsection (h), below. Applicants who were previously employed by the government and applicants who have had an offer for government employment withdrawn due to a previous positive urine test result, must also provide a written release of drug testing history for the two years immediately preceding the application date.

(i) No new excepted service candidate may be assigned to work in any position until he or she presents the results of a urine test, taken after the offer for employment has been made, that shows negative for the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine.

(ii) If the candidates test result is positive for the presence of a tested drug, without a legitimate explanation, the offer of employment will be withdrawn.

(iii) If the candidate presents a drug testing history showing a positive drug test within two years prior to the application date, the offer of employment will be withdrawn unless the candidate submits a statement of fitness for duty and agrees to execute an agreement similar to a return to duty contract described in subsection (e)(2).

(2) Reasonable Suspicion Testing. Where there is a reasonable suspicion that an employee is under the influence of alcohol or drugs while at work or about to begin work, he or she shall submit to a breath or urine test for the presence of alcohol, cocaine, marijuana, opiates, amphetamines, and phencyclidine, upon written notice from the employee's supervisor. Except as otherwise provided, the government shall pay for the testing.

(i) Properly trained supervisor. Only a supervisor with government-approved training in the physical, behavioral, and performance indicators of probable drug and alcohol use is permitted to make reasonable suspicion testing decisions.

(ii) Objective inquiry. The properly trained supervisor will observe the employee suspected of being under the influence of alcohol or illegal drugs. A decision to request testing shall be based on eye witness reports, facts of the event, and observed physical and behavioral characteristics of the employee. Prior to making the decision to require testing, the supervisor will question the employee in a private area to ascertain whether there are any reasons other than alcohol or drug use for any behavior observed.

(iii) Verification. No employee shall be required to submit to a drug or alcohol test based on reasonable suspicion unless the need for the test is verified by a second properly trained government employee. The regained verification shall be done in person.

(iv) Transportation assistance. The employee shall be accompanied to the collection site by a supervisor or manager, and shall be provided transportation home from the collection site. If the individual refuses and demands to drive his/her vehicle, the supervisor or manager shall notify the Department of Public Safety.

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- (v) Duty pending test results. Until the results of the drug and alcohol test are complete and verified, no employee tested based upon reasonable suspicion shall be allowed to perform or continue to perform a safety-sensitive duty.
- (vi) Report. The supervisor ordering reasonable suspicion testing shall put in writing, in detail, the facts leading to the decision. This report shall be considered confidential and will be maintained in the employee's medical file, which is confidential, until needed for a disciplinary action. Only at that time will the report be filed in the employee's official personnel folder.
- (3) Post-accident Testing. As soon as practical after an accident any employee whose action or inaction may have contributed to the accident must submit to breath and urine tests for the presence of alcohol, cocaine, marijuana, opiates, amphetamines, phencyclidine, upon written notice from the employees supervisor. Except as otherwise provided, the government shall pay for the testing.
- (i) Supervisor training. Only a supervisor with government-approved training in the physical, behavioral, and performance indicators of probable drug and alcohol use is permitted to make post-accident testing decisions.
- (ii) Objective inquiry. A supervisor's decision to request testing shall be based on eye witness reports, facts of the event, and observed physical and behavioral characteristics of the employee. Specifically, the properly trained supervisor shall require the driver of any government vehicle or the operator of any government equipment involved in the accident to be tested.
- (iii) Transportation assistance. The employee shall be accompanied to the collection site by a supervisor or manager, and shall be provided transportation home from the collection site. If the individual refuses and demands to drive his/her vehicle, the supervisor or manager shall notify the Department of Public Safety.
- (iv) Duty pending test results. Until the results of the drug and alcohol test are complete and verified, no employee reasonably suspected of having been under the influence of alcohol or drugs at the time of the accident shall be allowed to perform or continue to perform a safety-sensitive duty.
- (v) Report. The supervisor ordering post-accident testing shall put in writing, in detail, the facts leading to the decision. This report shall be considered confidential and will be maintained in the employee's medical file, which is confidential, until needed for a disciplinary action. Only at that time will the report be filed in the employee's official personnel folder.
- (4) Random Testing. During each calendar year randomly selected employees performing safety-sensitive functions will be required to submit to breath tests for alcohol and urine tests for cocaine, marijuana, opiates, amphetamines, and phencyclidine. The testing will be done during on-duty time. Except as otherwise provided, the government shall pay for the testing.
- (i) Method of selection. Employees will be selected by a statistically valid method such as a random number table or computer-based random number generator that is matched with employee Social Security numbers, payroll identification numbers, or other comparable identifying numbers.
- (ii) Number to be tested. No more than twenty-five percent of all employees performing safety-sensitive functions in each department or agency each year shall be required to submit to breath alcohol testing and no more than fifty percent shall be required to submit to urine testing. The actual percentage will be determined at the beginning of each fiscal year for each department or agency by the Office of Personnel Managements Alcohol and Drug Free Workplace Coordinator, in consultation with the employer and the M.R.O. after reviewing the

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departments or agency's prior positive testing rates, reasonable suspicion and post accident events, and referrals for service.

(g) Collecting and Testing Breath Specimens

(1) Collection Site. Breath specimens shall be collected only at a site approved by the Director of Personnel Management or at the scene of an accident if proper equipment and personnel can be made immediately available.

(2) Collection Protocol. Breath specimens shall be collected only by a B.A.T. trained in the collection of breath specimens at a course approved by the United States Department of Transportation in accordance with standard collection protocols as specified in 49 CFR, Part 40(C) Procedures for Transportation Workplace Drug Testing Programs - Alcohol Testing, except as otherwise provided in this section. However, the M.R.O. or a consulting physician, when requested, may assist in facilitating the collection for post-accident testing.

(3) Confirming Test. Breath specimens shall first be subjected to a screening test for alcohol. If that test indicates a probable breath alcohol concentration of 0.02 or greater, a second test confirming the first and providing quantitative data of alcohol concentration, shall be performed. No alcohol test shall be considered positive unless both the screening test and the confirming test show a B.A.C. of 0.02 or greater.

(4) Results. The breath test results shall be transmitted by the B.A.T., in a manner to assure confidentiality, to the employee, to the employee's employer, and to the Director of Personnel Management.

(5) Confidentiality. Other than as specified above, no person involved in the testing process shall release the results of breath tests to any other individual without a written release from the tested employee.

(6) Invalid Test. If the Director of Personnel Management determines the test is invalid, using the factors found at 49 CFR, Part 40.79, the test result shall be reported as negative.

(7) Statistical Reporting. The B.A.T. shall compile statistical data that is not name specific, related to testing results. The B.A.T. shall release the statistical data to the Director of Personnel Management upon request.

(h) Collecting and Testing Urine Specimens

(1) Collection Site. Urine specimens shall be collected only at a site approved by an appropriate government agency, and identified by the Director of Personnel Management.

(2) Collection Protocol. Urine specimens shall be collected by persons trained in the collection process developed by the Substance Abuse and Mental Health Service Administration, United States Department of Health and Human Services, in accordance with standard collection protocols as specified in 49 CFR, Part 40(8), Procedures for Transportation Workplace Drug Testing Programs - Drug Testing, except as otherwise provided in this section. However, the M.R.O. or a consulting physician, when requested, may assist in facilitating the collection for post-accident testing.

(3) Splitting Sample.

(i) After collecting a sample of the employees urine, the sample will be split into two specimens. Both specimens will be shipped to the laboratory selected for performing tests for the government.

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- (ii) One specimen, called the primary specimen, shall be tested for the government. The other specimen, called the secondary specimen, shall be the property of the employee, to be tested only upon request of the employee.
- (4) Confirming Test. Primary urine specimens shall first be subjected to a screening test. Only if the screening test shows positive for the presence of a prohibited drug, will a second test be conducted on the same urine specimen to identify the presence of a specific drug or metabolite, using a gas chromatography/mass spectrometry (GC/MS) test. No drug test shall be considered positive unless both the screening test and the confirming test show the presence of one or more of the drugs tested for.
- (5) Results. The laboratory conducting the urine test shall give the results only to the M.R.O. The M.R.O. shall discuss the test result with the tested individual.
- (6) Invalid Test. If the M .R.O. decides that the test is invalid, the candidate shall immediately submit another urine specimen for testing.
- (7) Employee Test. If the governments test shows positive for the presence of a specific drug or drugs, the employee may request that the M.R.O. have the secondary specimen tested at another laboratory certified by the United States Department of Health and Human Services, for the presence of the drug or drugs found in the primary specimen.
 - (i) The employee must make the request in writing, within 72 hours of receiving notice of the result of the governments test.
 - (ii) The results of the second test shall be given to the M.R.O. who shall discuss the result with the employee.
 - (iii) The employee shall pay for the cost of the second test.
- (8) Alternative Explanations for Positive Test Results.
 - (i) Upon receiving a report of a positive test results the M.R.O. shall determine if there is any alternative medical explanation for the results including the use of prescribed medication by the employee. Such a determination shall be based on information received from the employee such as the tested individuals medical history and records. If the M.R.O. determines it to be necessary he or she may request pertinent analytical records from the laboratory or require a re-analysis of the specimen.
 - (ii) The M.R.O. shall report the urine test result as negative and shall take no further action if he or she determines:
 - (A) There is a legitimate medical explanation for a positive test result, other than the use of the specific drug; or
 - (B) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the positive drug test result is scientifically insufficient for further action.
- (9) Illegal Use of Opium. If the GC/MS does not confirm the presence of 6-monoacetylmorphine; the M.R.O. shall determine whether there is clinical evidence, in addition to the urine test result, of illegal use of any opium, opiate, or opium derivative.
- (10) Report to Government. The M.R.O. shall report all positive and negative urine drug test results, in a manner to assure confidentiality, to the employee's employer, and to the Director of Personnel Management.
- (11) M.R.O. and Confidentiality. Other than as specified above, the M.R.O. shall not release the results of drug tests to any other individual without a written release from the tested employee.

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(12) **Statistical Reporting.** The M.R.O. shall compile statistical data that is not name specific, related to testing and rehabilitation. The M.R.O. shall release the statistical data to the Director of Personnel Management upon request.

(i) **Employee Awareness and Rehabilitation**

(1) **Employee Awareness Training.** All employees shall receive information concerning the effects and consequences of drug and alcohol use on personal health, safety, and the work environment; the manifestations and behavioral clues indicative of drug and alcohol use; and the resources available to the employee in evaluating and resolving problems associated with the use of illegal and legal drugs and alcohol.

(2) **Employees Seeking Voluntary Assistance.** Government employees shall be allowed to voluntarily seek assistance for alcohol or drug use at any time prior to being required to be tested under the reasonable suspicion, post-accident, or random testing procedures.

(i) **Referrals.** Employees may request referral to an S.A.P. for treatment, may refer themselves, or may be referred by a supervisor as part of a performance counseling. Such referrals shall only be made a part of the employee's medical file and shall not be a part of the employees official personnel folder. Referrals shall be kept confidential.

(ii) **Voluntary referrals.** Employees who voluntarily seek assistance in dealing with drug and alcohol problems or accept referrals, before job performance is compromised, shall be provided the same leave benefits for recommended treatment as provided for any other health problem.

(iii) **Accountability for job performance.** Regardless of participation in or requests for referrals, employees shall be held accountable for acceptable job performance. In no case where job performance has been compromised will disciplinary action be waived for employees asking for assistance and referral. However, such requests may be considered a mitigating factor in determining the appropriate form of discipline.

(3) **Job Security Maintained.** Employees shall not have job security or promotional opportunities jeopardized solely because of a request for a drug or alcohol treatment referral.

(4) **Required Documentation.** Although voluntary referrals or referrals made prior to testing are kept strictly confidential, documentation of poor performance or disciplinary actions taken due to drug or alcohol abuse shall be included in the employee's official personnel folder.

(j) **Disseminating Information on Regulations**

(1) **Distribution to Employees.** All current employees shall receive a copy of the regulations in this section at least thirty days before the implementation date. New employees hired after the effective date of this policy will be given a copy of the policy in this section at the time of hire. Each employee shall sign a form prescribed by the Director of Personnel Management which acknowledges the receipt of the policy and the employees understanding that he or she is bound by this policy. This acknowledgment shall be kept in the employee's official personnel folder.

(2) **Posting.** The regulations in this section will be posted in all government workplaces for at least sixty days following their implementation.

(k) **Record Retention and Reporting Requirements**

(1) **Administrative Records.** Records relating to the administration of the policy in this section, including policy and program development, employee awareness training, supervisory training, collection site training, program administration, and calibration documentation, shall be kept by the Director of Personnel Management and the M.R.O. for five years.

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(2) Records Relating to Collection Process. Records relating to the breath and urine collection process shall be kept by the Director of Personnel Management, the M.R.O., and the specimen collector at the collection site for two years.

(3) Refusals, Referrals, and Test Results. The Director of Personnel Management shall keep a copy of all records of refusals to be tested, breath and urine test results, and referrals to an S.A.P. in the employees medical file, not the employees official personnel folder, at least until such time as disciplinary action is taken. The M.R.O. shall keep a copy of all urine test results and the B.A.T. shall keep a copy of all breath test results in a manner to assure confidentiality. No test results shall be available for use in a criminal prosecution of the employee without the employees consent.

(i) Positive test result records, records of refusals to be tested, and referrals to an S.A.P. shall be kept for five years.

(ii) Negative test result records shall be kept for a period of one year.

(4) Report to Federal Contract Agency. To comply with the Drug Free Workplace Act of 1988, 41 U.S.C. 701(a)(1)(E), the Director of Personnel Management shall notify the federal contracting agency of the conviction of any employee for selling, manufacturing, or dispensing any illegal drug on government business property or government time, within 10 days of the conviction.

History: Adopted 35 Com. Reg. 34136 (Aug. 28, 2013); Proposed 35 Com. Reg. 33669 (June 28, 2013).

Commission Comment: The Commission inserted quotation marks around terms defined. The Commission corrected the capitalization of the words "Social Security" in subsection (f)(4)(i) pursuant to 1 CMC § 3806(f). The Commission inserted commas after the words "drinking" in subsection (A), "treatment" in subsection (b)(6)(i), "results" in subsection (b)(10), "entity" in subsection (b)(13), "upon" in subsection (b)(17), "purchase" in subsection (d)(1)(iii)(A), "contamination" in subsection (d)(1)(iii)(E), "event" in subsection (f)(2)(ii), "opiate" in subsection (h)(9), "post-accident" in subsection (i)(2), "referrals" in subsection (k)(3), "tested" in subsection (k)(3)(i), and "manufacturing" in subsection (k)(4) pursuant to 1 CMC § 3806(g).