

Alternative Dispute Resolution Equal Employment Opportunity Process

The Equal Employment Opportunity Commission (EEOC) requires, under 29 Code of Federal Regulations (CFR) 1614.102(b)(2) all agencies to make available an alternative dispute resolution (ADR) program. The ADR program must be available during both the pre-complaint process and the formal complaint process. The ADR process offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. Litigation or further administrative adjudication generally costs more than ADR and is usually less flexible. ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through ADR. Once a complaint goes to other forums, the outcome is decided by a third person, not by the parties. While in the ADR process, the parties maintain considerable control over the process and decide their own outcome.

There are a number of different ADR techniques, such as mediation¹, facilitation², fact-finding³, early neutral evaluation⁴, ombuds⁵, settlement conferences⁶, mini-trials⁷,

¹ MEDIATION - The use of an impartial and neutral third party in a dispute or negotiation. The objective is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute. Primarily, the mediator makes procedural suggestions regarding how parties can reach an agreement. At times, however, the mediator may offer substantive options as a way to expand the parties' range of possible solutions. A mediator may work with a party individually in a caucus to explore ideas to move the parties closer to resolution.

² FACILITATION - Uses techniques to improve the flow of information in a meeting between parties to a dispute. A facilitator focuses on the process involved in resolving the matter and remains impartial to the topics under discussion. The facilitator generally works with all of the participants at once to help the parties efficiently move through the process.

³ FACT-FINDING - Uses an impartial expert or group selected by the parties, or someone with authority to select, to determine what the "facts" are in dispute. When used as an ADR technique the collected facts must remain confidential.

⁴ EARLY NEUTRAL EVALUATION - A neutral or impartial third party provides an objective evaluation, sometimes in writing, of the strengths and weaknesses of a case. Under this method, the parties will usually make informal presentations to the neutral party to highlight their respective case or position.

⁵ OMBUDSMEN - Individuals who rely on a number of techniques to resolve disputes, including counseling, mediating, conciliating, and fact-finding. Once a complaint is received, an Ombudsman usually interviews the parties, reviews files, and makes recommendations to the parties. The power of the Ombudsman lies in his/her ability to persuade the parties to accept his/her recommendations.

⁶ SETTLEMENT CONFERENCES - Involve the use of a settlement judge or referee. The role of the settlement judge is similar to that of a mediator in that s/he assists the parties procedurally in negotiating an agreement. Attendance is mandatory at a settlement conference ordered by an Administrative Judge (AJ) and the failure to comply may result in sanctions. If settlement is not reached, the AJ that acted as the settlement judge is precluded from hearing the case.

⁷ MINI-TRIALS - Involve a structured settlement process in which each side to a dispute presents abbreviated summaries of their case before parties who have authority to settle the dispute. Generally, the rules are more relaxed with this technique than found in court or an administrative proceeding.

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peer review⁸, and a combination of techniques. The Department of Defense Education Activity (DoDEA) uses mediation as its preferred technique.

The ADR Process

An aggrieved is offered ADR when they are first contacted by an EEO counselor during the informal stage of the EEO process. Should the aggrieved invoke his/her right to the ADR process, the Agency has 90 days to attempt resolution. If the dispute is not resolved in 90 days, then the aggrieved has the right to file a formal complaint.

Aggrieved individuals have the right to representation throughout the complaint process, including during any ADR process. While the purpose of ADR is to allow the parties to fashion their own resolution to a dispute, it is important that any agency dispute resolution procedure provide all parties the opportunity to bring a representative to the ADR forum if they desire to do so. An Agency Representative represents the Agency and cannot serve as a representative of the responsible agency official. If legal counsel represents an aggrieved during ADR proceedings, then the Agency Representative from General Counsel will be there to represent the agency.

DoDEA does not mandate that management partake in the ADR process; however, management is strongly encouraged to participate. Agencies have discretion to determine whether a given dispute is appropriate for ADR.

Nothing said or done during attempts to resolve the complaint through ADR can be made the subject of an EEO complaint. Likewise, an agency decision not to engage in ADR, or not to make ADR available for a particular case, or an agency failure to provide a neutral, cannot be made the subject of an EEO complaint.

Successful Resolution

All terms of an agreement must be in writing and signed by both the aggrieved person and the responsible agency official, and in accordance with Policy Memorandum 01-GC-001, Settlement Agreements and Administrative Decisions/Orders (Attachment 1). Copies of the Settlement Agreement are made and provided to the parties. The original Settlement Agreement is filed with the EEO office. Funding for settlement costs and monetary awards will be the responsibility of the Deputy Director, DoDEA (DoDDS-Europe). Resolutions are binding on all parties.

Documentation that compliance was made in accordance with the terms and conditions of the Settlement Agreement will be provided to the EEO office.

⁸ PEER REVIEW - A problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision is typically not binding on the employee. The principal objective of peer review is to resolve disputes before they become formal complaints or grievances. The panel is typically made of employees and manager who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills, as well as, the specific policies and guidelines of the panel.

If not resolved within 90 days, the EEO Counselor will provide the aggrieved person with a final interview and the right to file a formal complaint. The EEO Counselor will ensure that a Counselor's report is prepared. In addition to the usual items required by the report, the report will indicate that ADR failed. No other information regarding the ADR session is to be provided.

The Role of the EEO Counselor

Once the aggrieved elects ADR, the EEO Counselor who advised the aggrieved of his/her rights and responsibilities is precluded from attempting to resolve the matter. The Counselor should have no further involvement in resolving the matter until he/she is advised of the outcome of the ADR process. However, the Counselor should complete the intake functions of counseling (that is, obtaining the information needed to determine the basis(es), claim(s), and timeliness) before referring the dispute for ADR processing to the EEO office. The report may not provide any information concerning the informal resolution other than to indicate that the Aggrieved elected the ADR program and the dispute was not resolved through that procedure. In no case will the individual be referred back to EEO Counseling where ADR fails to resolve the dispute. If the dispute is not resolved, someone from the EEO office will notify the EEO Counselor and the Counselor will issue the notice of right to file a formal complaint. Should resolution occur, someone from the EEO office will notify the EEO Counselor of the resolution.

Neutrals

A neutral is defined as an objective, impartial third-party who has been trained in ADR techniques and EEO law. The neutral has no power to decide the dispute. The neutral has no official, financial, or personal conflict of interest with respect to the issues in controversy. These neutrals may come from other Federal agencies (through a Federal neutral sharing program or other arrangement), or private organizations, private contractors, bar associations, or individual volunteers.

EEOC discourages EEO Counselors from acting as neutrals because of the perception of bias in favor of the agency. Additionally, investigators may not serve as a neutral in a case they are investigating.

A neutral's duty to the parties is to be neutral, honest, and to act in good faith, and

1. Ensure that ADR proceedings are conducted consistent with EEO law and Part 1614 regulations, including time frames;
2. Ensure that proceedings are fair, consistent with the core principles of the program (fairness, voluntariness, neutrality, confidentiality, enforceability), particularly providing the parties the opportunity to be represented by any person of his/her choosing throughout the proceeding;

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3. Ensure that the responsible agency official participating in the ADR proceeding has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the responsible agency official;
4. Ensure enforceability of any agreement between the parties, including preparation of the written settlement agreement if the parties reach resolution and ensuring that the agreement includes the signatures of the appropriate responsible agency official and aggrieved person;
5. Ensure confidentiality, including destroying all written notes taken during the ADR proceeding or in preparation for the proceeding; and
6. Ensure neutrality, including having no conflict of interest with respect to the proceeding (e.g., material or financial interest in the outcome, personal friend or coworker of a party, supervisory official over a party) unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.