

## **ELEMENT NINE**

### **Corrective Actions and Sanctions**

*Reference: 29CFR Part 37.54(d)(2)(vii)*

#### **Statement of Commitment**

The South Dakota Department of Labor and Regulation as the recipient of Workforce Investment Act funding, shall immediately institute corrective actions or sanctions, as necessary, to correct findings of noncompliance under 29 CFR Part 37. Such actions shall be designed to immediately and permanently correct these violations. Findings of noncompliance may result from investigation of a complaint or a recipient compliance review.

#### **Standards for Corrective and Remedial Actions**

*Imposition of corrective or remedial actions after a compliance review or complaint investigation when violations of the nondiscrimination and equal opportunity provisions of WIA are found.*

An initial Determination must be issued and must include the specific steps the grant applicant or recipient must take within a stated period of time in order to achieve voluntary compliance.

Such steps must include:

- Actions to end and/or redress the violation of the nondiscrimination and equal opportunity provisions of WIA;
- Make whole relief where discrimination has been identified, including, as appropriate, back pay (which must not accrue from a date more than 2 years before the filing of the complaint or the initiation of a compliance review) or other monetary relief; hire or reinstatement; retroactive seniority; promotion; benefits or other services discriminatorily denied; and
- Such other remedial or affirmative relief as the Director, Employment Security Division deems necessary, including but not limited to outreach, recruitment and training designed to ensure equal opportunity.

*Procedures if a recipient has violated the nondiscrimination and equal opportunity provisions of WIA.*

The investigating authority must notify the Secretary and Deputy Secretary of SD DLR and the violating recipient(s) through the issuance of an Initial Determination.

The Initial Determination must:

- Advise the Secretary, Deputy Secretary, ES Director and/or the WIA Director (hereafter Directors), negotiations immediately with the violating recipient(s) to secure compliance by voluntary means;
- Advise the Directors to complete such negotiations within 30 days of receipt of the Initial Determination; and
- Include a determination as to whether compliance must be achieved by:
  - 1) Immediate correction of the violation(s) and written assurance that such violations have been corrected;
  - 2) Entering into a written Conciliation Agreement; or
  - 3) Both.

If it is determined at any time during the 30 day period, that a recipient's compliance cannot be achieved by voluntary means, the Directors must notify the Director, CRC.

If the Directors are able to secure voluntary compliance, the recipient must submit to the Directors written assurance that the required action has been taken.

*Elements of a written assurance.*

A written assurance must provide documentation that the violations listed in the Initial Determination have been corrected.

*Elements of a Conciliation Agreement.*

A Conciliation Agreement must:

- Be in writing;
- Address each cited violation;
  - Specify the corrective or remedial action to be taken within a stated period of time to come into compliance;
  - Provide for periodic reporting on the status of the corrective and remedial action;
- Provide that the violation(s) will not recur; and
- Provide for enforcement for a breach of the agreement.

*If compliance cannot be secured by voluntary means.*

It will be determined that compliance cannot be secured by voluntary means when the grant applicant or recipient fails or refuses to correct the violation(s) within the time period established by the Initial Determination.

If it is determined that compliance cannot be secured by voluntary means, the Directors must either:

- Issue a Final Determination;
- Refer the matter to the State Attorney General with a recommendation that an appropriate civil action be instituted; or
- Take such other action as may be provided by law.

*What information must a Final Determination contain?*

A Final Determination must contain the following information:

- A statement of the efforts made to achieve voluntary compliance, and a statement that those efforts have been unsuccessful;
- A statement of those matters upon which the grant applicant or recipient and the Employment Security Division continue to disagree;
- A list of any modifications to the findings of fact or conclusions that were set forth in the Initial Determination;
- A statement of the grant applicant's or recipient's liability, and, if appropriate, the extent of that liability;
- A description of the corrective or remedial actions that the grant applicant or recipient must take to come into compliance;
- A notice that if the grant applicant or recipient fails to come into compliance within 10 days of the date on which it receives the Final Determination, one or more of the following consequences may result:
  - 1) After the grant applicant or recipient is given the opportunity for a hearing, its WIA Title I funds may be terminated, discontinued, or withheld in whole or in part, or its application for such funds may be denied, as appropriate; or
  - 2) The case may be referred to USDOL for other action against the grant applicant or recipient that is provided by law; and\
- A notice of the grant applicant's or recipient's right to request a hearing.

## **Breaches of Conciliation Agreements**

When it becomes known to the Directors that a Conciliation Agreement has been breached, the directors may issue a Notification of Breach of Conciliation Agreement. Notification of Breach of Conciliation Agreement must be sent to the grant making agency, and/or other party(ies) to the Conciliation Agreement.

A Notification of Breach of Conciliation Agreement must:

- Specify any efforts made to achieve voluntary compliance, and indicate that those efforts have been unsuccessful.
- Identify the specific provisions of the Conciliation Agreement violated;
- Determine liability for the violation and the extent of liability;
- Indicate the failure of the violating party to come into compliance within 10 days of the receipt of the Notification of Breach of Conciliation Agreement may result, after opportunity for hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in a request to file suit; and
- Advise the violating party of the right to request a hearing

In such circumstances, the Directors must notify the grant making agency; and the Governor, recipient or grant applicant, as applicable.

## **Procedures for Effecting Compliance**

If compliance has not been achieved after issuance of a Final Determination or a Notification of Breach of Conciliation Agreement the Directors may:

- After opportunity for a hearing, suspend, terminate, deny or discontinue the WIA Title I financial assistance, in whole or in part;
- Refer the matter to the State Attorney General with a recommendation that an appropriate civil action be instituted; or
- Take such action as may be provided by law.

### *Deferral of new grants.*

When proceedings have been initiated against a particular recipient, Directors may defer action on that recipient's applications for new WIA Title I financial assistance until a Final Decision has been rendered. Deferral is not appropriate when WIA Title I financial assistance is due and payable under previously approved application.

New WIA Title I financial assistance includes all assistance for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period. New WIA Title I financial assistance does not include assistance approved before the beginning of proceedings commenced, or increases in funding as a result of changed computations of formula awards.

*Notice of opportunity for hearing.*

As a part of a Final Determination, or Notification of Breach of Conciliation Agreement, the Directors must include, and serve on the grant applicant or recipient (by certified mail, return receipt requested), a notice of opportunity for hearing.

In the case of noncompliance that cannot be voluntarily resolved, the Final Determination or Notification of Breach of Conciliation Agreement is considered the Division's formal complaint.

To request a hearing, the grant applicant or recipient must file a written answer to the Final Determination or Notification of Breach of Conciliation Agreement, and a copy of the Final Determination or Notification of Breach of Conciliation Agreement, with the SD DLR Secretary's office through the appropriate state EO Officer.

The answer must be filed within 30 days of the date of receipt of the Final Determination or Notification of Breach of Conciliation Agreement. A request for hearing must be set forth in a separate paragraph of the answer. The answer must specifically admit or deny each finding of fact in the Final Determination or Notification of Breach of Conciliation Agreement. Where the grant applicant or recipient does not have knowledge or information sufficient to form a belief, the answer may so state and the statement will have the effect of a denial. Findings of fact not denied are considered admitted. The answer must separately state and identify matters alleged as affirmative defenses, and must also set forth the matters of fact and law relied on by the grant applicant or recipient.

The failure of a grant applicant or recipient to request a hearing under this paragraph, or to appear at a hearing for which a date has been set, waives the right to a hearing; and whenever a hearing is waived, all allegations of fact contained in the Final Determination or Notification of Breach of Conciliation Agreement are considered and admitted, and the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Directors as of the day following the last date by which the grant applicant or recipient was required to request a hearing or was to appear at a hearing.

Hearings will be conducted as outlined in SD Statute.

Hearings will be held at a time and place ordered by the Secretary upon reasonable notice to all parties and, as appropriate, the complainant. In selecting a place for the hearing, due regard must be given to the convenience of the parties, their counsel, and witnesses, if any.

The Secretary may use judicial process to secure the attendance of witnesses and the production of documents. In any hearing evidentiary matters will be governed by the standards and principles set forth in SD Statute.

*Procedures for initial and final decisions.*

After the hearing, the Secretary must issue an initial decision and order, containing findings of fact and conclusions of law. The initial decision and order must be served on all parties by certified mail, return receipt requested.

The initial decision and order becomes the Final Decision unless further review is initiated under SD Statutes, exceptions are filed by a party.

A party dissatisfied with the initial decision and order may, within 30 days of receipt, file for review through the judicial process.

A party filing for review by the Department must specifically identify the finding or conclusion to which exception is taken. Any exception not specifically urged is waived.

Within 45 days of the date of filing such exceptions, a reply, which must be limited to the scope of the exceptions, may be filed and served by any other party to the proceeding.

Requests for extensions for the filing exceptions or replies must be received by the Secretary no later than 3 days before the exceptions or replies are due. If no exceptions are filed, the SD DLR Secretary may, within 30 days of the expiration of the time for filing exceptions, on his or her own motion, serve notice on the parties that the SD DLR Secretary will review the decision.

Where exceptions have been filed, the initial decision and order of the Secretary becomes the Final Decision and Order of the Secretary unless the Secretary, within 30 days of the expiration of the time for filing exceptions and replies, has notified the parties that the case is accepted for review.

Where exceptions have not been filed, the initial decision and order of the Secretary becomes the Final Decision and Order of the Secretary unless the Secretary has served notice on the parties that he or she will review the decision. Any case reviewed by the Secretary must be decided within 180 days of the notification of such review. If the Secretary fails to issue a Final Decision Order within the 180 day period, the initial decision and order of the Secretary becomes the Final Decision and Order.

If, after issuance of a Final Determination or Notification of Breach of Conciliation Agreement, voluntary compliance has not been achieved within the time set and the opportunity for a hearing has been waived, the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary.

When a Final Determination of Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary, the Secretary may, within 45 days, issue an order terminating or denying the grant or continuation of assistance or imposing other appropriate sanctions for the grant applicant or recipient's failure to comply with the required corrective and/or remedial actions, or referring the matter to the Attorney General for further enforcement action.

A Final Decision and Order constitutes final agency action.

*Procedures to suspend, terminate, withhold, deny or discontinue WIA Title I financial assistance.*

Any action to suspend, terminate, deny or discontinue WIA Title I financial assistance must be limited to the particular political entity, or part thereof, or other recipient (or grant applicant) as to which the finding has been made, and must be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found. No order suspending, terminating, denying or discontinuing WIA Title I financial assistance will become effective until:

- The Directors have issued a Final Determination or Notification of Breach of Conciliation Agreement;
- There has been an express finding on the record, after opportunity for a hearing, of failure by the grant applicant or recipient to comply with a requirement imposed by or under the nondiscrimination and equal opportunity provisions of WIA;
- A Final Decision has been issued by the Secretary, the Directors' decision and order has become the Final Decision of the Secretary, or the Final Determination or Notification of Breach of Conciliation Agreement has been deemed the Final Decision of the Secretary; and
- The expiration of 30 days after the Secretary has filed, with the Civil Rights Center, a full written report of the circumstances and grounds for such action.

## **Distribution of WIA Title I financial assistance to an alternate recipient**

When the division withholds funds from a recipient or grant applicant under these regulations, the director may disburse the withheld funds directly to an alternate recipient. In such case, the director will require any alternate recipient to demonstrate:

- The ability to comply with these regulations; and
- The ability to achieve the goals of the nondiscrimination and equal opportunity provisions of WIA.

## **Restoration of Eligibility**

A grant applicant or recipient adversely affected by a Final Decision and Order will be restored, where appropriate, to full eligibility to receive WIA Title I financial assistance if the grant applicant or recipient satisfies the terms and conditions of the Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of WIA.

A grant applicant or recipient adversely affected by a Final Decision and Order may at any time petition the director to restore its eligibility to receive WIA Title I financial assistance. A copy of the petition must be served on the parties to the original proceeding that led to the Final Decision and Order. The petition must be supported by information showing the actions taken by the grant applicant or recipient to bring itself into compliance. The grant applicant or recipient has the burden of demonstrating that it has satisfied the terms and conditions of the Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of WIA. While proceedings under this section are pending, sanctions imposed by the Final Decision and Order must remain in effect.

The Secretary must issue a written decision on the petition for restoration. If the Secretary determines that the grant applicant has not brought itself into compliance, he or she must issue a decision denying the petition. Within 30 days of its receipt of the Secretary's decision, the recipient or grant applicant may file a petition for review of the decision by the Secretary, setting forth the grounds for its objection to the decision. The petition must be served by the Secretary. The Secretary may file a response to the petition within 14 days.

The SD DLR Secretary must issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration eligibility.

## **Documentation for Element Nine**

Please refer to SD DLR procedures in Element One Documentation for directives on corrective actions to WIA recipients.