

# Guide to the *Informal*



## EEO Counseling & ADR Process



APHIS  
Civil Rights Enforcement &  
Compliance Office

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United States  
Department of  
Agriculture

Animal and  
Plant Health  
Inspection Service

Civil Rights  
Enforcement and  
Compliance



**Animal and Plant Health Inspection Service  
Civil Rights Enforcement and Compliance  
(Revised June 2008)**

**GUIDE TO THE INFORMAL EEO COUNSELING & ADR PROCESSES**

The purpose of this guide is to provide information on the federal complaint process and your rights and responsibilities in this process.

**Part A – INFORMAL EEO COUNSELING**

**1. Equal Employment Opportunity Commission (EEOC) Regulations**

The EEOC is authorized to issue rules, regulations, orders and instructions in accordance with Section 717(b) of Title VII of the Civil Rights Act of 1964 and other statutes and Executive Orders which prohibits employment discrimination on the basis of race, color, religion, sex, national origin.

EEOC is also responsible for administering -

- The Age Discrimination in Employment Act, which protects workers age 40 and over;
- the Equal Pay Act (EPA), which protects women and men against pay discrimination based on sex;
- Section 501 of the Rehabilitation Act of 1973, as amended, which prohibits employment discrimination against individuals with disabilities.
- The 1990 Americans with Disabilities Act which prohibits employment discrimination against individuals with disabilities, and requires a process for consideration of reasonable accommodation.

**2. EEO Complaint Bases Covered within USDA**

USDA Civil Rights regulations allow the filing of EEO complaints based on marital status, parental status, and sexual orientation. These bases are not covered under EEOC regulations or laws, and, therefore, have no appeal rights/processed beyond the USDA Office of Adjudication and Compliance.

**3. EEO Counseling**

An APHIS employee or applicant for employment who believes that he/she has been discriminated against on the basis of race, color, religion, sex, age, national origin, disability or reprisal for an EEO protected activity must first consult with an APHIS EEO Counselor/Mediator in order to try to informally resolve the matter. The contact with an EEO Counselor must take place:

- Within 45 calendar days of the alleged discriminatory act;
- Within 45 days of learning of the act; or
- Within 45 calendar days of the effective date of a personnel action.

#### 4. Contacting the APHIS ADR Center

The APHIS EEO Counseling/Alternative Dispute Resolution (ADR) program is housed in the ADR Center, located in Riverdale, Maryland. The program is managed by a full time Assistant Director. The contact numbers for the center are [301-734-6317](tel:301-734-6317) or [1 800-372-7428](tel:1-800-372-7428). The EEO/Intake specialist will answer your call and discuss your issues and the process. If you call after normal business hours or the line is in use, you will be prompted to leave a voice message.

#### 5. Information Required During Intake

The employee/complainant should be prepared to provide the Intake Specialist with the following information.

- Current business and home address and telephone number(s)
- A signed designation of representative form with the name, address, and telephone number of your attorney or representative. (This form will be mailed to the complainant)
- A signed form electing either traditional EEO Counseling or ADT/Mediation
- The case will then be assigned by the Intake Specialist to a Counselor or Mediator depending on the complainants' election.

#### 6. The EEO Counselor/Mediator will:

- Make contact by telephone or with the Complainant as soon as possible from assignment of the case. If the contact cannot be made within a reasonable period of time, the complainant will be notified of the reason for the delay. The Counselor will do everything possible to process the complaint within 30 days or 90 days if the complainant grants an extension.
- Handle all complaints brought in a fair and impartial manner explaining relevant laws, regulations, and precedent decisions that will be utilized in the counseling process.

- Advise you of your rights and responsibilities in the Federal EEO Complaint process, including providing details on the option to elect ADR. Mediation is a method recognized under the Administrative Dispute Resolution Act (Public Law 101-552) which encourages Federal agencies to use mediation and other negotiation processes, known as Alternative Dispute Resolution (ADR), to avoid or resolve disputes.

## 7. The Complainant's Right to Remain Anonymous

During the EEO Counseling process, the complainant has the right to remain anonymous. This right to anonymity can continue until the Resolving Official offers a proposal to resolve the issues presented. Anonymity requires that the complainant's name be kept confidential. This means that inquiries will need to be made about the allegations without divulging the complainants' identity.

## 8. EEOC Requirements for EEO Counseling Sessions

EEOC Regulations identify six duties that must be performed for each completed counseling session;

- (1) advise the complainant of the requirements of Federal EEO complaint process under 29 CFR 1614;
- (2) assist in determining the issue(s) and basis(es) of the potential formal complaint;
- (3) conduct a limited inquiry for the purpose of furnishing information for settlement/resolution efforts and determining jurisdictional questions if a formal complaint is filed;
- (4) seek a resolution at the lowest possible level;
- (5) document the resolution or advise the complainant of their right to file a formal complaint if resolution fails; and
- (6) prepare a report sufficient to determine that the required counseling actions have been taken and resolve any jurisdictional questions that may arise.

## 9. The Complainants Responsibility

During the Informal Process the Complainant is responsible for:

- Cooperating with the EEO Counselor by providing as much information as possible to identify and clarify the issue/issues, basis/bases. This includes a full explanation of the circumstances which led to filing the complaint.
- Maintaining communication with the Counselor and responding to information requested by the Counselor.
- Responding to offers of resolution. (If the Resolving Official wishes to offer a resolution, but the complainant will not waive their right of anonymity, the

counselor will advise the complainant of the EEO complaint process, and if appropriate, issue a Notice of Right to File)

### **10. The EEO Counselor's Limited Inquiry**

The EEO Counselor will conduct a limited inquiry to determine what facts will be needed to resolve the issues that the employee raised during the discussion of the problem. There is no set formula for the Counselor to follow in attempting a resolution. The Counselor is not an investigator and will not investigate an informal complaint or take written statements. However, the scope of the Counselor's inquiry and discussions with the complainant and appropriate management officials will meet the criteria established by the EEOC. Since inquiries are conducted informally, and do not require sworn testimony or extensive documentation, a Counselor may not make a finding on the issue of discrimination.

If the problem clearly does not involve an allegation of discrimination based on race, color, religion, sex, age, national origin, disability or reprisal (based on a protected EEO activity), the Counselor will advise the complainant of other channels available for resolution of the problem. If, for example, a person alleges that she or he was the target of reprisal for union activities. In the absence of acts to show that the union activities are related to participation in protected EEO activities or related to opposing discriminatory practices, the Counselor will provide information on other alternatives for redress.

In order to resolve an EEO informal complaint/EEO dispute, the agency and the complainant must agree on a solution. However, if resolution is not achieved within 30 calendar days from initial contact, or with a written authorization from the complainant to extend counseling, not to exceed 90 days, the Counselor must advise the complainant in writing of their right to file a formal complaint and the time limit for doing so. This written notification is known as a Notice of Right to File a Formal Complaint (NRF). The complainant has fifteen (15) calendar days from the date she or he receives this notice to file a complaint with the USDA Office of the Assistant Secretary for Civil Rights, Employment Adjudication Division.

The Counselor will advise the complainant that the formal EEO complaint must be in writing and must be specific in regard to the matter or matters complained of, and it must be signed. Usually, a formal complaint form will be sent with the notice of right to file.

If a formal complaint is filed with the Office of Adjudication and Compliance, the EEO Counselor is notified and a written report of EEO Counseling is issued.

## **PART B – ALTERNATIVE DISPUTE RESOLUTION (ADR)**

### **1. The Federal Mediation Process**

In 1998, APHIS established an Alternative Dispute Resolution program as required by 29 Code of Federal Regulation (CFR) 1614.102(b) and EEOC Management Directive (MD) 110, Chapter 3. The term Alternative Dispute Resolution (ADR) is used to describe a variety of approaches to resolving workplace disputes. EEOC regulations mandate that an ADR process be offered and made available during the EEO Complaint Process. In APHIS, ADR is also offered at the formal stage. As is the case with EEO Counseling, a complainant may designate an attorney or representative to advise them during the ADR process.

## **2. ADR in APHIS**

The method of ADR used by APHIS is Mediation, however, there are a variety of methods for resolving employment disputes. The Mediator may choose to offer Telephonic Mediation, Settlement Conferences and Facilitation as a means to resolve the dispute.

Often techniques may be combined to provide more than one method. Agencies are not limited to using only one method or technique in their ADR programs. The EEO Specialist assigned to process your complaint can provide a detailed description of each technique.

## **3. The Objectives of ADR**

The objective of ADR is to assist all parties in voluntarily reaching an acceptable resolution to the issues in dispute. Mediation, a form of ADR, is a voluntary process and does not obviate the complainant's rights under any applicable Negotiated Grievance Process (NGP), Equal Employment Opportunity (EEO) Complaint Process or Administrative Grievance Process (AGP). The mediation process works because it creates a "safe" environment for the parties to hear each other out, peacefully express conflict and vent their feelings, share information, and address underlying needs and problems. There is sufficient latitude to raise both EEO and non-EEO related issues during this session. However, if resolution of the matter is not successful in mediation, non-EEO issues brought to the attention of the Counselor/Mediator cannot be included in the formal complaint.

The Mediation process does not seek to declare winners or losers, but to find reconciliation between the parties. This process is conducted through the skills of a trained mediator. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution. However, there are some matters that may be inappropriate or feasible for ADR. Agencies have discretion to determine whether a given dispute is appropriate. When there is no resolution, the complaint may withdraw the complaint or continue to the next phase of the complaint process.

## **4. ADR Time Limits**

EEOC Regulation, 29 CFR 1614.105(f) provides a pre-complaint (informal) complaint processing period for ADR of ninety (90) calendar days. This includes the time necessary to schedule travel to the session (if necessary) and to conduct the Mediation session. Sessions may take a few hours, a full day, or more.

#### **5. What You Can Expect In Mediation:**

- Participants are limited to the complainant, the representative, the responding management official, the resolving official, and the Mediator.
- Participation in Mediation does not waive the complainant's right to file a formal complaint.
- The background information obtained by the Mediator will only include the information obtained from the Complainant by the Intake Specialist. The limited amount of information ensures neutrality and gives the parties the opportunity to obtain relevant information from each other.
- All parties should come to me to the mediation session as prepared as possible to participate fully in the process, including presenting documentation necessary to support a particular position.
- Documentation should be relevant to the proceeding and may include references to time; place; exactly what occurred; the name(s) of the responsible officials, the identity of others who may know about the particular event(s), why you believe it was done, etc.
- A work sheet is available from the Mediator prior to the session to assist each participant in identifying critical information.
- The Mediation session is not a legal proceeding, therefore, no report is written, no notes are taken and no testimony is written or electronically recorded.
- The actual settlement/resolution agreement will be in writing (or entered into a computer) and shared only with those in the Mediation Session, those responsible for processing, and the staff of the USDA Office of Compliance and Adjudication. When personnel issues are involved, Human Resources/payroll specialists may also be involved.
- All information conveyed during the mediation is confidential, except those matters required by Departmental policy or by regulation, i.e., fraud waste and abuse or criminal activity.

#### **6. The Mediation Process will include:**



1. Mediator's Opening/Introductory Statement
2. Initial Statements/Opening Statement by Parties
3. Information Gathering/Joint Meeting
4. Caucuses (individual)
5. Negotiation/Generating Options
6. Agreement Writing
7. Closure

- The mediation session will begin with an opening statement from the mediator regarding their role as a neutral and not as an advocate for or against either party. The mediator utilizes this stage of the mediation process to explain the basic ground rules and what will be expected of the parties in the session.
- After the opening statement, the mediator will ask for opening statements from each of the parties. The Mediator will advise that these statements will be "uninterrupted". The parties opening statements are important. The mediator can use the parties' opening statements to help identify each of the parties' issues.
- The mediator will explain the caucus process, i.e., a meeting with each party separately. The caucus information may be confidential if the party desires. After the caucus with each respective party, the mediator will reconvene the parties to assess where they are in resolving the issues.
- The mediator will reopen the joint session after having caucused with both parties, may provide the parties with a neutral assessment and guide the parties toward resolution discussions. The assessment will be developed using the recommended "Model of Analysis" of Discrimination Complaints outlined in EEOC Management Directive (MD) 110. This is an informal process and there are no rules of evidence or adjudication.
- In considering a resolution, a reasonable analysis is necessary to determine what offer of relief is appropriate for the complaint.
- If the parties are able to come to resolution of some or all of the issues in dispute, the resulting agreement will be written by the mediator. Appropriate authorization for all agreements will come from the Director, CREC or designee. The agreement must conform to APHIS policy on settlement/resolution agreements.
- If resolution is achieved, the written agreement is binding on both parties. Parties are prohibited from discussing the terms of the resolution agreement with anyone unless there is a need to share the information to implement the agreement.
- If an offer of resolution is rejected by either party, specific reasons must be provided as to why the offer is not acceptable, and a reasonable alternative is

presented for discussion and consideration.

- If the complaint is not resolved, the complainant can continue with the complaint process and will be issued a Notice of the Right to File (NRF) a formal complaint of discrimination by the Mediator.

*Title VII of the Civil Rights Act of 1964 expressly encourages the settlement of employment discrimination complaints without litigation. The Equal Employment Opportunity Commission (EEOC) strongly support settlement attempts at all stages of the EEO complaint process as identified in 29 CFR 1614.603. The particular remedy negotiated in any case is dependent upon the underlying personnel action, term or condition of employment which formed the basis of the complaint.*

- Issues that set precedent or are regulated by law or regulation that would prohibit implementation or disciplinary action of any management official are not suitable for negotiations or discussion between the parties during mediation.
- For a settlement/resolution agreement to constitute a valid and enforceable contract there must be an offer, an acceptance and consideration flowing between the parties. An offer is essentially a promise to do or refrain from doing some specified act in the future in exchange for another promise or act. So the language of an agreement is very critical in identifying the terms of resolution/settlement.

### Part C - CLASS ACTION COMPLAINTS

A class complaint is defined as one where a group of Agency employees, former employees or applicants for employment, on whose behalf it is alleged that they have been, are being, or may be adversely affected by an Agency policy or practice which discriminates against the group of the basis(es) of their common race, color, religion, sex (including sexual harassment), national origin, age (40+ years), and physical/mental disability.

A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class, alleging that the class is so numerous that a consolidated complaint by the members of the class is impractical, that there are questions or facts common to the class, that the claims of the agent are typical of the claims of the class, and that the agent of the class or, if represented, the representative, will fairly and adequately protect the interest of the class.

A class agent must be:

- A member of the class;

- Describe with specificity the alleged incidence of discrimination against him/her;
- Have been personally affected by the Agency's policy or practice which allegedly discriminates against the class;
- Notify the ADR Center, in writing, of the identity of his/her representative.

# APPENDICES

**Role of the Responding Management Official  
In the EEO Complaint Process**

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[Definition of a Responsible Management Official](#)

A Responsible Management Official (RMO), sometimes referred to as the Responding Management Official, in EEO cases, is the official(s) who, according to the complainant's allegations, is (are) responsible for the action or made the decision that allegedly harmed the complainant. This means the complainant has identified the individual as being responsible for an action or decision which the complainant believes is discriminatory because of his or her race, color, religion, sex, national origin, age, disability, or in reprisal for prior EEO activity. A RMO will not serve as the designated Resolving Official.

### Rights and Responsibilities of a Resolving Official

As a Responsible Management Official you have certain rights, responsibilities and opportunities with respect to the EEO investigation that will begin.

- As a Responsible Management Official, you have the right to be informed of all allegations of discrimination lodged against you. An EEO Specialist with the Civil Rights Enforcement and Compliance (CREC), EEO Complaints team, will contact you telephonically, upon their notification of the complaint acceptance to advise you of the accepted issues and basis of the complaint. The EEO Specialist will serve as your point of contact throughout the processing of this complaint.
- As a Responsible Management Official, you will be contacted directly by a Contract EEO Investigator. You have the responsibility of fully cooperating with the investigator. This may include preparation of a preliminary affidavit, prior to your actual onsite or telephonic interview and production of relevant documents as requested by the investigator.
- As a Responsible Management Official, you have the right to review your affidavit thoroughly to ensure it states your responses to the allegations clearly. You should never sign any statement or affidavit without careful review. Any discrepancies or errors should be brought to the attention of the investigator immediately. Concerns regarding the investigator and or the investigative process should be brought to the attention of the assigned EEO Specialist.

## **Role of the Resolving Official In the EEO Complaint Process**

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*(Based on a letter Developed by the Office of General Counsel, Civil Rights Division May 2008)*

It is the policy of USDA and APHIS to prevent conflicts whenever possible and, when conflicts

do occur, to make every effort to reach the earliest possible consensual resolution of conflicts and issues. An important component in the resolution of EEO-related conflicts process is designation of a Resolving Official.

### Definition of a Resolving Official

Central to the process of Alternative Dispute Resolution (ADR) are the roles and responsibilities of resolving officials and responsible management officials.

A Resolving Official in an EEO complaint, is the official who the APHIS program has designated and assigned the authority to make changes, accept and approve proposals for resolution during an ADR session in both the informal and formal complaint processing stage. The Resolving Official binds a responding agency by signing an EEO settlement agreement.

### Expectations for a Resolving Official

In the resolution of EEO issues and concerns, the Resolving Official will work closely with CREC EEO Specialist and/or (in an EEOC Hearing), the assigned Agency Representative. The Resolving Official will be appraised of the issues and bases alleged as well as any case assessments conducted by the CREC EEO Specialist. In the EEO complaint process, the Resolving Official is expected to:

- Be part of this process from the beginning until the end.
- Participate in ADR sessions, either in person, or be reachable by telephone.
- Consult with the CREC EEO Specialist and/or the assigned Agency Representative prior to an ADR session.
- Only sign a settlement agreement when the terms and/or conditions have been reviewed and cleared by the CREC Director or Designee or the Agency Representative when the case is at hearing.
- Ensure the settlement terms are implemented and documented within the identified timeframes.

### The Resolving Official's Role:

- The Resolving Official's role and responsibilities are important to the Agency in reaching a fair, enforceable, resolution of EEO complaints.
- All settlement proposals will be discussed with and provided to the Resolving Official for consideration.

- The role of the Resolving Official is not limited to EEO settlements; he or she may also be called upon to provide assistance in a number of EEO-related matters and concerns.

#### Resolving Officials Should Know:

- The CREC EEO Specialist will provide a detailed briefing on the allegations raised in the EEO complaint
- All settlement proposals which involve an action governed by Human Resources, such as back pay, retroactive promotions, leave restoration, etc. must be cleared by the appropriate Human Resources specialist.
- All proposed settlement terms must be enforceable, with a definitive and realistic implementation timeframe.
- The CREC EEO Specialist will draft the settlement agreement, for all cases which are not being adjudicated by either the agency representative or OGC.

#### Settlement Guidelines

All settlement agreements are approved by the CREC EEO Director or Designee, or in a case at hearing, the Agency Representative. The review must be conducted prior to signature by the Resolving Official. In order to ensure a settlement agreement is valid and enforceable, it is advisable to adhere to the following basic guidelines:

The settlement agreement should:

2. Include ALL terms upon which the parties have agreed.
3. Include the complete release of all pending claims (identified by EEO case number) and any claims which could have been brought up until the date of signature.
4. Include withdrawal of all pending complaints and/or legal actions including Merit System Protection Board (MSPB), Civil Actions, or Grievances.
5. Ensure there are confidentiality provisions.
6. Ensure there is a procedure for addressing allegations of non-compliance.
7. Terms are to be written in a clear and concise manner which specifically details the action to take and definitive timeframes for implementation – no open-ended terms.
8. All employment/personnel issues should be cleared by the appropriate Human Resources official prior to writing the settlement agreement. Do not agree to anything that is contrary to personnel regulations.

## **Tips for Resolving Officials in EEO Complaint Mediation Sessions**

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Preparing for the Mediation Session:

- ▶ Keep in mind that mediation is not an adversarial proceeding. Neither party has a burden of proof to establish in mediation, as you would in a formal EEO or MSPB case, and there



is no determination of fault or blame.

- The goal of mediation is to identify the issues, explore settlement solutions, and preserve or mend the working relationship.
- Remember that the Complainant may feel strongly that he/she has been wronged by the Agency, and is seeking some type of relief by contacting the Civil Rights Staff.
- The Complainant has agreed to mediate in an attempt to resolve the complaint at the early stage. You were asked to serve as the program Resolving Official because you have the authority to explore options to resolve an issue in dispute.
- Learn all that you can about why there is a dispute. You may need to make confidential inquiries to your managers to obtain a better understanding of the complaint. In order to make an informed decision you will need to know the facts and underlying issues of the complaint before the mediation session.
- Allow time to analyze the case, focus only on the issues and interests important to management, not the personalities of the parties involved.
- Think about the strengths and weaknesses of the government's actions or position.
- Is this a case that management can settle by making some minor concessions?
- What are the risks and benefits?
- Are there other employees in that work area with similar complaints?
- What do you believe are the strengths and weaknesses of the Complainant's case?
- What are possible relief options that may result in a settlement/resolution?
- Clarify management's interests (want, needs, fears, and concerns).
- Identify possible standards (Union agreements, precedents, prior practice, and accepted principles).
- Plan a strategy.
- Be creative. The time spent planning will aide the mediation process. Planning will help you make concessions, compromises, and justify your interests as negotiations proceed. Planning prevents accepting what could be called a “bad deal” because you were unaware of the alternatives or the ramifications involved.
- Make sure that all proposed solutions can be implemented within the regulations, i.e. pay, benefits, promotions, etc.

- ➡ If the mediation deals with performance-based action consider reviewing:
  - Employee's performance standards, performance appraisals, or any written information that can support the unacceptable performance.
  - Documentation concerning any efforts made to assist the employee (counseling/training).
  - Documentation establishing that the employee was afforded the opportunity to demonstrate acceptable performance but did not do so.
  
- ➡ During the mediation session:
  - Listen attentively to what the Complainant is presenting.
  - Make no assumptions about what you think the issues are and what you think they want.
  - Avoid focusing on a silent rebuttal during any part of the complainant's presentation.
  - Be prepared, the session may take several hours.
  - It is important to be logical, reasonable, persistent, and patient.
  - Allow the mediator to work using open communication and negotiation skills.
  - Consider that some mediation sessions are about “being heard” by management.

### Overview of Federal Sector Complaint Processing Under 29.C.F.R. 1614

*ADR is offered at all stages of the Federal Complaint Process -- pre-complaint, complaint and prior to a hearing; unless it is determined that ADR is inappropriate for that particular case. However, ADR is mandatory at the pre-complaint stage for managers.*



