How to Manage and Mediate Workplace Disputes

Air Force Mediation Compendium

The Dispute Resolution Division of the General Counsel's Office (SAF/GCD) leads the award-winning alternative dispute resolution (ADR) program. SAF/GCD is committed to being at the leading edge of federal government conflict management initiatives. The Air Force integrated conflict management system, which leverages the crosscutting application of dispute resolution, conflict management, and negotiation skills to more effectively prevent and resolve Air Force disputes, remains the central concept of the Air Force ADR Program. ADR efforts extend across the Air Force to reach workplace, environmental, real property, acquisition, Freedom of Information Act, claims, and public policy disputes. SAF/GCD engages in various partnerships with the Department of Defense and the federal government to provide current programs to the Air Force. Our mission is to match individual ADR needs with Air Force ADR resources, training, and experts, and to continue to serve as the flagship ADR Program of the federal government. For more information on the AF ADR Program, please visit our website at http://www.adr.af.mil/.

FOREWORD

Welcome to the Fourth Edition of The Air Force Mediation Compendium: How to Manage and Mediate Workplace Disputes. For many years, the Compendium has served as the principal guidance for Air Force (AF) Alternative Dispute Resolution (ADR) Managers and mediators of AF workplace disputes. The Compendium provides details and offers other resources to ADR Managers and mediators, enabling them to perform their duties in a fair and competent manner. It applies to mediations of AF workplace disputes, including Equal Employment Opportunity complaints, Merit Systems Protection Board appeals, employee grievances for bargaining unit and non-bargaining unit employees, labor-management conflicts such as unfair labor practice, and other disputes arising out of the employment relationship between the Air Force and its personnel. This new edition has been updated to reflect the publication of Air Force Instruction (AFI) 51-1201, Alternative Dispute Resolution in Workplace Disputes (21 May 2009).

The latest Compendium revision clearly distinguishes the duties of the ADR Manager from that of the mediator through the addition of a second narrative part addressing the duties and competencies of mediators. The first narrative part provides substantive and procedural guidance to ADR Managers to guide them through intake, convening, support, reporting, and program development of AF workplace dispute mediations. While ADR Managers should have some knowledge of ADR proceedings and mediation specifically, completion of a basic mediation course is not required for appointment to the position. Therefore, some introductory mediation information has been placed in the Compendium for the benefit of ADR Managers who are new to the field. ADR Managers, regardless of their level of experience, should be able to pick up the Compendium and fully understand the best practices for convening and accounting for the mediations occurring at their installation. Once ADR Managers have fully grasped their programmatic duties, they will find it beneficial to read the subsequent mediator section and attend the Basic Mediation course in order to fully understand how workplace disputes can be resolved through mediation. ADR Managers may also delegate their duties to others.

The second narrative part provides substantive and procedural guidance to mediators of AF workplace disputes including collateral-duty neutrals and prospective mediators. Mediators will find it beneficial to read the preceding section of the Compendium as a means of clearly understanding the role of the ADR Manager and developing reasonable expectations of the ADR Managers' support before, during, and after the mediation session.

Finally, the Compendium offers revised appendices. The appendices are divided into three sections. The first section includes useful forms and information for the ADR Manager. The second section consists of forms and checklists useful to the mediator. The third section contains tools and tips beneficial to mediators and/or parties during the mediation process.

The Compendium is a collaborative effort of the Dispute Resolution Division of the General Counsel's Office (SAF/GCD), the Air Force Human Resource Management School, and experienced Air Force mediators and trainers. Special acknowledgments to Bob Caviness, Barb Dycus, Steve Goldman, Terry Hirons, Norm Jacobson, Duane Keys, Iris Seals, and Leo Arias for their vital contributions to this edition of the Compendium. An online version of the Compendium is also available at *www.adr.af.mil*.

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Principal Deputy General Counsel

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PART ONE

GUIDANCE FOR ADR PROGRAM MANAGERS FOR WORKPLACE DISPUTES

INTRODUCTION

This Compendium is a reference for Installation Alternative Dispute Resolution Managers for Workplace Disputes (hereinafter referred to as ADR Managers), Stakeholders, Neutrals, and Support Providers, describing the process, techniques and best practices for utilizing mediation as an alternative dispute resolution (ADR) tool in workplace disputes. This edition of the Compendium reflects the 2009 revision of AFI 51-1201, Alternative Dispute Resolution Processes in Workplace Dispute. The Compendium is a summary of the field of mediation in Air Force workplace disputes.

All AF Installation Commanders must appoint an ADR Manager[1] who assists the Commander in setting workplace dispute ADR policies and procedures and promoting the ADR Program among all organizations on the installation, along with other duties listed in more detail in AFI 51-1201, paragraph 12. Individuals appointed as the ADR Manager must understand what ADR is, the different types of ADR used, why ADR is prevalently used in the federal government, the legal authority for using ADR, who the ADR program stakeholders are, and how to implement an effective mediation program at the installation. In this section of the *Compendium*, the different types of ADR proceedings are briefly addressed in broad terms.[2] The primary focus in this section is on mediation as the Air Force's preferred method of ADR. The *Compendium* provides practical advice and resources to successfully arrange workplace dispute mediations. It contains helpful information regarding each stage of the mediation process, from intake through settlement and reporting of ADR statistics. It explains what procedures are recommended and why, and includes in the appropriate sections of the Appendix sample forms, checklists, and other helpful material for the ADR Manager as well as information for individuals seeking certification as collateral-duty mediators. New ADR Managers should contact their Major Command (MAJCOM) ADR Manager, fellow ADR Managers, and SAF/GCD to seek guidance on matters not addressed in detail in this *Compendium* or at the website, *www.adr.af.mil*.

The ADR Manager has the flexibility to create an ADR program that works best for his/her installation. Alternative Dispute Resolution in the Department of Defense (DOD) and in the Air Force specifically, is a decentralized program. Although there are policies that the ADR Manager needs to follow and data that needs to be collected and reported, an ADR Manager has freedom to determine the practical "how-to" for implementation of the installation's ADR program. This includes how to recruit fair and competent neutrals to serve as mediators, how to determine the proper location, date and time for the mediation, and how

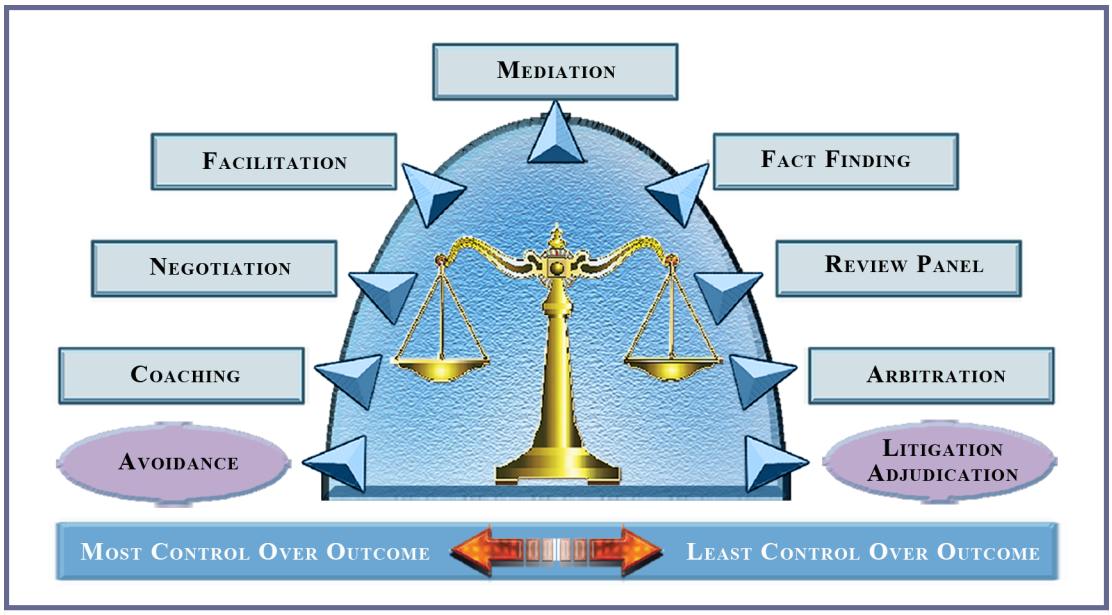
(1) See Appendix 1-A for a template of the Delegation of Authority. See also Air Force Policy Directive (AFPD) 51-12, Alternative Dispute Resolution, paragraph 4.4. Each MAJCOM, installation, FOA, and DRU commander shall appoint an ADR Program Manager who will serve as the focal point of coordination of ADR efforts within their respective organization. See also AFI 51-1201, paragraph 11.3, "the installation commander will appoint an individual to serve as the installation's ADR Manager for Workplace Disputes."

(2) Like any field, ADR has its share of specific jargon and terms. See Appendix 3-M for a list of commonly used AF ADR terms.

to market mediation around the installation. In creating a system of dispute resolution that will work for the stakeholders at the installation, an ADR Manager should consider the culture at the installation, to include its history, trust of personnel in leadership, rapport of leadership with the unions, approaches taken to systematically address organizational change, resource allocation, and overall responsiveness of management to issues. Keep in mind that this *Compendium* is primarily focused on one dispute resolution process, mediation, out of an array of possible conflict management processes and tools that could be used to resolve workplace disputes. The ADR Manager's goal is to reduce the number of disruptive or destructive disputes and assist commanders in maintaining a workplace climate conducive to doing the best possible job of serving Airman and defense needs of our country. Because mediation is a proven method to do that, this *Compendium* is focused on mediation.

WHAT IS ADR?

A dispute resolution proceeding means any process in which an "…alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate."[3]



Alternative Dispute Resolution Sample Spectrum

Alternative Dispute Resolution is an "umbrella" term that encompasses many different means to resolve issues in controversy.[4] The individuals assisting the parties are called "neutrals" because they do not have a stake in the matter. Types of ADR include conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds.[5]

As illustrated above, mediation is an opportunity for parties to utilize an ADR process that allows them to retain total control over the outcome and, even more importantly, allows them to craft an outcome that an arbitrator or administrative judge may not be able to impose.

(3) Public Law 104-320, 5 U.S.C. §571(6) (1999).

(4) 5 U.S.C §571(3).

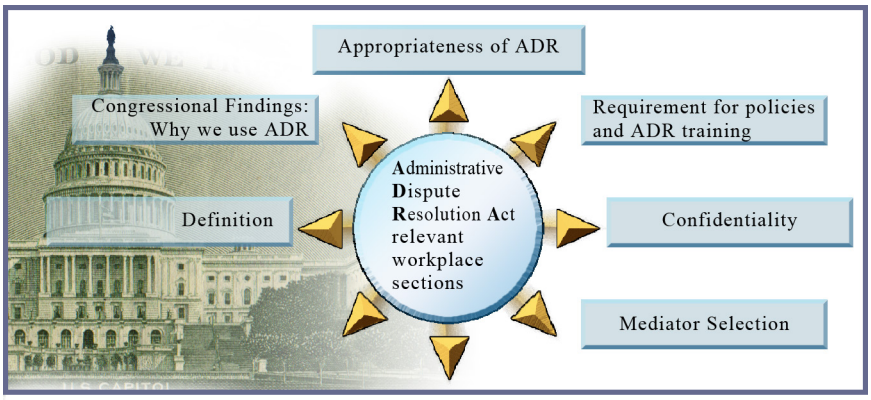
(5) These terms are further defined in Appendix 3-M.

THE LAW AND GUIDANCE

There are laws and policies which AF mediation programs must follow and there are optional guidebooks. Air Force workplace dispute mediations are governed by the Administrative Dispute Resolution Act of 1996, 5 United States Code (U.S.C.) §571, et seq. (ADRA);[6] Department of Defense Directive 5145.5; Air Force Policy Directive 51-12, Alternative Dispute Resolution; and Air Force Instruction 51-1201, *Alternative Dispute Resolution Processes in Workplace Disputes* (in that order unless superseded by the preceding guidance).

This image represents some of the major components of the ADRA, as they relate to workplace disputes. These items may serve as helpful references when requesting mediation program support.

In structuring any ADR program office and its processes and procedures at installations or commands where there is a strong Union presence, there are definite priorities in terms of authorities. Public Law is the highest authority that must be followed. After Public Law, authority comes from Collective Bargaining Agreements (CBAs) and local Memorandum of Agreements (MOAs) (in that order). Third, authority comes from DOD regulations and instructions, AF policy directives, and AFIs. Final guiding authority includes any other Departmental guidance pursuant to or implementing AFIs. When CBAs and MOAs are consistent with AF policy, the ease with which ADR Managers can do their jobs is enhanced.



This image represents some of the major components of the ADRA, as they relate to workplace disputes. These items may serve as helpful references when requesting mediation program support.

It is vastly important that ADR Managers understand the Public Law that provides the foundation for the ADR program, to include what is directed by its authority and what is not directed by it. Then, the ADR Manager must understand the applicable major command CBA. Next, the ADR Manager must know local union MOAs, which may further define the scope and details of the ADR program. Lastly, if issues or subjects are not specifically addressed in the CBAs or MOAs mentioned above, the ADR Manager will utilize the guidance given by AFIs and other Departmental guidance. The following are some helpful examples that show this hierarchy.

Example 1: ADR public law recommends that ADR be offered as a vehicle for resolving workplace disputes. Since ADR is recommended (not directed) as a resolution method via public law, a MAJCOM Union contract may have terms that limit ADR, or remove ADR in its entirety, from being utilized in that MAJCOM.

Example 2: AFI 51-1251, paragraph 12.11, authorizes the ADR Manager to exercise oversight of the installation workplace disputes ADR program to include conducting case

(6) Excerpts available in Appendix 3-L.

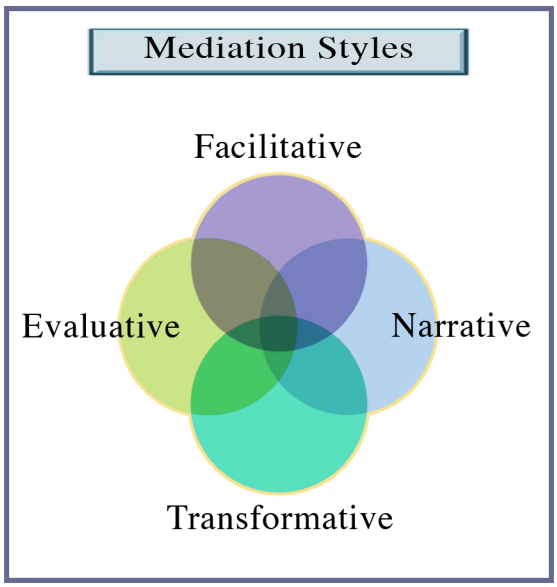
intake. However, if a MAJCOM CBA (or local MOA) limits, or strictly prohibits, contact with a bargaining unit employee about a grievance, the ADR Manager, Functional ADR Liaisons, or ADR Support Providers may not conduct the case intake process. In this instance, the CBA or MOA supersedes AFI 51-1201. However, AFI 51-1201 would apply to employees not in the bargaining unit because the CBA or MOA would not apply to them.

GUIDANCE	CONTENTS
A Guide for Federal Mediators: A Supplement to and Annotation of the Model Standards of Conduct for Mediators May 9, 2006	This 13-page ethical guide contains notes following each principle to further apply it to federal ADR programs. There are some additional standards addressed that are not relevant to mediators in their Air Force capacities.
Confidentiality "Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators" April 2006	This 68-page confidentiality guide offers a legal analysis and questions & answers of how confidentiality pertains to workplace ADR to include: Confidentiality Considerations Before, During, and After Mediation Sessions; Confidentiality Agreements; Agency Record-Keeping; Evaluation of ADR Programs and Processes; Requests for Disclosure of Dispute Resolution Communications; and Non-Party Participants in Mediation
Confidentiality: Guide to Confidentiality in Federal Alternative Dispute Resolution Programs December 29, 2000	This 32-page document contains detailed guidance on the nature and limits of confidentiality in federal ADR programs. It gives numerous case scenarios and explains how the ADR Act might warrant disclosure. This guide provides clarification to questions like "When would it be 'manifestly unjust' or 'harmful to public safety'?"
Evaluation of Federal ADR Programs October 4, 2000	The 20-page document explains the importance of data collection, suggests metrics that ADR Managers may want to collect, and describes how to present metrics to various audiences.
Federal ADR Manager's Resource Manual	This three-part comprehensive manual for ADR Managers discusses topics including program design, development, implementation, marketing, training, obtaining neutrals, supporting users, obtaining resources, ethical considerations, and program evaluation.

MEDIATION GENERALLY

Mediation is a structured process in which a qualified neutral person uses interest-based problem-solving techniques to assist parties in resolving their issues in controversy. The interest-based problem-solving approach to dispute resolution is characterized by focusing on *interests*,[7] not **positions**, creating **options** for mutual gain, and using **objective criteria** to ensure legitimacy of any agreement. Positions are pre-determined outcomes or demands that the parties believe would resolve the dispute. In contrast, interests are the underlying needs, wants, and desires that the parties try to satisfy during the mediation session. These terms are further defined in the Mediator section of this *Compendium*.

Mediation is distinguished from other forms of ADR because of the existence of separate and confidential caucuses which are individual private meetings between each of the parties and the mediator. Caucuses offer the mediator the "behind-the-scenes" perspective from each party to ensure there is a potential zone within which the parties can reach agreement.



The Air Force has adopted the facilitative style of mediation for all workplace disputes. Other styles of mediation include narrative, transformative, and evaluative. The facilitative style is characterized by an active mediator who enhances communication and encourages the parties to discuss matters freely by assessing their own strengths and weaknesses. In the facilitative style of mediation, the parties clarify issues, reevaluate positions, and analyze interests—all with an eye towards resolving the dispute that brought them to the mediation table. This is contrasted with three other styles of mediation: evaluative, transformative, and narrative. In the evaluative style of mediation, a subject-matter expert mediator delineates the issues, offers an opinion on the strengths and weaknesses of each party's side, and may offer suggestions on how to resolve the dispute. The transformative style of mediation, successfully used at the U.S. Postal Service, is characterized by a mediator who emphasizes party empowerment and recognition of one another. The mediator employing the transformative style guides the parties in discussions of their emotions and relationship and does not push the session towards settlement until directed by the parties. Narrative mediation views conflict through the prism of culture and social relations rather than peoples' inner personal drives and interests. The narrative technique includes deconstructive questioning, externalizing conversations and constructing alternate stories to achieve understanding and cooperation. Although elements of other mediation styles may surface in facilitative mediation, the facilitative approach is currently the best practice for AF workplace dispute mediations.

Elements of federal workplace mediation include, but are not limited to:

- Parties' voluntary agreement to participate;
- Timely use at the earliest possible time and at the most appropriate level in the organization;

(7) See Appendix 3-C for a list of common interests of the parties.

- Location or medium that is conducive to each parties' full participation;
- Self-determination of participants to make informed, uncoerced, and voluntary settlement;
- Parties' rights to be accompanied by representatives of their choice, in accordance with relevant collective bargaining agreements, statutes, regulations, and case law;
- Confidentiality consistent with the provisions in the ADRA;
- Use of a qualified, trained, impartial, and ethical neutral as mediator;
- Multiple attempts to resolve the dispute(s);
- Interest-based negotiation techniques;
- Separate confidential caucuses between each party and the mediator;
- Preservation of rights to utilize a formal dispute process if a mutually acceptable resolution is not achieved; and
- Closure of the process, either with or without a settlement.

SCOPE OF WORKPLACE MEDIATIONS

This Compendium focuses on mediation of workplace disputes. These types of disputes come in many forms including complaints arising under Equal Employment Opportunity (EEO) procedures, grievances under negotiated and administrative grievance procedures, labor union-management disputes under the jurisdiction of the Federal Labor Relations Authority (FLRA) (such as unfair labor practice allegations), or appeals of adverse actions under the jurisdiction of the Merit Systems Protection Board (MSPB) (such as disciplinary and performance actions), as well as generic, informal workplace issues such as employee to employee disagreements. An ADR Manager ensures that an ADR suitability determination is made for every eligible workplace dispute, pursuant to established case selection procedures and criteria, before mediation is offered to the parties.[8]

STAKEHOLDERS IN MEDIATION

Attachment 1 of AFI 51-1201 defines a stakeholder as "an organization or individual with an official or, in the case of a complainant, claimant, or grievant, a personal interest in the initiation, processing, and resolution of one or more workplace disputes. Commanders, supervisors, individual employees, dispute program owners (e.g., personnel, Equal Opportunity (EO)) and legal and other advisors are all ADR stakeholders." This also includes anyone affected by or affecting the mediation program, such as labor unions. Communication with all of these individuals is critical to successful ADR programs. The ADR Manager and the chain of command of the initiating employee will select who will represent the Air Force at the mediation session. In some instances, the ADR Manager will request the Commander's involvement in this selection. While "stakeholder" is a broad term, "participants" refer to a narrower group of people who participate in the mediation session, such as counsel, subject matter experts, and the parties. Often when the term

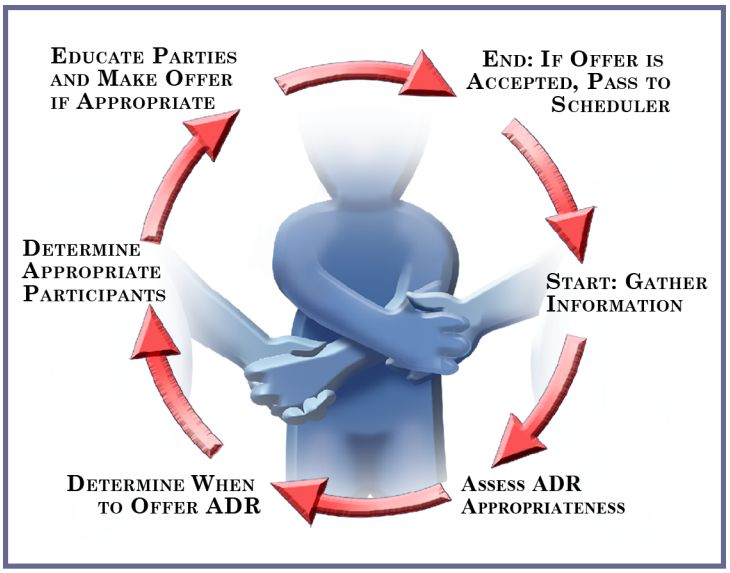
(8) See AFI 51-1201, paragraphs 12.11 and 22.

"parties" is used in the context of a mediation session, it refers to yet a smaller group of individuals who are in the mediation session with a stake in the outcome. For example, the "party" would include the Agency Representative and the Complainant for a formal EO case. In complaints against the Agency, the "party" is the Agency. The term, however, often refers to the management official who has been delegated settlement authority to resolve the dispute. The individual with settlement authority is typically the individual in the mediation session with signature authority.

VITAL PROCEDURES FOR AN EFFECTIVE MEDIATION PLAN

INTAKE

This section will present some of the best practices used during intake. Intake is a process through which a dispute is initially brought to the attention of, and subsequently processed by, an individual or office with authority to accept, reject, or transfer the dispute. For example, EO counselors and their offices serve in the intake process for EO disputes. During intake, information is gathered about the issue in controversy that underlies the parties' dispute and that information is used subsequently when the ADR Manager or Functional ADR Liaison (FAL)[9] requests the installation legal office determine if the dispute is suitable for ADR.



Common intake steps

The number of individuals and offices that assist in the intake process varies among MAJCOMs and installations. From the point that someone in the workplace identifies a dispute and requests assistance to the point when participants sit down at the mediation table, the case may touch many hands. In some AF organizations, one individual is responsible for administering the dispute under the local plan, from intake to closure. In other AF programs, different individuals handle intake cooperatively under the ADR.

Where a dispute is initially reported also impacts how many hands may touch the case. If an employee goes directly to the ADR program office to request mediation, the ADR Manager may be the individual solely responsible for intake in that case. If an aggrieved employee instead starts with the Installation EO Director, Installation Civilian Personnel Office, or another office within the installation, that employee's case may or may not be transferred to other individuals for processing when they elect to use ADR. Though the following guidance will refer to "intake coordinators," such coordinators may actually be the ADR Manager.

While there is no one right way to design and implement a mediation program, case

(9) Functional ADR Liaisons (FALs): (Formerly ADR Functional Area Managers) Individuals assigned to organizations with the functional responsibility for workplace dispute programs who are designated by the ADR Manager to help facilitate the use of ADR in the program they administer.

intake is critical to the success of any effort to foster the use of mediation and ensure the parties can effectively attempt resolution. Regardless of program design, the ADR Manager must ensure that the following steps have been completed prior to the mediation. The tasks of intake include:

- Gathering sufficient information about the dispute to provide meaningful guidance to stakeholders and neutrals, and for a proper eligibility and appropriateness for ADR determination;
- Screening a dispute to determine whether mediation is appropriate;
- Determining when to offer mediation;
- Determining appropriate participants for mediation;
- Educating the parties about the process so they can make a voluntary and informed choice about agreeing to mediate their dispute; and
- Offering or deliberately electing not to offer ADR.

1. Gathering Information

Decisions to use or not use ADR in a particular dispute almost always depend on the facts of the dispute, both specific and general. Part of the intake process involves gathering sufficient information from the parties to determine whether ADR is appropriate for resolving the dispute. The initiating party, the one requesting assistance with a dispute, and individuals from the initiating party's chain of command, which could include the commander of the organization, should be interviewed as part of the intake process, as well as anyone else determined to have relevant information regarding the dispute. Information obtained during an intake interview is confidential under the ADRA of 1996, 5 U.S.C. §571, et seq, as long as the person taking the information is designated as a neutral by the ADR Manager or other competent authority for purposes of confidentiality protection.[10] Intake coordinators designated as neutrals for such purposes are referred to as "administrative neutrals," as opposed to "session neutrals" (i.e., mediators who actually conduct the ADR proceeding).

2. Screening Disputes for Appropriateness

Once sufficient information has been gathered, it must be determined whether ADR is appropriate to resolve the dispute. Although AF policy is to maximize the use of ADR to resolve disputes, not all disputes are necessarily appropriate for mediation. AFPD 51-12 favors the use of ADR to resolve disputes when it is "practicable and appropriate" to do so.[11]

Since ADR is not necessarily "appropriate" in every case, disputes must be ***screened*** before ADR is offered as a dispute resolution option. AFI 51-1201, paragraph 22.1 makes the installation Staff Judge Advocate (SJA) or the servicing Labor Law Field Support Center (LLFSC) attorney primarily responsible for dispute screening unless the function is delegated to the installation ADR Manager.

Depending on the installation's volume of workplace disputes, delegated dispute screening may be accomplished by intake coordinators using checklists and guidelines approved by the legal office and ADR Manager. Keep a copy of each screening sheet[12] in the ADR file. The determination of whether a dispute is appropriate for ADR must be done ***before*** mediation is offered to the parties. Screening involves not only following the legal guidelines of

(10) AFI 51-1201, paragraph 31.2.

(11) AFPD 51-12, paragraph 3. See also AFI 51-1201, paragraph 2.

(12) Sample screening sheets are found in Appendix 1-B.

what can be mediated, but also assessing the parties' individual circumstances and looking behind the issue in controversy. ADR Managers can presume that oral disputes are appropriate for ADR and do not require screening before offering ADR to the parties, unless the dispute is synopsized in writing.[13]

If the determination is made that a case is inappropriate for ADR, the ADR Manager must make sure that the determination is captured in writing and reviewed and approved by the SJA (including the servicing LLFSC attorney, if applicable), and retained in the appropriate case file. In any case, where authorized agency officials disagree about the suitability of ADR to resolve a dispute, the commander or designee will make the final determination. See AFI 51-1201, paragraph 22.8. Options available for case screening are outlined in AFI 51-1201, paragraphs 19 and 22.

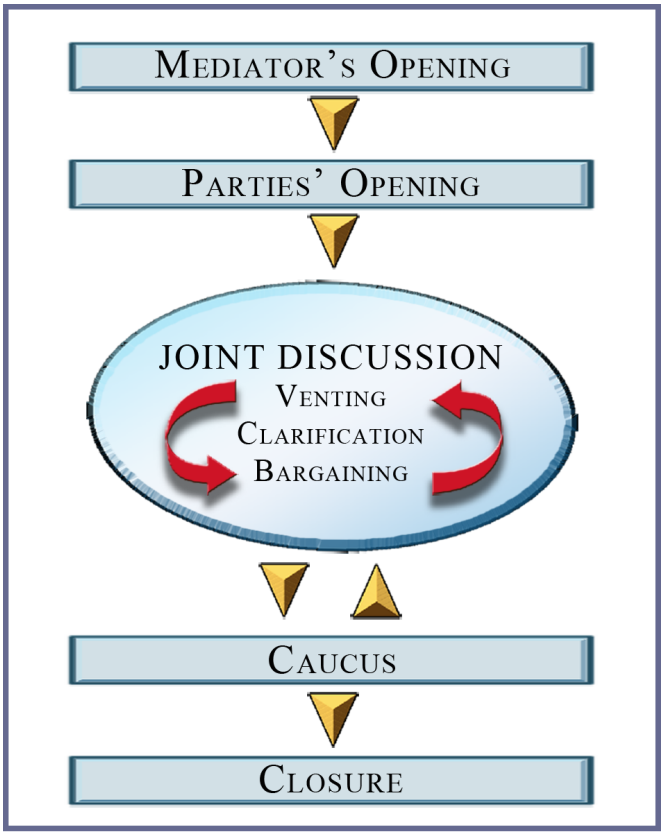


FIG 1. AIR FORCE MEDIATION MODEL.

a. Factors Favoring Mediation

Though not an exhaustive list, if a dispute exhibits one or more of the following characteristics, it is probably appropriate for mediation:

- The parties are interested in seeking settlement of the dispute, but personality conflicts or poor communication between the parties or opposing counsel adversely affect settlement negotiations;
- There are underlying issues propelling the dispute that are not part of the formal dispute and cannot be remedied through the traditional process;
- A continuing relationship between the parties is important or desirable;
- The complainant/grievant demands, or the agency's view of the case, are unrealistic, and a discussion of the situation with a mediator may open a dialogue toward the discovery of options for mutual gain;
- Traditional settlement negotiations have reached an impasse and the parties wish to avoid establishing precedent;
- The parties wish to resolve disputes involving MSPB appeals, EEO complaints,[14] administrative grievances, and grievances under a negotiated grievance procedure that provides for ADR;
- The parties wish to resolve disputes involving labor and management relations, including bargaining impasses, allegations of unfair labor practices, and grievances under a negotiated grievance procedure. Management and the union may also agree to

(13) AFI 51-1201, paragraph 22.

(14) Under EEOC guidelines, agencies may determine ADR to be inappropriate based on case-specific considerations, or limit its availability by geographical location or issue, but they may not exclude entire bases (i.e., race, color, religion, sex, national origin, or disability) from ADR consideration. Management Directive (MD)-110, Chapter 3, § II (A)(5).

mediate a grievance under a negotiated grievance procedure (NGP) that is silent as to ADR. In such situations, the ADR Manager should consult with the installation's labor relations officer or labor law attorney for requirements involving written acquiescence of the parties to engage in mediation when an NGP is silent as to ADR; or

- The parties desire a prompt mutually acceptable resolution in lieu of the time consuming processes of the traditional dispute systems.

b. Factors Not Favoring Mediation[15]

Ordinarily, the following types of disputes are inappropriate for mediation:

- An indication that fraud, waste or abuse was committed by either party;
- Allegations of criminal misconduct or complaints filed under Article 138, Uniform Code of Military Justice (UCMJ);
- Civilian position classification appeals that involve the technical interpretation and application of Office of Personnel Management position classification standards;
- The case involves significant legal, policy, or constitutional issues, and one of the parties desires a precedent (Note: ADR Managers unsure of whether a particular case touches on one of these issues should consult the appropriate specialist in the Civilian Personnel Office (CPO) and an attorney in the installation legal office.);
- The dispute significantly affects non-parties. For example, a dispute whose resolution would significantly affect working conditions of non-party employees, or significantly change the interpretation of a collective bargaining agreement, may be inappropriate for mediated settlement;
- There is a need for uniform treatment toward an issue or disputant. For example, the issue has nationwide impact or many similar suits are pending and there is no legitimate reason to settle with only one party;
- The dispute involves military personnel quality force actions, such as involuntary administrative separations, denials of reenlistment, resignations, promotion propriety actions, and officer grade determinations;
- Development of a full public record is important;
- Agency counsel determines the agency must maintain continuing jurisdiction over the matter or finds it appropriate to file a motion to dismiss or summary judgment; or
- Disputes in which there is substantial evidence that the claimant initiated the action to harass or intimidate, or is otherwise flagrantly abusing the process.

3. When to Offer Mediation

Although mediation can be effective at any stage of a dispute, it is generally accepted that using it early in a dispute carries a greater chance of success. One reason for this success is that the early stage of a dispute tends to be informal—an environment well suited to mediation and most other ADR techniques. Another reason is that parties' positions tend to harden the longer a dispute continues. Thus, if a dispute is considered appropriate for mediation, then mediation generally should be offered as soon as practicable, consistent with AF policy to resolve civilian workplace disputes at the lowest level possible. Remember that parties who elect to mediate a dispute may, if no settlement is reached, resume the applicable complaint or grievance processes if relevant time standards are met.

(15) The ADRA, 5 U.S.C. § 572(b), lists six specific circumstances in which an Agency must consider not using ADR. These circumstances are included in the Factors Not Favoring Mediation. Keep in mind, the presence of one or more of these factors does not definitively mean mediation should not be offered. Each case should be evaluated individually. If after discussing relevant factors the parties wish to mediate and the relevant Agency departments concur, mediation may well be productive.

Also, unsuccessful mediation at an early stage of a dispute does not preclude successful mediation later. Sometimes parties may feel uncomfortable settling a dispute at an early stage because they lack knowing enough of the facts and fear making a bad deal. As a dispute works its way through the system and more facts become known, parties often feel more confident in their knowledge and therefore are in a better position to explore options for resolution.

Keep in mind that unless there is a specific extension of time for conducting ADR, mediation does not toll the running of the limitations periods for using traditional dispute resolution processes. Thus, for example, if the parties to a potential workplace grievance desire to attempt mediation before the grievance is filed, and the negotiated grievance procedure requires a grievance to be filed within 20 days[16] after the event giving rise to the grievance, conducting the mediation does not toll the running of that 20 day period unless the negotiated grievance procedure specifically allows a longer period when mediation is attempted, or the parties expressly agree to extend the period. In EEO complaints, the Equal Employment Opportunity Commission (EEOC) has addressed time limitations somewhat by automatically extending the informal processing period from 30 days to 90 days when ADR is chosen.[17] However, the EEOC's adjustment to the processing period does not change the 45-day filing period for a complaint.[18] In adverse personnel actions, the MSPB allows the employee an additional 30 days to appeal if mediation is attempted.[19]

Below are some general guidelines for ADR Managers to consider when offering mediation to the parties.

a. Equal Employment Opportunity (EEO) Complaints

Like the Air Force, the EEOC supports the use of ADR throughout the complaint process and encourages its use at the earliest stage of a dispute.[20] According to the EEOC, agencies must make available an ADR program in both the informal pre-complaint and formal complaint stage of the EEO complaint process.[21] The EEOC has developed an ADR Policy[22] setting forth core principles regarding the use of ADR while allowing agencies flexibility in the development of their ADR programs.

(16) This time period is notional. Actual time limits are set forth in the NGP.

(17) See 29 C.F.R. § 1614.105(f).

(18) See 29 C.F.R § 1614.105(a)(1).

(19) See 5 C.F.R. § 1201.28, Case suspension procedures.

(20) Under 29 C.F.R. Part 1614, EEO claimants can elect ADR in lieu of the informal complaint process, if offered by the Agency. Should ADR not resolve the matter, the complainant does not resume the informal complaint process, but rather is provided a Notice of Right to File a Formal Complaint by the EEO Counselor. See 29 C.F.R. § 1614.105(f).

(21) The EEOC's regulations governing federal agency EEO complaints are found at 29 C.F.R Part 1614.

(22) See EEOC MD-110 (July 17, 1995), Chapter 3, § II, EEOC's ADR Policy Statement.

According to the EEOC, ADR programs must adhere to certain core principles:

- ADR must further the mission of vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes;
- ADR programs must be fair and be based on voluntariness, neutrality, confidentiality and enforceability;
- ADR programs must be flexible by adapting different ADR techniques to fit changing program needs and caseloads; and
- ADR Programs must include adequate training and evaluation components.[23]
- EEOC Management Directive 110 (MD-110) is a document issued by the EEOC to provide federal agencies with EEOC policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by 29 C.F.R. Part 1614 of EEOC regulations. EEOC regulations and MD-110 require all agencies to establish an ADR program available to complainants during the pre-complaint process as well as during the formal complaint process.[24]

An important practice point to note when using mediation in the pre-complaint stage (or informal stage), is that complainants ***must be advised*** that they can elect to seek resolution through the use of ADR or through the traditional EEO counseling process. If the Air Force agrees to use ADR in a particular case, the pre-complaint processing period is extended to 90 days.[25] If complaints are not resolved through the use of mediation within 90 days, then complainants are issued a notice of a right to file a formal discrimination complaint. In short, complainants must understand that they are making an "either/or" choice between ADR and the traditional EEO counseling process. If the traditional EEO counselling process is selected, ADR can be used if the parties desire but the processing period is not extended to 90 days. The EO Specialist who advises the aggrieved of his/her rights is precluded from serving as the mediator. See MD-110, Ch. 3, § III.

In EEO cases where the complainant has filed a civil lawsuit in federal district court, the ADR Manager must contact the Labor Law Field Support Center (LLFSC) at (240) 612-4700 and SAF/GCD, DSN 223-2795, prior to the use of mediation.

b. Administrative Grievance

Air Force Instruction 36-1203 encourages use of mediation during all phases of the administrative grievance procedure with the consent of the parties to the grievance. Immediate supervisors, who may receive a request from an employee seeking informal resolution of a matter before filing a formal grievance, can utilize the services detailed in the installation ADR Plan. This is part of the ADR Manager's marketing duties. When a formal written grievance is filed, the locally designated deciding official is responsible for determining whether the parties are willing to attempt mediation.[26]

c. Negotiated Grievances/Unfair Labor Practice

The ADR Manager must review the applicable CBA or Union MOA and consult with the installation's labor relations specialist and SJA office when mediation is possible for grievances filed under the negotiated grievance procedure. Further review and consultation is necessary to determine when mediation may be offered and what constraints may apply according to the applicable CBA or MOA.[27]

(23) See EEOC MD-110, Appendix H.

(24) See 29 C.F.R. § 1614.102(b)(2); see also MD-110, Chapter 3, § I.

(25) See 29 C.F.R. § 1614.105(f).

(26) See AFI 36-1203, Administrative Grievance System, paragraph 11.5.2.

(27) See Appendix 1-D for the ADR Union Election Memorandum.

d. Merit Systems Protection Board Appeals

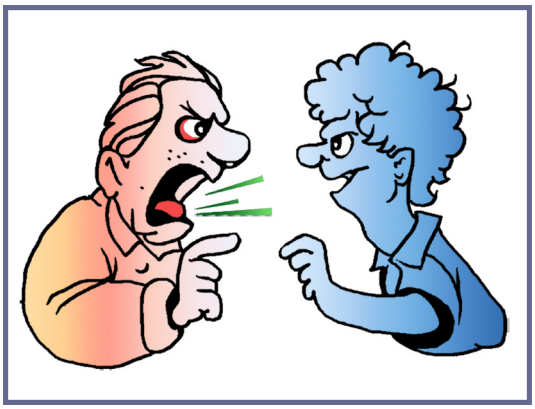
The MSPB encourages parties to use ADR methods and provides for ADR throughout the appeal process.[28] The ADR Manager must coordinate with the local SJA or designated LLFSC attorney and installation's civilian personnel office prior to offering mediation in disputes involving MSPB appeals. The same coordination is necessary for "mixed cases" filed first with the local EO office. A mixed case is one that alleges discrimination in connection with a claim that is also appealable to the MSPB.[29]

e. General Workplace Issues

Guidelines and procedures for undefined, non-process disputes (often verbal disputes) will vary from installation to installation. An ADR Manager must consult his/her local ADR plan for the appropriate guidelines and procedures addressing this type of dispute.

4. Determining Appropriate Participants; Getting the Right People to the Table

a. Parties, Representatives and ADR Support Providers



Air Force Instruction 51-1201, paragraph 27 addresses participants in mediation. At a minimum, the ADR Manager will need a mediator and the parties to the dispute at the mediation. The parties may appear alone or with representatives of their choice.[30] For mediation apprenticeship or mentoring training, and with the parties' consent, a co-mediator or mediation mentor/mentee may also participate at all stages of the proceedings, including private caucuses. ADR Support Providers[31] (i.e., subject matter experts), referred to as "SMEs," may attend to the extent necessary to provide technical support or special expertise to either a party or the mediator. Before scheduling a session, the ADR Manager should assess which SMEs, if any, have a high probability of being required to give expert information during mediation. The ADR Manager should schedule these SMEs for the mediation. ADR Support Providers are usually available during the mediation in person or by telephone to answer questions that may arise during mediation. All ADR Support Providers are subject to the confidentiality requirements that apply to the parties.[32]

The parties to mediation of an AF workplace dispute usually consist of the employee and the agency or one of its subordinate organizations ("management"). Although management decides who represents the Air Force at the table, the ADR Manager is well advised to offer considerations to management that will assist them in choosing the right individual to represent management during mediation. Some considerations for selecting

(28) See 5 C.F.R § 1201.28.

(29) See EEOC, MD-110, Appendix C, § B,1.

(30) Review the installation ADR plan or policy and collective bargaining agreements for any local attendance and participation requirements.

(31) AFI 51-1201, paragraph 17. ADR Support Providers are individuals who provide technical assistance to the parties or the neutral to an ADR proceeding. Certain key installations functions serve in this role on a frequent and reoccurring basis, such as Civilian Personnel, Legal, and Finance.

(32) AFI 51-1201, Confidentiality, section D.

the management representative are: proximity to the employee in the supervisory chain of command, knowledge of the issue, and previous positive discourse with the employee. The answers will depend on the facts and circumstances of each dispute. Immediate supervisors can be appropriate officials to represent management in workplace mediations because they have knowledge of the events and may have sufficient authority to agree to any reasonably foreseeable settlement terms. If immediate supervisors are not serving as management officials in mediations, it is recommended that they have input to any preparation or planning by management prior to mediation sessions.

There will be disputes when immediate supervisors are not the best representatives. For example, if the immediate supervisor is accused of sexual harassment, that supervisor has a personal stake in the outcome that may conflict with what might be the best outcome for the agency. Such a conflict would make that supervisor an inappropriate choice to participate on behalf of management during the mediation. In such a case, the ADR Manager should advise management that an official higher in the chain or outside the chain of command altogether is a better choice. On the other hand, management officials not personally involved in the events giving rise to the dispute also probably have no personal knowledge of the case, which can frustrate mediation efforts and may deprive the employee of the outlet for emotional release that often leads to resolution. Rather than adopt a blanket policy, management along with the ADR Manager should examine each case on its merits to determine the right person to represent management in mediation.

Regardless of who represents management, that person must have sufficient authority to agree to reasonable settlement terms on behalf of management. For example, the management official named in an EO complaint does not have signature authority on a settlement agreement.[33] If authority is lacking or the management official at the mediation is uncertain about it, the official present must locate the person in his chain with authority. The person with authority must then be readily available by phone or in person to discuss and authorize settlement terms. The ADR Manager can prevent this delay by informing management that they must identify who will serve as the settlement authority for the mediated dispute.

Management officials chosen by their chain of command to participate as the responsive management official could consider their participation as coerced or involuntary. However, since the official party is the Air Force, this practice still satisfies the requirement that parties participate in mediation "voluntarily." Some of the reasons for reluctance to participate include the perception of weakness or misunderstanding of the process. ADR Managers can alleviate management officials' concerns by educating them about the mediation process and the underlying policies supporting ADR.

b. Union Participation in Mediation

Unions can participate in workplace mediations in two ways. One is as the designated representative of the employee. The other is as the representative of the bargaining unit during a "formal discussion" between one or more representatives of management and one or more bargaining unit members, or their representatives, concerning grievances or conditions of employment.[34] Generally, unless the CBA or other negotiated agreement states otherwise, the union has a right to be present during mediation of a negotiated grievance.

In the case of mediation of EEO complaints, the FLRA has taken the position that

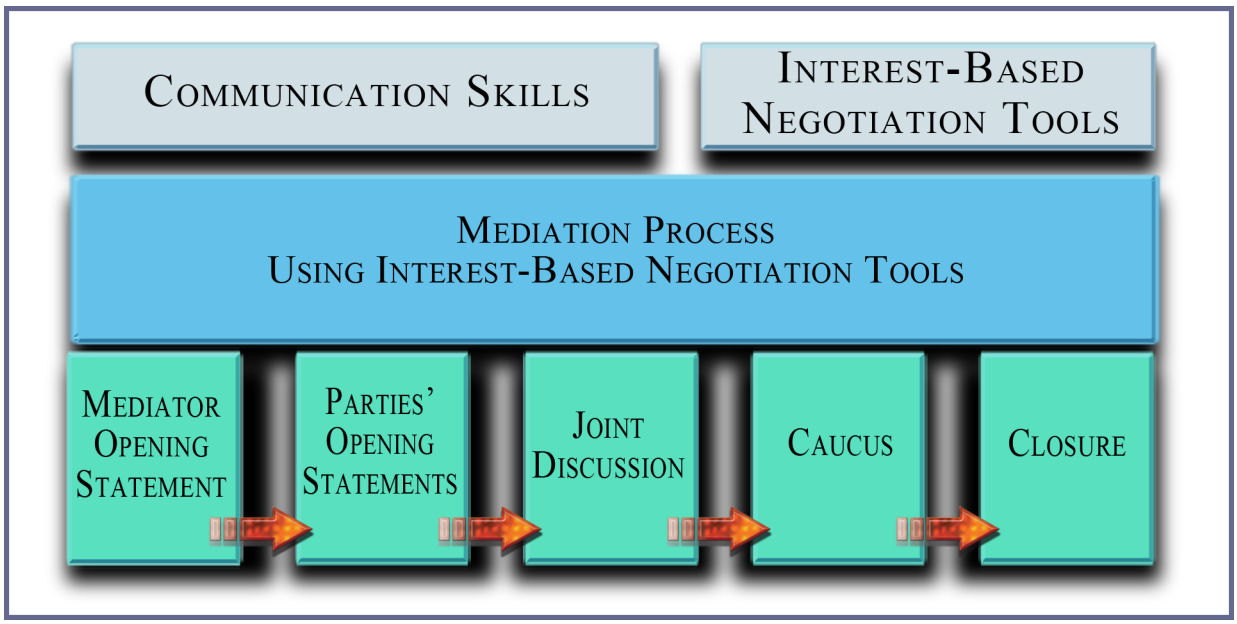
(33) See EEOC MD-110, Chapter 3 Section VI.A.9. Alleged discriminating officials are likely to have a conflict and should not serve as the settlement or signatory authority. However, nothing prevents them from participating in the mediation session on behalf of management.

(34) See 5 U.S.C § 7114(a)(2)(A).

mediation of a formal EEO complaint in which the complainant is a bargaining unit member is a "formal discussion" under the Federal Service Labor-Management Relations Statute,[35] giving the union the right to attend the mediations even if complainants have not designated a union official as their representative. In 1999, in *Luke AFB v. FLRA*[36] the U.S. Court of Appeals for the 9th Circuit agreed with the Air Force that EEO complaints are not "grievances" for which the union has any formal discussion rights and reversed the FLRA. Then, in January 2003, the U.S. Court of Appeals for the D.C. Circuit, arguably the most influential of the federal circuit courts of appeals, disagreed with the 9th Circuit and upheld the FLRA in *Department of the Air Force, 436th Airlift Wing, Dover AFB v. Federal Labor Relations Authority*.[37] The D.C. Circuit held that an EEO complaint is a "grievance" and that mediation of a formal EEO complaint is a formal discussion, giving the union a right to attend if the complainant is a member of the bargaining unit represented by the union. The court did leave open the question whether the complainant's objection to union attendance would defeat the union's rights (the complainant in *Dover* didn't object), commenting that such a "direct" conflict might result in an outcome favoring the complainant.

The LLFSC recommends the union be notified of an ADR session and provided an opportunity to attend such sessions regarding EEO complaints of bargaining unit employees only after a "formal" complaint has been filed. If the complainant/bargaining unit employee objects to the union's presence, contact the LLFSC (240-612-4700) for more detailed guidance.

5. What the Parties Need to Understand about Mediation



Throughout the intake process, the ADR Manager must ensure that the parties understand the nature of mediation and its availability to them as a self-determined means of resolving an issue in controversy. The education of participants in general is critically important to a successful ADR Program. As an issue proceeds through the intake process,

(35) 5 U.S.C. §7101-7135.

(36) For a brief description of the case, see Appendix 3-J.

(37) 316 F.3d 280 (D.C. Cir. 2003). For a brief description of the case, see Appendix 3-K.

the ADR Manager must ensure that all parties understand the mediation process, the role of the mediator and the mediator's relationship to the parties, and that the parties' participation in mediation is voluntary. A strong understanding of the process will allow the parties to make an informed choice to mediate and have a firm commitment to properly participate throughout the mediation process. Management needs to understand mediation to ensure that the most appropriate management official participates in mediation. The Alternative Dispute Resolution (ADR) Program Notice (EEO Complaints), available at Appendix 1-I, educates the parties for an EO-related mediation, but is not a substitute for effective intake by a knowledgeable individual.

Although the Air Force uses the facilitative mediation style, there are certain deviations to this model, which the ADR Manager can encourage the mediator to use in unique situations. If the parties are comfortable with the concept of mediation, but uncomfortable meeting with one another, the ADR Manager can explore several options. If the employee is uncomfortable with the person selected to represent the Agency, the ADR Manager may request management to consider changing the person representing the Air Force at the table. The ADR Manager may consider encouraging the mediator to modify the typical mediation process into a telephone, video-conference, web-based, or live shuttle diplomacy format.[38] In such a unique situation, the goal of mediation is still met by the parties, self-determination by the parties with assistance from a neutral.

a. Air Force Mediation Process

The AF facilitative mediation model requires the mediator to assist parties in the resolution of their issue in controversy by promoting voluntary agreement (or "self-determination") by the parties to the dispute. This model is described by the following stages.

STAGE 1 Mediator Opening Statement: The session is started by the mediator who begins with introductions followed by an opening statement. In the opening, the mediator usually addresses the principles and purpose of mediation, the structure for the session, and the parties' understanding of the process and commitment to it.

STAGE 2 Parties' Opening Statement: In the second stage of the mediation session parties have an uninterrupted amount of time to speak about the issue in controversy and share their view of the dispute. Parties should fully explain the issue, if possible, during their statement. Though the ADR Manager may provide some information to the mediator before the mediation session, the ADR Manager should encourage the parties to prepare a full explanation of their issues and interests for their opening statements.

STAGE 3 Joint Discussion: Joint discussion follows the conclusion of the parties' opening statements. During this stage the mediator facilitates the exchange of questions and answers between the parties. This may require very little participation by the mediator. This is also the stage where the mediator assists the parties in exploring potential options for resolution. The degree of participation by the mediator will depend on the extent and tone of the parties' participation in exploring potential options. The ADR Manager should provide the parties with the AF Negotiation Worksheet[39] prior to attending the session. The worksheet assists the parties in developing questions they would like to ask during the Joint Discussion and options for resolution.

STAGE 4 Caucus: "Caucus" is mediator jargon for a "private meeting" that can occur at

(38) Shuttle diplomacy is a technical term for mediation when caucuses are relied on heavily or even exclusively. In shuttle diplomacy, the mediation session may even start with separate caucuses rather than joint openings and then shuttle back and forth between the separate caucuses relaying information to the separate parties.

(39) See Appendix 1-L.

any time during the process. These private, confidential and one-on-one discussions between the mediator and each party are unique to mediation. Maintaining confidentiality after the caucus is of utmost importance in order to promote the free and open discussion that is so crucial to resolving a dispute. Parties should understand they have the power to ask for an individual meeting and that the mediator may request one as well.

STAGE 5 Closure: Closure is referred to as such because not all mediations end in settlement. The mediations that do end in settlement might have a very lengthy closure stage because the settlement agreement is a legally binding document and it usually takes significant time to ensure it reflects the parties' understanding and goes through the administrative and legal approving channels of the Air Force. If a settlement is not reached, the closure stage may involve the mediator reconvening a second mediation or informing the party who brought the dispute of their formal rights outside of the mediation process. Closure also includes the distribution of the mediation evaluation forms.

b. The Role of the Mediator and the Relationship to the Parties

A mediator facilitates communications, promotes understanding, focuses the parties on their interests (rather than their positions), and seeks creative problem-solving to enable the parties to reach their own agreement. Because interest-based problem-solving techniques are central to the AF facilitative mediation model, they are discussed in greater detail for the mediator in Section 2 of this *Compendium*.

Mediators in AF workplace disputes have considerable flexibility and discretion in how the mediation is conducted, but the mediators do not have the power to offer legal advice or subject matter expert advice to the parties. The parties are free to consult with experts, since the mediator cannot advise or judge. Parties can use their mediators as sounding boards. Some mediators find themselves shuttling between caucuses as conduits of information or serving as "referees" during joint session. The role of the mediator varies with the mediator's style and the needs of the parties.

c. Mediation Participation is Voluntary

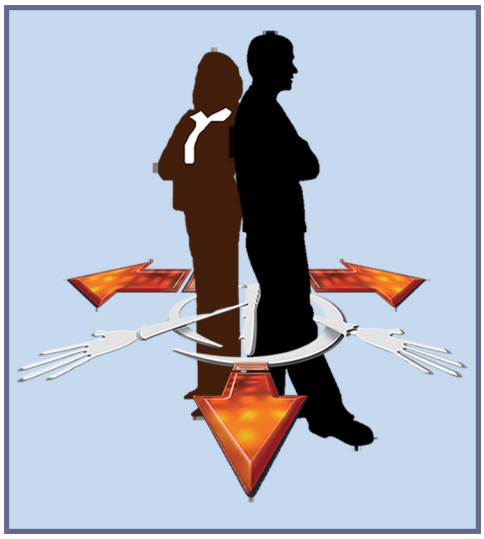
Parties, including the management official, should participate in mediation voluntarily. When parties agree to participate in a mediation session, they are agreeing to participate in "good faith." Good faith participation includes listening to the other party's statements without interruption, asking and answering questions during the session as needed, being open to the possibility of an agreement which resolves the issue in controversy, and cooperating in the closure of the session as appropriate. The mediators or the parties can end the mediation session when they see fit.

6. Mediation Offers are Accepted

Once all parties have been educated about mediation and its benefits, the majority of parties should agree to use mediation. This depends on effective marketing of the ADR Program by the ADR Manager and on the program's reputation (which is influenced by past participants sharing that they have had positive experiences with the mediation process

and mediators). Once it is determined that the dispute is suitable for mediation, management is first offered the opportunity to mediate and then the employee is presented with the unconditional offer to mediate. If either the management official or the employee declines mediation, the ADR Manager could explore and offer another form of ADR or a non-ADR dispute resolution technique to the parties. If both management and the employee accept mediation, the ADR Manager must schedule the mediation to occur within the next 15 days but no later than the next 45 days.

ARRANGING THE MEDIATION



Once the parties have agreed to participate in mediation, there is a significant amount of preparation that needs to be done by the ADR Manager. Juggling calendars is just one of the many tasks involved in getting the parties to the table. For a mediation to be successful, the ADR Manager should secure the parties' written agreement to mediate when they elect mediation. Also, the ADR Manager can coach the parties so that they can effectively participate.

The ADR Manager must ensure that:

- **All appropriate steps are taken to prepare for the mediation;**
- **The mediation services are provided promptly, properly, and to the satisfaction of the clients;**
- **All appropriate accommodations for a successful session are in place before the session begins; and**
- **All appropriate ADR Support Providers including the installation SJA are prepared and available to offer technical assistance on an issue in dispute, and if a settlement agreement is reached to review and coordinate prior to final approval.**[40]

How these steps are accomplished and who accomplishes them will vary at each installation. The ADR Manager must ensure that the mediator understands the installation's policy and process for mediation of workplace disputes prior to starting the mediation session.

1. Selecting the Mediator

The ADR Manager is responsible for having trained and qualified mediators at his/her installation or having access to trained and qualified mediators in the area available to mediate. The ADR Manager must maintain a list of qualified mediators, who may be full-time or collateral-duty mediators. Mediation is both a science and an art, so while some of the mediators at the ADR Manager's disposal may have been through a basic mediation course and understand the "science" of mediating—it takes hard work, natural talent, and practice to develop the ability to connect with people. The ADR Manager should check each prospective mediator's previous client evaluations, mentor mediator evaluation sheets, and successful completion of at least 30 hours of mediation training (to include combined classroom instruction and role play exercises) to ensure he/she is selecting quality mediators.

(40) See AFI 51-1201, paragraphs 14 and 17.

The ADR Manager must ensure that all collateral-duty mediators are appointed by the installation commander or designee in writing. [41]

In situations where a full time or collateral-duty mediator from the installation is not available, the ADR Manager may request a mediator from another installation or contact SAF/GCD and request assistance in finding a qualified mediator, provided funding[42] is available, or seek mediators from other federal agencies through the Interagency Shared Neutrals Program or the local Federal Executive Board. In some situations, the ADR Manager may also consider using contract mediators, if time and funding is available.

2. Educating the Parties

Educating the parties about mediation is essential for a successful program. Education of the parties begins with marketing the ADR program and continues through coaching the parties during intake of the dispute and indentifying the issues in controversy. The success of the program is determined by how well the ADR Manager educates current and future parties. This is because educated parties will make sound and informed choices to mediate and will possess a stronger commitment throughout the mediation process. The ADR Manager must ensure that all parties considering mediation receive complete and accurate information about the installation's mediation program for workplace disputes. This must occur before asking parties whether they are willing to participate. Inadequate knowledge about the mediation process will greatly hinder the credibility of the mediation process and diminish its opportunity to resolve the dispute.

3. Informed Decision to Mediate

The following is a list of the topics and issues the ADR Manager should cover with each party to ensure that their decision to mediate is an informed one. It is vital that the parties understand each topic and issue in order to make an informed decision about whether to mediate. Please also note that these items are listed in Appendix 1-K. If either party decides against ADR, encourage them to fill out an Alternative Dispute Resolution Questionnaire[43] in order for the program manager to gain a better understanding of why ADR was not chosen.

- EEO complainants, administrative grievants, or grievants under a negotiated grievance procedure (NGP) do not waive their rights to continue with the formal dispute resolution process by attempting mediation. If mediation does not succeed, they may resume the formal process as long as applicable time limits are met. If the parties ask for advice on the applicable time limits, the ADR Manager must refer parties to the appropriate office such as the EO Office or the Civilian Personnel Office. When complainants or grievants sign settlement agreements though, they are entering into legally binding contracts waiving their rights to continue in the formal processes.
- Complainants and grievants must understand how the mediation process differs from

(41) See AFI 51-1201, paragraph 25.2.

(42) See AFI 51-1201, paragraph 23.2.

(43) See Appendix 1-J.

the procedures it is being used in lieu of, such as the NGP or the EEO complaint process. The ADR Manager must remind complainants and grievants that mediation, and any resulting settlements, depend on the voluntary agreements of the parties involved in the disputes. No one can force parties to settle on terms unacceptable to them.

- The ADR Manager must carefully and fully explain confidentiality and impartiality to parties explaining to them why confidentiality and impartiality are keys to the success of mediation. Also, make certain that all parties understand what a caucus is and why it makes mediation a powerful dispute resolution process.
- The ADR Manager must inform the parties about any information concerning the mediator that might create a reasonable question of conflict of interest or partiality of the mediator. This could include any acquaintance between the mediator and any parties and/or their representatives. For mediators who are AF civilian or military personnel, the ADR Manager must inform the parties about the mediator's unit of assignment. For AF civilian employee mediators who are also union officials, the ADR Manager must inform the parties about the mediator's union affiliation.
- The ADR Manager must inform the parties about how a case is scheduled, who they can bring with them to the table, how a mediator is assigned, what happens if there is no agreement, and remind parties who are complainants or grievants about their responsibility to comply with applicable timelines for resuming or commencing other dispute resolution processes.
- It is important that the ADR Manager inform parties that they have a right of representation during a mediation session. This means that, at their option, parties can have their representative present during the mediation session or simply be available by phone for consultation.
- The ADR Manager must inform the AF official who approves or authorizes any AF action in the dispute about the complainant's or grievant's desire to mediate.
- The ADR Manager must assure that case screening was properly conducted to ensure the matter is appropriate for a mediated resolution.
- In addition, the ADR Manager must inform responsible management officials and others who might need to attend the mediation with the same information about the process that was given to complainants or grievants. The AF management officials then need to decide with the ADR Manager's assistance if they are willing to participate and, if so, who will represent management at the table.[44]

Later in this *Compendium* is more information on management participation.

4. Party Negotiation Preparation

The following is a list of additional topics and issues that the ADR Manager should cover with each party to a dispute before a mediation session begins ensuring that participating

(44) Id. It is important to remember that in a workplace dispute, the Agency, not the individual supervisor, manager, or other management official, is a party to the dispute. Management officials who participate in mediation represent the Agency's interests, not their own. Therefore, individual management officials do not necessarily have the same "right" to refuse to participate in mediation as an individual employee. For this reason, many installations have issued command policies requiring managers and supervisors to attempt mediation if requested by the employee and the case is appropriate for ADR. Such policies are acceptable as voluntary choices by the Agency to use ADR, even if the individual manager or supervisor personally disagrees with that choice.

parties are well prepared for their negotiation session:[45]

- Where the session will be conducted (location);
- How long the parties can expect the session to last;
- What is and what is not allowed in the room during the session—generally, beepers, cell phones, laptops or pagers are not allowed on during the session;
- When breaks are permitted—usually the mediator allows breaks for the parties as needed;
- What they can expect from the mediator–the mediator is likely to explain the mediation process again to them at the start of the session;
- What is expected from each party—parties are expected to prepare and present an opening statement addressing the issue in controversy;
- What is allowed during the session—although parties and their representatives may take notes during the negotiation session, the mediator will confiscate and shred the notes at the end of the session preserving the parties' rights to confidentiality;
- What can the parties bring to the mediation—parties are allowed to bring documents to the session and leave with them at the end;
- What is the scope of the parties' mediation—they will address the issue in controversy and work towards a resolution that will apply to them and not to anyone outside the session;
- What is co-mediation—the rules of confidentiality apply to both mediators;
- What happens if the parties reach a resolution and document their understanding in a written settlement agreement—the parties' agreement is subject to review and approval ensuring legal and regulatory compliance and the ability of the parties to carry out its terms;
- How they can best participate—good faith participation by the parties begins with keeping an open mind throughout the mediation process; and
- What happens at the end—parties should inform the ADR Manager whether their session is adjourning for the day and will continue on another day, is at impasse, or is concluding with a mutually agreeable resolution to their dispute.

PREPARING FOR THE MEDIATION SESSION

The ADR Manager has important responsibilities ensuring that accommodations and logistics will facilitate a successful mediation session. The ADR Manager must address the logistics of finding a mutually acceptable time, place, and date to hold the mediation.[46] The ADR Manager must pay special attention to the following: (1) neutrality of the location; (2) availability of a caucus room; (3) access to telephones for ADR Support Providers; and (4) access to a computer and printer to assist in the drafting of a settlement agreement. As the person responsible for these arrangements, the ADR Manager must also consider the special needs of the parties or non-party participants, such as accommodations for any person with a disability.

Mediators will have different requests of ADR Managers depending on the style of the mediator. The ADR Manager must provide mediators with basic logistical information about the session, such as directions to the session and parking information, as well providing mediators with the basic general nature of the dispute (e.g., NGP, MSPB, or EEO). However, the ADR Manager should anticipate that some mediators will request additional information about the dispute. Some mediators believe that having detailed information

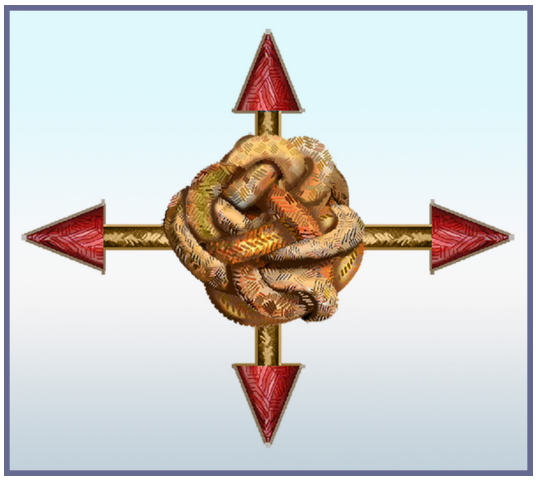
(45) The mediator will also address many of these topics at the formal start of the mediation.

(46) See Appendix 1-C for the Mediator Case Management Worksheet.

about the issues in controversy and possible options for resolution will better prepare them for mediation. Other mediators, on the other hand, want to enter the session completely neutral and fear hearing or reading about the dispute before holding the mediation session out of concern that such preparation may cause them to develop biases. The ADR Manager must consider how much information the mediator expects and balance that request against the amount of information necessary for a successful mediation. Additionally, the ADR Manager must remind mediators who are in the military that they should not wear their military uniforms to the session.

Review and coordination of all settlement agreements from mediations is required by AFI 51-1201, paragraphs 14.5 and 28. The ADR Manager must ensure that the proper offices review agreements for legal and regulatory compliance and the ability of the parties to carry out the terms of the agreements. Advance planning of the coordination requirements by the ADR Manager will ensure that proper offices can effectively and timely review the agreements.

1. Agreement to Mediate



It is a best practice for the ADR Manager to confirm the parties' agreement to mediate in writing. A signed letter from the ADR Manager is sufficient. This letter should state the time, place, and likely duration of the mediation session. In addition, the ADR Manager should recommend to the selected mediators that they reiterate to the parties at the start of the session what the parties should expect from the mediation process.

The Sample Mediation Memorandum, Appendix 1-E, provides a thorough explanation of what mediation is and what it is not. The confidentiality and representation sections of this memorandum are especially important in this regard. A Mediation Agreement[47] serves to confirm the parties' understanding about the mediation process and serves as the basis for the agreement to mediate. Accordingly, the Agreement to Mediate[48] is very short and merely documents the parties' agreement to abide by the terms of the mediation letter.

Many workplace mediation sessions last about four to six hours, some last less. In more complex cases, however, mediations can take longer, either stretching into the evening or over two or more days. The ADR Manager should ensure the parties schedule the appropriate amount of time for the mediation.[49]

2. Scheduling the Mediation

Check with the mediator, all participants, and any required ADR Support Providers before scheduling the mediation session. Ideally, the ADR Manager should schedule the mediation to take place within 15 days, but no later than 45 days from receipt of the parties' agreement to mediate.

(47) See Appendix 1-F.

(48) See Appendix 1-G for an Agreement to Mediate form for the negotiated grievance process.

(49) For planning purposes, the parties should set aside at least six hours for the mediation session.

3. Preparing for a Settlement Agreement

a. Have Settlement Agreement Approving Authorities Available

Prior to the mediation session, the ADR Manager should assure that appropriate managers, supervisors, and attorney[50] are available by phone to answer substantive questions raised by the parties regarding their ability or authority to agree to particular terms in a settlement agreement. This simple step can ease a lot of administrative "red tape" that can sometimes delay or prevent settlement. The signature or approval of the following officials for all settlement agreements is either required or highly recommended: (1) the management official(s) with settlement authority for approval of the terms of the agreement; (2) the appropriate installation or LLFSC attorney for legal sufficiency; (3) the local Civilian Personnel Office (may involve multiple functions, e.g., Staffing, Classification, Non-Appropriated Funds, or Labor & Employee Relations) for implementation of the terms of the agreement within the personnel system; and (4) Union representative, if applicable.

During the mediation session, either party is free to consult with their lawyers or experts to ensure terms and conditions to a settlement are legal and that the party has authority to agree to them.

b. Parties Must Have the Authority to Agree to Satisfy the Agreement

If there is uncertainty about a party's authority to agree to something, or a question regarding the legality of a particular term, then the parties should consult the appropriate subject matter expert. Such consultations need to be timely, which is why it is again strongly recommended the ADR Manager secure the availability of appropriate experts by phone or in person during the mediation session.

After coordinating with the Office of Personnel Management (OPM), the EEOC has published guidance on the authority for implementing settlement agreements in EEO cases, which is worth quoting here in full:

> *There may be some instances where a proposed informal settlement appears to be at odds with normal personnel procedure or practice contained in regulations implementing Title five of the United States Code or processing guidance of the OPM. Such situations could arise where OPM regulations or guidance foresee personnel actions taken in the normal course of business and do not generally discuss personnel actions taken pursuant to court order or a settlement. Title VII provides authority to enter into settlements of EEO complaints, and, likewise, Title VII provides authority for agencies to effectuate the terms of those settlements.*
>
> *Chapter 32, Section 6(b) of OPM's Guide to Processing Personnel Actions describes the procedure for documenting personnel actions taken as the result of a settlement agreement, court order, or as the result of an EEOC or MSPB decision. The purpose of this procedure is to protect the privacy of the employee.*
>
> *Rather than including personal and irrelevant settlement information on the employee's SF-50, the SF-50 may be processed with the computer code "HAM." "HAM" is a computer code that prints on the SF-50 a citation to 5 [Code of Federal Regulations] C.F.R. § 250.101. If an agency's computer system does not permit the use of the citation "HAM," then the SF-50 may cite to 5 C.F.R. § 250.101. This section of the C.F.R. indicates that the personnel action is processed under an appropriate legal authority.*

(50) The attorney may be from the installation's legal office or the LLFSC.

The EEOC provides other helpful guidance on the broad authority provided by Title VII to reach settlements on back pay independent of the Back Pay Act (5 U.S.C. §5596), without findings of discrimination, payment of cash awards without corresponding personnel actions, and payment of lump sum with corresponding personnel actions in EEOC Management Directive MD-110, Chapter 12.

ADR MANAGER'S DUTIES AFTER THE MEDIATION

1. Settlement Agreements

The ADR Manager must make clear to parties that agreements reached as the result of mediation sessions are binding to the same extent any settlement agreements are binding on the parties and that the same enforcement procedures apply to settlement agreements reached in mediation. Settlement agreements need not be signed by the mediator, but must be signed by each party. Party representatives may also sign. Settlement agreements pertaining to a dispute in which there is an official dispute file, such as an EEO complaint or employee grievance, become part of the official dispute file at the applicable office. Only when there is no official dispute file are settlement agreements saved in ADR case files. The ADR Manager is responsible for the agreement being placed in the correct and appropriate file.

Specific enforcement provisions apply to the enforcement of settlement agreements that resolve EEO complaints. See 29 C.F.R. §1614.50. Complainants who reach a settlement agreement during mediation of their EEO complaints must follow EEOC regulations to enforce the agreement. EEOC regulations require complainants to contact the "EEO Director" within 30 days of an alleged failure by the AF to comply with the terms of the settlement agreement. The AF installation has 30 days to issue a decision on whether it failed to implement the settlement. The complainant can then appeal the AF's decision to the EEOC's Office of Federal Operations within 30 days, or, if the AF fails to issue a decision, 35 days after the complainant filed his/her allegation of noncompliance with the installation's EEO Director.[51] If the EEOC finds failure, it may order compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. For agreements other than EEO cases, the party alleging noncompliance would need to contact the ADR office or Civilian Personnel Office depending on the language for notification in the agreement.

In situations where EEO complainants allege retaliation after the settlement agreement, they must contact an EEO Counselor to initiate new complaints based on retaliation. Generally, in such situations, complainants cannot have settled complaints reinstated even if the settlements include non-retaliation clauses.[52]

(51) See 29 C.F.R. § 1614.504.

(52) See Martinez v. Department of the Navy, EEOC Appeal No. 01934493 (1993); see also 29 C.F.R. § 1614.504(c).

The ADR Manager must recognize that allegations of noncompliance with settlement agreements and the enforcement of their terms requires a delicate balancing between fixing the problem and undoing the repairs to the parties' relationships achieved in mediations. The ADR Manager must carefully investigate allegations fully when appropriate and properly correct breaches in any form, whether the breaches concern confidentiality or other contractual terms. The ADR Manager should coordinate inquiries and solutions to allegations of noncompliance with his/her installation's attorney.

Not every agreement must be in writing, though a written settlement is the only way to ensure the agreement is legally binding. Complainants and grievants may choose to immediately withdraw their complaints or grievances as a result of the mediation session. Partial settlements (i.e., parties' tabling of issues or agreement) present potential complications because of the release language typically contained in settlement agreements. Typically, settlement agreements contain a default clause releasing all past, present and future workplace claims related to the dispute. ADR Managers, mediators, and the parties must address a narrower release in their settlement agreement if the intention of the parties is a partial resolution of the disputes. Partial settlements are discouraged.

2. Ensuring Quality Mediation Services

The richest ADR Programs are those that meet the needs of their clients by providing timely and high-quality ADR services. This requires the ADR Manager to maintain a roster of trained and talented mediators who are available to mediate disputes.

Since the ADR Manager does not attend the mediation sessions, the best way to ensure that mediation was used appropriately for particular disputes and that the mediators did superior jobs is through client evaluations. A sample client evaluation can be found in Appendix 2-J.

An ADR Manager who receives a substantiated complaint or series of complaints about a mediator must consult with the agency counsel. Depending on the facts and circumstances, the ADR Manager may have to ensure that proper corrective action is taken for the sake of the program, such as imposing training requirements for the mediator or decertifying or relieving the mediator of further mediation duties. If the complaint can be traced to a specific mediation session in which the mediator's conduct materially affected the outcome of the mediation to the detriment of one or both parties, the ADR Manager may need to arrange a new mediation session with a different mediator. More information concerning complaints about mediation services is available at AFI 511201, paragraphs 40.1 and 40.2.

CONTINUOUS DUTIES FOR ADR MANAGERS

1. ADR Program Development of High-Quality Mediators

The Air Force has trained over 2,000 personnel as mediators. Some of those who were trained have mediated dozens of cases and have earned reputations as first-rate mediators. Others have mediated few or no cases at all. Given the range of mediation experience, SAF/GCD highly recommends that ADR Managers integrate a mediation mentoring program into their mediation programs. Pairing experienced AF or private-sector mediators ("mentors") with trained, but inexperienced, AF mediators ("mentees") can give mentees hands-on apprenticeship training. Even if the mediation does not settle, the inexperienced AF mediator still benefits from the training. If mediation produces a settlement, the Air Force not

only receives a training benefit, but also resolves the dispute. Because the difference in cost between solo mediation and mediation-mentoring is usually negligible, SAF/GCD encourages training through mentoring whenever possible. Appendix 2-L is a sample Co-Mediator/Mentor Mediator evaluation form.

It is critical for new mediators to first observe or co-mediate a few mediation sessions prior to mediating solo. Co-mediation is an art in and of itself. Mediators, who are going to work together during a session, need to meet prior to the mediation session to clarify roles and styles. Co-mediation is not only reserved for new mediators. Some experienced mediators find it helpful to have the assistance of another neutral. It can be beneficial when the parties are of two difference races or genders to have co-mediators of two different races or genders. Two mediators often provide more comprehensive reality testing with the parties during caucuses and have a tendency to generate more options for consideration because of the various backgrounds and expertise they bring to the table.

2.Mediator Certification

The ADR Manager is responsible for finding and nurturing high quality mediators to serve on a collateral-duty basis. Those interested in becoming collateral duty mediators should complete an Alternative Dispute Resolution Mediator Application.[53] The ADR Manager can also offer an incentive to interested employees by nominating qualified candidates for certification, which is designated with a Career Code in the personnel file. The ADR Manager is responsible for:

Securing the appointment of their mediators as collateral duty mediators by the Installation Commander or Designee according to AFI 51-1201, paragraphs 11.5 and 25.2;

- Reviewing mediator applications for certification at their installation; and
- Recommending approval or disapproval of the certification application to SAF/GCD, and providing sound reasoning for the recommendation with supporting documentation.

Quality mediators are an integral and vital component for the success and reputation of workplace dispute resolution programs.

(53) See Appendix 2-K for a sample application.

PART TWO

THE MEDIATOR'S ROLE IN AIR FORCE WORKPLACE DISPUTES

THE MEDIATION PROCESS

Now that the preludes to the actual mediation have been covered, this section will discuss the elements of the actual mediation. There are five elements to mediation:

1) Mediator's opening statement; 2) Parties' opening statements; 3) Joint discussion; 4) Caucus; and 5) Closure.

1. Mediator's Opening Statement

The opening statement is the verbal opening of the mediation by the mediator. This is the mediator's first contact in person with the parties together. It is, therefore, an important part of the mediation process. Aside from setting the ground rules for the proceeding, the mediator will set the tone for the mediation as well as have an opportunity to gain or lose credibility as a capable neutral.

Because of the importance of the opening statement, mediators are strongly advised to begin with a prepared statement which they can refer to when addressing the parties. Many mediators, once they have developed a good opening statement, always use that same opening statement. Good speaking skills are helpful for mediators, especially in the opening statement. An inexperienced mediator should practice the opening statement until comfortable. This will not only make the mediator more comfortable in the mediation's opening minutes, it will also allow the mediator to have good eye contact with the parties, thus putting them at ease and increasing their confidence in the mediator. A sample opening statement is provided in Appendix 2-A. It is recommended mediators take and refer to an opening statement checklist (Appendix 2-B) to make sure they hit all the key elements of the opening statement.

The first thing mediators should do in the opening statement is identify themselves to the parties. This introduction not only includes the mediators' identities, but also their qualifications. Mediators should explain that they are qualified to be neutrals because: 1) they were duly appointed as mediators, and 2) have the necessary training and experience.

During the introductions, mediators should acknowledge any acquaintances or associations that they may share with the parties or the parties' representatives. Mediators must assure the parties of their neutrality and impartiality in the process. If the mediator is also an AF employee or a union official, it is also important for parties to know the mediator's unit of assignment or union affiliation.[54] Disclosure of such information ensures that the parties' consent to the mediator's continued involvement is fully informed and increases the parties' confidence in the mediator.

(54) To preserve the appearance of impartiality, a mediator who is also an AF employee should not be assigned to the same functional organizational unit as either party.

Mediators should next confirm receipt of the mediator's letter and Agreement to Mediate with the parties.[55] This confirmation emphasizes to the parties that each is attending voluntarily and is prepared to attempt to resolve the dispute in good faith. Furthermore, the mediator may want to use the Agreement to Mediate as a tool later in the process to move beyond impasse. Getting each party to acknowledge their agreement and understanding of the letter allows the mediator to use this acknowledgment later in the process to reinforce the parties' commitment.[56]

It is imperative that during the opening statement the mediator establishes the ground rules for the mediation. This includes not only explaining the process, but also laying out the mediator's expectations and rules for the parties (e.g., the parties must wait for the other side to finish speaking before offering a response). The parties can also set additional ground rules. Of particular importance is the need for the mediator to review the confidentiality of the process. While confidentiality should already have been addressed during case intake, the mediator must ensure the parties understand what can and cannot be held in confidence. Finally, the mediator should congratulate the parties for being willing to attempt to settle their dispute and assert a note of confidence in the process of which they are about to undergo.

2. Parties' Opening Statements

Each party has the opportunity to present an opening statement. Usually the moving party, the employee, goes first. The mediator should allow parties to fully explain their positions. This may be the first time that each party hears the other party's view on the issues. Because of this, the mediator should allow both parties to fully explain their position even if they become emotional. Furthermore, venting by the parties can be the first step in putting the dispute behind them and moving toward resolution.

It is also very important that the mediator listen very closely during the opening statements, paying careful attention to the issues as articulated by the parties. Many times the issues defined by the parties in the opening statement are different from those articulated in the issue in dispute.

Mediators can also learn from a party's opening statement the hidden concerns or interests of the parties and sometimes can even discover the real source of the dispute. This type of information is invaluable later when getting the parties to focus on interests instead of positions.[57]

The opening statement of the parties can also allow mediators to note how far apart the parties are at the outset. This will give mediators an initial view of the challenges ahead as well as assist them in determining when and if caucuses should be utilized. Of course, at this time mediators can learn about the attitudes of the parties and their abilities to articulate their positions. This information will assist mediators in determining who may need caucuses more often and how much they will need to assist the parties in understanding the other party's views on the issues.

The parties' opening statements provide the first opportunity for the mediator to determine whether the parties are participating in "good faith." This concept really refers more to the absence of bad conduct than particular proactive measures. In order for mediation

(55) The Agreement to Mediate is a good source for information to be included in the opening statement. A sample Agreement to Mediate is found in Appendix 1-F.

(56) See the section on impasse for more on this use of the agreement.

(57) See Part 2, Interest-Based Negotiation.

to work, parties should be using it as a means of communicating to potentially reach a settlement, rather than a forum for evidence gathering. When mediators hear parties say "I'm not prepared to make an offer today," they should offer to reschedule the mediation to a time that allows the parties to prepare an offer. Having settlement authority and the willingness to negotiate are aspects of mediation that distinguish it from a regular conversation. If mediators partake in sessions under the guise of mediation that are not intended to reach settlement, mediation loses its credibility.

Each party has the power to frame the mediation session through their story-telling and word choice in a cordial opening statement. The mediator must understand that emotions play a primary role in workplace disputes and mediations. The mediator must recognize when parties are not able to effectively convey their issues and interests. At the same time, a mediator must make the parties aware of the danger when their words and actions are influenced by their uncontrolled emotion. This danger includes blurring the focus from the dispute at hand; thereby, limiting the opportunity to resolve the dispute.

3. Joint Discussion

Joint discussion is the first opportunity for the parties and the mediator to interact. The mediator should start the joint discussion by summarizing the parties' opening statements, if the mediator did not do so at the end of the parties' opening statements. The mediator should ask the parties questions that clarify the issues in controversy. As important as the questions are, it is more important that the mediator understands the parties' answers and asks follow-up questions, if necessary. Moreover, this is an opportunity to begin assisting the parties in focusing less on their positions and more on their interests. Careful observation is required though. Based on observations, the mediator may conclude that caucus is the more appropriate forum for discussion for more sensitive parties or sensitive interests.

The mediator may allow or encourage the parties to ask questions and discuss the issues more with each other rather than the mediator. The amount and speed of the mediator's withdrawal from the dialogue is case-specific. It depends on how the parties are able to interact and whether the parties' emotions or abilities make unassisted, face-to-face discussion possible or effective. If the parties are unable to communicate with each other, the mediator should continue to serve as a buffer.

At this stage, parties should be generating options for resolution. After they have brainstormed options, parties should agree on criteria for selecting the options that turn into resolution terms in the settlement agreement. Possible options for resolution are included in Appendix 3-F.

If joint discussion breaks down or issues arise that are sensitive or confidential, the mediator should suspend the joint discussion and move to caucus. Throughout joint discussions, it is important that the mediator use active listening skills and take good notes for use in caucus or later joint discussions.

4. Caucus

A caucus is an optional private meeting between the mediator and one party. This is not a stage of the mediation process, but rather an optional tool that often makes mediation particularly comfortable and beneficial to the parties. Virtually everything discussed in caucus, which was not previously disclosed either before or during the mediation, is confidential. Unless the party explicitly grants the mediator permission to discuss some or all of

what is discussed in caucus, the mediator must not reveal the information to the other party either in caucus or joint discussion. When the mediator holds caucuses with the individual parties, the mediator should explain the rules on confidentiality before starting the caucus. To avoid confusion, the mediator should verify, at the end of each private caucus, what information the party wishes to keep confidential and what information the mediator can disclose to the other party. The parties are free to reveal their own communications offered in caucus.[58]

Caucuses serve many purposes. The mediator may call a caucus when the parties need to cool off and refocus or when the mediator needs to discuss confidential information with the proper party in a protected setting. In a caucus, the mediator and a party can explore options for settlement in a secure setting. A caucus may prove appropriate to allow a party to save face in front of the other party.

In caucus, the mediator also has an opportunity to cultivate a relationship with each party. While it is imperative that the mediator maintains impartiality, it is almost as important that the party trusts the mediator as well as the process as a whole.

One of the most important tools that can be employed in a caucus is the reality check. Reality check is an incredibly powerful tool for the mediator in getting a party to be more reasonable. The mediator can find a discussion of reality checking in Appendix 3-H. Tips for caucus and impasse are found in the appendices.[59]

Sometimes a break, rather than a caucus, is necessary for the mediator's success. The mediator is responsible for being the calmest and most controlled person in the mediation. If the circumstances of the mediation make meeting this responsibility difficult, the mediator should take a break. In other circumstances, issues will arise during the mediation where the mediator will need guidance from the ADR Manager, SJA, SAF/GCD, or a subject matter expert. When speaking to a subject matter expert, the mediator generally should have the parties present to hear the expert's statements or opinions.

5. Closure

At some point, after using joint sessions and caucuses, the mediation process will come to a close. This can occur in one of two ways: 1) without agreement/settlement, or 2) with agreement/settlement, either partial[60] or in full.

When settlement no longer seems possible—there is no more movement by the parties on any of the issues, the parties and the mediator have seemingly exhausted all available

(58) See 5 U.S.C. § 574(b)(1).

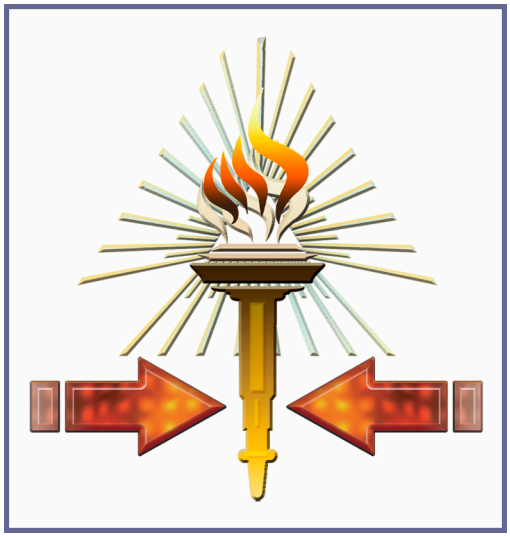
(59) See Appendices 3-D and 3-E, respectively.

(60) Partial settlements, though legally acceptable, are nevertheless not encouraged. One of the major benefits of ADR is to resolve the entire dispute with finality and avoid further litigation. Partial settlements frustrate that benefit.

mediation tools, or one or both parties have removed themselves from the mediation—the mediation should end. The mediator should again congratulate the parties for availing themselves of the process and encourage them by recounting any progress that was made during the mediation. The mediator should ensure the parties know how to contact the mediator (or the ADR Manager) in the future. While the mediation has ended, the mediation process is not necessarily over, and either one or both parties may reconsider their decision to stop and become more amenable to settlement after the passage of some time. Appropriate follow-up by the mediator or ADR Manager may result in bringing the parties back to the table and lead to an eventual settlement. The mediator should also be sure to fill out a lessons learned sheet[61] in order to reflect on what worked and did not work throughout the mediation.

In most cases the mediation session will close with at least some issues resolved. Once a specific issue has a specific solution proposed and the mediator works through the proposal with the parties to see if it is indeed satisfactory to them, the mediator should facilitate the writing of the parties' agreement by serving as scribe. The mediator should have the parties review it again prior to signing and have the parties sign it, subject to the previously addressed coordination process. A more complete discussion of settlements follows later in this section.

ISSUE IDENTIFICATION AND SCOPE OF ISSUES ADDRESSED



Prior to engaging in a mediation session, all stakeholders[62] should identify the issues in controversy for the mediation. The individual initiating the mediation session will typically identify the initial "issue," but often the stakeholders can derive multiple issues from the initial issue. This is particularly true after the intake coordinator hears the perspective of the other people involved in the disputed matter. More often, the parties begin discussing with the intake coordinator what they perceive as tangential matters. From those discussions, the intake coordinator is able to identify additional distinct and separate issues for resolution. For example, one party, an employee, may frame the issue in controversy as a simple request for purging disciplinary records. The other party, a management official, may frame the same set of circumstances as two issues involving the conduct and performance of the employee. It is often the intake coordinator, with the entire perspective on the issues from both points-of-view, who can best identify the issue(s) in controversy. Later, the mediator during the mediation can further scratch under the surface of the issue(s) in controversy.

Mediators can expect that the intake coordinator will share the broad issue(s) in

(61) See Appendix 2-H.

(62) See AFI 51-1201, Attachment 1, "ADR Stakeholder— an organization or individual with an official or, in the case of a complainant, claimant, or grievant, a personal interest in the initiation, processing, and resolution of one or more workplace disputes. Commanders, supervisors, individual employees, dispute program owners (e.g., Civilian Personnel and EEO) and legal and other advisors are all ADR stakeholders."

controversy with the mediator prior to the mediation session. Mediators have different stylistic preferences regarding the amount of information they would like about the issues and the number of issues they choose to assist the parties in resolving. If the mediator would like more specifics about the issues in dispute prior to the mediation session, the mediator can request that of the intake coordinator.

Mediators will also be able to identify the issues during the parties' opening statements. If the parties' issues are not apparent or clear from their opening statement, the mediator should ask clarifying questions so that all understand the issues. After hearing the issues that the parties identify during their opening statements, some mediators may choose to address only the issues brought up in mediation. Other mediators may refer to any issues that the intake coordinator identified prior to the mediation session, even if the parties did not share those issues in their opening statement. This is largely to ensure the parties did not forget to identify issues that need to be addressed prior to a settlement. For example, in a party opening statement the party may focus on their disappointment with the performance appraisal without address the discrimination basis that the party raised with the intake coordinator. Some mediators may choose to address all past, present, and future issues of any kind involving any number of people if the parties choose to have such a discussion. Other mediators will limit the mediation to the issues identified in the complaint or grievance.

When identifying the issues to be addressed, mediators must consider the complaint's or grievant's willingness to sign a settlement agreement releasing the agency of any claims against the agency. In addition, collective bargaining agreements and other institutional concerns may limit the issues that the parties can discuss during the mediation session. For grievances, some organizations and their CBAs will not allow the mediation of issues that are not listed on the grievance paperwork. If additional issues arise, some CBAs require a grievant to amend the grievance paperwork before the parties can address those issues during mediation. Institutional concerns will also preclude certain issues from being discussed at the mediation and from being a term of an individual settlement agreement. For instance, institutional concerns prevent a settlement agreement from directly impacting others who are not parties to the mediation.[63] The intake coordinator can share with the mediator any applicable CBAs and limits on issues appropriate or inappropriate for mediation prior to the session.

INTEREST-BASED PROBLEM-SOLVING

Mediation involves negotiation between parties where a neutral person assists or facilitates a settlement, which is voluntarily accepted by both parties. The style of negotiation best suited for parties in mediations is called Interest-Based Negotiation, or "IBN."[64] IBN is also referred to as interest-based problem-solving. The theory of IBN is that parties are much more likely to come to a mutually satisfactory outcome when their respective interests are met than they are when one "position" wins over the other. Most negotiations ultimately involve the question of how to distribute something among the disputants or negotiating parties, whether it is money, property, benefits, or obligations. The object of negotiation may be tangible (e.g., money or benefits) or intangible (e.g., better communication, better work performance, or more respect). Thus, in almost all disputes there is the question of a "pie" and how best to divvy it up. The traditional form of negotiation,

(63) See AFI 51-1201, paragraph 22.5.4.

(64) See Roger Fisher and William Ury, Getting to Yes 97 (1991).

characterized by the assertion of opposing positions by the parties, is referred to as position-based or rights-based negotiation. This tends to view the pie as fixed, such that a greater share for one means a lesser share for the other, a "zero-sum game." The rights-based negotiation typically narrows the issues to the streamlined legal arguments and focuses on the predicted judicial or administrative outcomes. IBN, however, focuses on interests to be satisfied rather than positions to be won, seeks to "expand the pie," giving each side more, thereby producing a "win-win." The expansion of the pie is possible through synergy, in which two people can cumulatively create more value working together than the summation of their individual efforts. The mediator's challenge is to guide parties who are inclined to focus on positions to instead focus on interests.

Interest-based negotiation is a preferred negotiation style in the mediation context because, in most instances, there will be a continuing relationship between the parties. The relationship can be impaired if one party wins at the other's expense. For mediation to thrive as a litigation alternative in the workplace, the process must be satisfying to both parties. For these reasons, IBN is the style adopted by the AF and used in AF mediation of workplace disputes. More specifically, it is the style that AF mediators will encourage negotiating parties and their representatives to use.

1. Problem-Solving Preparation

As with any negotiation, party preparation is critical. Proper education and coaching will permit the participants to properly prepare for mediation. This begins at intake when the intake coordinator describes the mediation process to the parties and later provides them with the Negotiation Worksheet[65] (see Appendix 1-L). The intake coordinator should give the parties notice that they will make an opening statement so the parties can prepare in advance the sequence of events they would like to share and the issues to bring to the table. The intake coordinator should suggest to the parties that they write down any questions they have for the other party and complete the Negotiation Worksheet, either by hard copy or on-line and then print a copy. It is not necessary for the intake coordinator to see the worksheet; it is simply a preparatory tool for the party. When the intake coordinator asks the parties whether they will invite a representative or subject matter expert to assist them, the intake coordinator should encourage the parties to determine what role their representative will take in the mediation session.

Parties should begin by considering their goal(s) for the mediation session and anticipate the other parties' goal(s). The goal of the session should include the desired resulting relationship between the parties, if any, as well as the substantive outcome of the negotiations. An aspiration point is the best possible outcome (rationally bounded) for the party and the reservation point is the minimum acceptable outcome. Parties need to determine what criteria they will use to evaluate whether the options on the table are attractive to them. Interest-based negotiators will consider which proposals will satisfy all parties'

(65) An interactive Negotiation Planner is available on-line, contact SAF/GCD for more information.

interests. Savvy negotiators may find themselves prioritizing their interests and making concessions in order to fully satisfy their most critical interests, while accepting less than the ideal situation for their less critical interests.

If parties haven't fully identified goals and interests, mediators should ask questions or use tools such as reality checking to help the parties more effectively prepare for joint session and communicate. In mediation, the parties and the mediator have the opportunity to end the mediation session at any given time. In order for parties to determine whether continuing the mediation is worthwhile, parties need to know what alternatives they have outside the mediation. Recognizing a party's **Best Alternative To Negotiated Agreement (BATNA)** is important because many times, that party's BATNA will not be a desirable option. Similarly, getting a party to contemplate the probability and gravity of the worst-case scenario, the **Worst Alternative To Negotiated Agreement (WATNA)** can often have the effect of compelling the party back to the table, or to be more amenable to considering options for settlement.

2. Focus on Interests, Not Positions

Positions are pre-determined outcomes that may not be easily satisfied, and it is the rare case when a position can be fulfilled to both parties' satisfaction. Interests, however, are needs that can often be met to both parties' satisfaction. Examples of common interests broken down by dispute category can be found at Appendix 3-C. A mediator can help the parties focus on interest instead of positions by asking clarifying or open-ended questions either in joint session or in caucus. Because positions tend to become hardened, and understanding underlying interests can offer opportunities to the parties to at least brainstorm and perhaps develop other ways to address the matters in dispute, the mediator supports the key principle of party empowerment by helping parties identify their own and the other party's interests. It is vital that the mediator facilitate the parties' expression of needs or interests rather than positions. In part, the vocabulary of the mediator can help or hinder reaching that goal. In this regard, the techniques of "rephrasing" and "reframing" what has been said are especially useful for distilling positions into interests. Appendix 3-B contains examples of rephrasing and reframing.

One of the classic examples of focusing on interests rather than positions is the Orange Scenario. In this scenario, two teenage siblings are fighting over the last orange in the refrigerator. The parent enters the kitchen, trying to find a way to satisfy both teenagers' position "I want the orange." One option is to cut the orange in half, leaving each person half as satisfied as they could have been with the whole orange. The interest-based option is to ask the teenagers what it is about the orange that is important to each of them, seeking to understand their interests underlying their position. When the parent asks about the interests, one teenager says he wants the orange for orange juice and the other teenager wants the rind for baking. Now they can peel the orange and both teenagers leave with their interests completely satisfied.

3. Invent Options for Mutual Gain

Once the interests of the parties are known, the parties, with the help of the mediator, may brainstorm options for mutual gain. These potential solutions should attempt to address issues and concerns of each party. The mediator should not propose a solution, but should ask questions of the parties designed to elicit potential solutions.

To be successful in assisting the parties to invent options for mutual gain, the mediator must identify the barriers that may restrict option development. Such barriers may include making premature judgments and limiting the search for options to a single solution, which assumes that one party must win while the other must lose. The mediator can assist the parties in brainstorming by helping them broaden the proposed options, by helping them search for mutual gain, and by keeping them from dismissing solutions as unworkable during the brainstorming process. The mediator should never strong-arm or pressure a party in this process. Further, mediators must remember that their role is to keep as many options open and not make judgments or comments expressing an opinion regarding the merits of a proposal.

4. Apply Objective Criteria

Once the mediator has helped the parties focus on their interests and identify possible settlement options, the next step is to help the parties agree on the objective criteria that they will use to evaluate the options. The parties should develop or select the criteria prior to judging particular options. Many times a party knows how to describe the desired settlement, but is not able to articulate the details of such a settlement. Sometimes objective criteria are not necessary for judging options, if the parties readily identify options that are agreeable.

Use of objective, rather than subjective, criteria will allow the parties to fairly evaluate the settlement options. Objective criteria can limit the party rejection of an option just because it comes from the other party (i.e., reactive devaluation).[66] Moreover, parties are much more likely to comply with and carry through on terms of a settlement that they each view as legitimate, and objective criteria go a long way to providing that legitimacy. One example of the use of objective criteria is using past practice or industry standards as comparisons to the proposed settlement. Once the parties develop settlement options, the mediator can walk each option through the criteria developed at this stage to help the parties determine whether the option meets the interests of the parties.

Sometimes the parties will incorporate the objective criteria into their settlement agreement. Both parties, for instance, might agree to follow industry standards or other independent criteria provided those standards or criteria are unambiguous.

(66) Reactive devaluation is the natural act of automatically diminishing an idea because it comes from the opposition.

DEALING WITH IMPASSE

Impasse, or the failure to make progress toward resolution, is a significant challenge in any mediation. Getting past impasse is a skill that can separate great mediators from the rest. There are a number of tools that can assist in getting past impasse. Three are discussed below.[67]

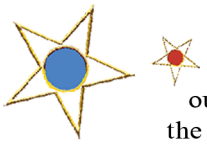
1. Reality Checking

Reality checking is critically important tool for a mediator to use in a caucus setting to address impasse. Reality checking is the process by which the mediator gets the parties to understand, typically through a series of questions, the weaknesses of their case, issue, or demand. When parties have no case, a very weak case, no claim for what they seek, no legal basis for the settlement they desire, or unrealistic demands of the other party, reality checking is necessary.

Reality checking is accomplished through questioning parties regarding their claims, defenses, demands, or positions. In an EEO dispute, the mediator could ask complainants questions based on the specific elements of an EEO prima facie case. In turn, the complainant's answers will allow him/her to reconsider the strength of his or her position and move beyond impasse. Appendix 3-H outlines the elements required to prove various EEO claims that a mediator might use in reality checking. Hard, tough hitting questions are not required for effective reality checking; however, thorough question by the mediator will help the parties realize on their own the strength and weakness of their claims, defenses, demands, or positions. Appendix 3-G, an EEO Process Flow Chart, can serve as a reminder to the parties of the extensive process. Of course, the mediator should do nothing in this process that compromises impartiality. Also, the mediator should never render an evaluation of claims and positions. The AF ADR program for workplace disputes follows a facilitative model of mediation. Facilitative mediation allows for proper reality checking without mediators rendering opinions to the parties.

2. BATNA and WATNA

A great technique to use with parties who wish to leave the table or are unwilling to work towards settlement is to discuss with them their BATNA[68] and their WATNA. Simply put, the parties need to know what alternatives they have outside the mediation. These are courses of action they may take on their own if they fail to reach resolution.



BATNA:
the best course of action outside of the mediation that the party can realistically take if resolution is not reached in mediation

WATNA:
the worse possible course of action that the party may face if resolution is not reached in mediation

Recognizing a party's BATNA is important because many times that party's BATNA is an undesirable option. Similarly, getting parties to contemplate the probability and gravity of their worst-case scenarios can often have the effect of compelling parties' return to the table or their reconsideration of settlement options.

(67) Additional tips for getting past impasse can be found in Appendix 3-E.

(68) See Fisher & Ury, SUPRA NOTE 63. BATNA WAS FIRST COINED BY THESE AUTHORS.

3. Fostering Understanding of Others' Views

One of the strongest barriers to resolution of a problem is the inability or unwillingness of the parties to "see" the problem from their opponent's point of view. A skillful mediator uses empathy, defined simply as understanding another's situation, feelings and motives, to help the parties overcome this barrier. Empathy is the ability to put oneself in the other person's position, to "walk a mile in his shoes." Understanding the other side's point of view does not mean the mediator shares, agrees, or even sympathizes with it. It merely provides new perspectives that may open options previously hidden. A good mediator can help the parties overcome impasse by asking questions designed to focus on the other side's point of view. The mediator may assist the parties in "walking a mile in the other party's shoes" through role-reversal techniques to gain a better understanding of the other's perception of the problem as well as assisting the parties in communicating the source of the problem.

The mediator should understand that parties may interpret the other's motives through their own filters, perceptions, and fears. The mediator should diffuse any negative signals expressed by either side as soon as possible. The biggest pitfall for a mediator, though, is possibly committing the same type of error. Mediators should never assume their own fears or concerns are the same as those of the parties, or, that the parties' motives and perceptions are the same as theirs. To do this, mediators must get the parties to discuss their perceptions either in caucus or in joint session, which will prevent mediators from drawing incorrect assumptions about the parties' motives or perceptions.

4. Other Impasse and Problem Behavior Considerations

While emotions might make some parties or mediators uncomfortable, they are important to recognize. Often acknowledging emotions and allowing parties to vent is one key to resolution. It is important that mediators ensure that parties have the opportunity during joint sessions to speak plainly and honestly about their feelings without interruption. This plain talk can often be loud and argumentative and can be difficult for the mediator to manage. Sometimes, what seems to be non-productive arguing, however, can be the cathartic event, that makes settlement possible. The mediator should allow the parties to vent their emotions and frustrations to the greatest extent possible. Mediators should avoid immediately moving to caucus when the mediation environment gets uncomfortable, charged, or heated.

For the mediator, it is very important to have no outward reaction to a party's emotional display. A reaction can jeopardize the mediator's all-important neutrality. Throughout the session, the mediator retains the responsibility for maintaining the safety of the participants. While venting should be embraced and not feared, mediators must end joint sessions if it appears that either or both parties are close to losing control of their actions. It always remains the mediator's responsibility to remain calm and maintain the quality of the proceedings.

The following chart depicts a few considerations from parties and mediators as to when the impasse may be an indication that the mediation is coming to an end.

Potential Indicators of Impasse	
How do parties know?	How does the mediator know?
• When the BATNA is better than the option in the negotiation • Once the party has received answers to all of their questions and answered their counterpart's questions • When the party needs to consult with additional people to make a good decision	• If parties are no longer engaged nor participating actively • If parties have been repeating for a significant amount of time the same issues to discuss with no new ideas or information surfacing

AIR FORCE STANDARDS OF CONDUCT FOR MEDIATORS

Model Standards of Conduct for Mediators[69] serve as ethical guides for mediators in AF workplace disputes. The Model Standards also serve to inform mediating parties what they should expect of their mediator's performance and promote public confidence in mediation as a process for resolving disputes. The AF has adopted a variation of these model standards in AFI 51-1201, paragraph 26.[70] These six standards, self-determination, impartiality, conflicts of interest, competence, confidentiality, and quality of the process, govern all AF workplace dispute mediations. Compliance with these standards is mandatory. If a mediator reasonably believes that he or she is unable to conduct the mediation consistent with these standards of conduct, the mediator shall take appropriate steps including asking for assistance or postponing, withdrawing from, or terminating the mediation. When a mediator is faced with withdrawing from or terminating the mediation, the mediator needs to carefully assess whether or not to share the reasoning for the action with the parties. If the case is appropriate for mediation, but just not appropriate for that particular mediator, such information is helpful to the parties. If actions that a party is taking or plans to take make the case inappropriate for any mediator, the mediator should discuss that with the ADR Manager, who can then share the appropriate course of action with the parties. The ADR Manager should inform the parties when there is a process issue, substantive issue, or personal issue that makes the mediator unable to perform at that time.

Failure to follow these standards may require the ADR Manager to eliminate the mediator from the installation's list of mediators. The comments accompanying each standard provide guidance in applying each standard, but are not mandatory.

STATUTORY CONFIDENTIALITY

Confidentiality is a powerful component of mediation allowing the participants a full opportunity to explore the issue(s) and option(s) for the dispute at hand. In addition to the

(69) Listed in AFI 51-1201, paragraph 23, which follows the Model Standards of Conduct for Mediators issued by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution as well as the supplemental A Guide for Federal Employee Mediators by the Federal Interagency ADR Working Group Steering Committee.

(70) See Appendix 3-A for a copy of the Air Force Standards and comments.

ethical standard of confidentiality, there is a statutory confidentiality requirement in federal mediation. The ADRA[71] prohibits a neutral (such as the mediator and the installation ADR Manager) from voluntarily disclosing or from being compelled to disclose a "confidential dispute resolution communication," unless an exception applies. A "confidential dispute resolution communication" is an oral or written communication, made for the purpose of the mediation, given with the express intent that it not be disclosed or given under circumstances that create a "reasonable expectation" that the communication will not be disclosed. Communications disclosed in violation of confidentiality are inadmissible in any future legal proceeding.

This is extremely important because the ADRA contains a provision, 5 U.S.C. § 574(e), that requires a party to agree to defend a mediator against a discovery request within 15 days of notification from the mediator to avoid a waiver of any objection to the mediator's disclosure of the information.[72]

The parties' expectations regarding confidentiality are important; the mediator should ensure these expectations are realistic and consistent with existing law and policy. AF policy is to support the confidentiality of dispute resolution communications in AF mediations whenever it is consistent with the ADRA.[73]

In order to protect the reasonable expectations of the parties, the ADR Manager or intake coordinator must explain the parameters of confidentiality prior to scheduling a mediation session. At the beginning of mediation session, mediators must explain confidentiality during their opening statements and confirm that the parties fully understand.

During mediation, statements made by any participant during an individual session or private caucus are presumptively confidential unless the party shares the information or gives the mediator permission to share the information. Mediators should begin each individual session or caucus by reminding parties about the confidentiality requirements and the exceptions. It is good practice for mediators at the end of sessions or caucuses to ask the parties what information cannot be disclosed to the other party. Mediators should ask the parties who—the mediator or that party—will convey the information that can be disclosed to the other party.

While Congress recognized that confidentiality is essential for effective mediation, there is a strong public interest in open government. This dichotomy between confidentiality and openness requires a proper balance. In circumstances where the need for confidentiality is diminished or non-existent, or is outweighed by strong public interests or other considerations, confidentiality gives way. Accordingly, the ADRA has several exceptions to the general rule of confidentiality. If a communication meets any of these exceptions, it can be disclosed. Even here, however, the ADRA gives parties significantly greater leeway to disclose than it gives the neutral. **For this reason, a mediator should never voluntarily disclose information produced during mediation without first seeking guidance and a recommendation from the ADR Manager, installation**

(71) See 5 U.S.C. § 574.

(72) See AFI 51-1201, paragraph 34. See Footnote 10 and accompanying text.

(73) See AFI 51-1201, paragraph 30.

legal office, and SAF/GCD regarding otherwise confidential information.[74]

The exact contours of confidentiality under the ADRA are often complex and not readily apparent, especially where the exceptions are concerned. AF mediators must have at least a basic understanding of the types of communications that are not confidential, if for no other reason than to protect the reasonable expectations of the parties.

Under the ADRA, the following communications are NOT confidential, even if made during the course and in furtherance of an ADR proceeding:

- Agreements to Mediate;[75]
- Settlement Agreements reached as a result of an ADR proceeding;[76]
- Dispute resolution communications that the parties agree in writing can be disclosed;[77]
- Communications that exist in the public domain prior to the mediation;
- Information that is required by statute to be made public;[78]
- Information that a court requires be disclosed to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety;[79]
- Evidence that is otherwise discoverable. (Merely because pre-existing, discoverable evidence is presented in the course of a dispute resolution proceeding does not make it confidential).[80]

Under the ADRA, mediators must notify the parties about a demand for disclosure by way of discovery request or other legal proceeding. Air Force mediators must notify the ADR Manager or the SJA before any possible disclosure of the content of any mediation communication. The ADR Manager and SJA will coordinate a reply to the mediation's notification with SAF/GCD.

Mediators should also keep in mind that other statutes (e.g., the Privacy Act) may make certain information confidential. This is true for EEO discrimination complaints as well as employee grievances under a negotiated grievance procedure or agency grievance process. As such, mediators must protect information contained in these records from disclosure under those statutes. Mediators and ADR practitioners should refer all issues related to disclosure of possibly confidential material to the ADR Manager and legal office for guidance. Other alternatives to the ADRA for maintaining confidentiality include contractual agreements[81] between the parties.

It is neither necessary nor particularly helpful for the parties in AF mediation to know all the ins and outs of the ADRA's confidentiality provisions. It is important for mediators to have a basic understanding of these rules so that they can appropriately protect confidential communications and help define the reasonable expectations of the parties. If requested or directed to disclose information that might be confidential, mediators are not to decide for themselves whether disclosure is permitted. The mediator should, instead, bring the matter to the attention of the ADR Manager and installation legal office, which will coordinate the disclosure determination with SAF/GCD.

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(74) Id., paragraph 34.

(75) Id.

(76) Id., § 571(5) (Note: The parties can make arrangements to limit the circulation of any settlement agreement, and other laws or regulations may provide additional confidentiality protections.)

(77) Id., § 574(a)(1) & (b)(2) (Note: If a nonparty participant provided the confidential dispute resolution communication, that participant also must consent in writing.)

(78) Id., § 574(a)(3) & (b)(4). For example, in response to a Congressional subpoena.

(79) Id., § 574(a)(4) & (b)(5).

(80) Id., § 574(f).

(81) See 5 U.S.C § 574 (d)(1).

USE OF ADR SUPPORT PROVIDERS

Issues may arise during the mediation where either the party or the mediator needs guidance from an expert. Before scheduling a session, ADR Managers assess which ADR Support Providers, if any, have a high probability of being required to give expert information during mediation. ADR Managers schedule these experts for the mediation. Experts are usually available during the mediation in person or by telephone.

It is only in rare circumstances that mediators need to contact a subject matter expert for their own knowledge and guidance. Mediators may need to contact the ADR Manager, installation's attorney, or SAF/GCD about issues involving confidentiality, reporting requirements, mediation technique advice, or any other items directly related to mediation performance. Mediators are discouraged from contacting subject matter experts on their own. Instead, mediators are encouraged to arrange for advice from subject matter experts though the ADR Manager. Generally, the mediator may limit the number of non-party participants, such as ADR Support Providers, in the mediation session at any one time to ensure an orderly process during the mediation.

Most often, an expert contacted during a mediation session is for the benefit and education of the parties. The subject matter expert should provide advice in the presence of both parties. Since the management official is participating in mediation on behalf of the agency, the management official is welcome to utilize agency experts when he or she sees fit. When employees are utilizing subject matter experts from the agency, the information shared by the expert is typically provided in a joint session. Employees should be made aware when agency's experts are not neutral and are ultimately working on behalf of the agency.

The mediator must request that the subject matter experts participating in a session agree to maintain confidentiality. Mediators may request subject matter experts to sign confidentiality statements before entering sessions. See Appendix 1-H for a template of a Confidentiality Agreement for ADR Support Providers.

SETTLEMENT

One goal of mediation is for the parties to devise and agree on a resolution of their dispute. It is therefore up to the parties, not the mediator, to decide on the terms of a resolution. The parties are expected, with assistance from the mediator, to memorialize the terms and conditions they agree upon in a written agreement. Mediators should scribe the settlement agreement for the parties to sign. Ideally this should be done prior to departing the mediation session. Parties are normally ready to sign the settlement agreement at this point and put the matter behind them. Even when the parties have reached an agreement verbally, but are not willing to sign at the time, it is important for mediators to draft a document that memorializes the parties' agreement. This prevents confusion when the parties return to complete the drafting of the settlement

agreement. Therefore, mediators should document all verbal settlements or settlements "in principle" at the close of a session. If possible, mediators should obtain the initials of the parties on the document memorializing the "verbal agreement" or an "agreement in principle" as a means of capturing how the parties concluded their session.

Assisting the parties in crafting a quality settlement agreement is an important task that mediators are expected to perform in AF workplace disputes. The following guidance, based on the past experiences of mediators, is designed to assist in crafting a settlement agreement that will settle the current claim, avoid establishing the basis for additional claims in the future, and survive the ratification or review and coordination process. A settlement cover sheet and sample settlement agreements can be found in Appendices 2-C, 2-D, 2-E, 2-F, and 2-G.

1. Terms of the Agreement - Who, What, Where, and When

Settlement agreement terms that are vague or ambiguous increase the risk of possible noncompliance, leading to an allegation of breach of agreement by either party. A best practice is to review the settlement agreement at least once considering who does what, when, and where. Avoid vague terms that invite misunderstandings and differences of interpretation.

Another point to remember is that review and coordination of settlement agreements by the appropriate AF officials may take a couple of days. It is important that the "when" and "how" contained in the agreement take into account the delay caused by this review and coordination process. Therefore, parties should provide sufficient timeframes in the agreement to carry out the agreement's terms. For example, in several cases the parties were obligated to do certain things the day after the mediation, but the mediation agreement did not become final for several more days—making it impossible for the parties to perform under the timetable established in the agreement. Parties and mediators can address this problem by indicating in the agreement that the terms are not final until review and coordination by appropriate agency officials is complete. The completion of the review and coordination can then serve as the triggering event for the timetable agreed to in the settlement.

2. Settlement Agreements Providing for Payment of Funds

Payment of funds by the Government in a settlement requires a statutory basis.[82] For example:

- The Back Pay Act, 5 U.S.C. § 5596, allows for the payment of back pay and attorney's fees when the pay is lost due to an unjustified or unwarranted personnel action.[83]
- The Civil Service Reform Act, 5 U.S.C. § 7701, allows for the payment of attorney's fees and interim relief payments.

(82) See Appendix 3-I for an excerpt from 42 U.S.C. § 1981(a) Compensatory Damages & Punitive Damages.

(83) MD-110, Chapter 12, states that Title VII provides authority to award back pay that is independent from the Back Pay Act. It states: "The independent Title VII authority to settle EEO claims is significant because unlike the Back Pay Act, section 717 of Title VII does not limit awards of back pay to situations where there has been a finding of unjustified or unwarranted personnel action. Thus, there is no impediment to an award of back pay as part of a settlement without a finding of discrimination." Id., Section III, page 3.

- The Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, allows for the payment of back pay as equitable relief and attorney fees.
- The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, allows for the payment of compensatory damages in cases of intentional discrimination, except in the case of age discrimination.

In addition to the statutes listed above, other statutes authorize the payment of funds. Parties and agency officials must have a clear understanding of which law authorizes the payment of funds in their particular matter. Once authority to make a payment is identified, the parties should determine the tax consequences caused by the payment. Payment of back pay requires the withholding of the appropriate taxes prior to payment to the employee.[84] Also, mediators, stakeholders, and parties should note that damages paid for emotional distress, such as pain and suffering, loss of enjoyment, anxiety, etc., are taxable after 1995.[85]

Stakeholders and participants with questions about tax implications arising from resolutions should consult their own financial management expert. In disputes involving discrimination, the ADR Manager and stakeholders should consult EEOC MD-110, Chapter 12, to examine available flexibilities in resolution.

3. Settlement Agreements that Discuss Modification of Employee Benefits

If a settlement contemplates changing an employee's benefits, the ADR manager should consult with the Civilian Personnel Office and an AF attorney immediately. It is imperative that the appropriate AF official(s) contact OPM and afford OPM the opportunity to review and discuss specific proposed settlements *before* they are effective.

The OPM's fundamental principle is that the Retirement Fund is not a litigation settlement fund. The fund's purpose is to provide annuities to federal employees and their survivors. The legitimate use of the Retirement Fund is limited by 5 U.S.C. § 8348(a) to payment of benefits under the express and specific provisions of either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), and to the costs of administering those systems. Using the Retirement Fund to underwrite a settlement agreement by artificially creating eligibility to or enhancing an annuity is inconsistent with 5 U.S.C. § 8348(a), as well as with the substantive provisions of CSRS and FERS.

4. Special Settlement Agreement Language Required in Cases Involving Age Discrimination

Settlement agreements that resolve allegations of age discrimination must follow specific provisions under the *Older Workers Benefit Protection Act of 1990*, 29 U.S.C. § 631 and 29 C.F.R. §1625.22. Under federal law, enforceable waivers of rights and claims in settlements resolving age discrimination complaints must meet the following conditions:

- The entire waiver must be in writing, written in plain language, and in a manner calculated to be understood by and not mislead the complainant;
- The complainant must be advised in writing to consult with an attorney before signing the agreement;

(84) See 26 U.S.C. § 3402(a).

(85) See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Sec. 1606 (Aug. 20, 1996) (H.R. 3448 as enrolled).

- The waiver must specifically refer to rights and claims under the *Age Discrimination in Employment Act of 1969* (ADEA), 29 U.S.C. § 621 *et. seq;*
- The complainant does not waive any rights or claims under ADEA, as amended, that may arise *after* signing the waiver;
- The complainant is receiving, in exchange for the waiver of rights and claims, consideration in addition to anything of value that the complainant is already entitled to;
- The complainant is given a reasonable period of time, at least 21 days, to consider the agreement and waiver; and
- The complainant is provided in the agreement at least seven (7) days from the date of signing to revoke the agreement and waiver.

These conditions, as specified in the statute, establish the minimum requirement for "knowing and voluntary" waivers of ADEA right and claims. Samples agreements and waivers resolving allegations of age discrimination are found at Appendix 2-E. The ADR Manager must contact the local installation attorney or the LLFSC (240-612-4700) for answers to questions regarding waivers in age discrimination disputes.

5. Standards Indicating Compliance with the Agreement

The best practice is that settlement agreements must contain objective standards, which allow the parties to determine easily if the terms of agreement are being met. The use of terms such as "good faith," "best efforts," or "reasonable" are easy to use but such terms alone are ambiguous and can lead to future problems. Mediators should urge the parties to include specific timeframes within which to fulfill clear obligations. In guiding the discussion on clarifying the terms and standards, the mediator should ask the parties during the session how they and others, who may have to review the agreement but are not present during the mediation, will know whether the specific terms of agreement have been satisfied.

6. Addressing Confidentiality Concerns

A settlement agreement is not protected by confidentiality under the ADRA. Therefore, if the parties want to treat such an agreement as confidential, they must include a clause in the agreement addressing confidentiality. At the same time, parties should avoid putting otherwise-confidential communications into a non-confidential settlement agreement, unless they intend to waive confidentiality. Remember, a confidentiality clause in a settlement agreement binds only the parties to that agreement. If unsure of the limits of confidentiality protections, the mediator or the ADR Manager should consult with the installation's attorney or attorney with the LLFSC or SAF/GCD.[86]

7. Labor Unions

If the dispute involves an employee who is part of a collective bargaining unit, or if the proposed settlement will affect other bargaining unit employees, management must satisfy bargaining obligations under the Federal Service Labor-Management Relations Act, (FSLMRA), 5 U.S.C. §7101, *et. seq*, prior to implementing the settlement agreement. This should rarely happen; however, mediators and ADR Managers should immediately consult the installation attorney or the LLFSC when they question the possible impact to other bargaining unit employees caused by the settlement.

(86) AFI 51-1201, Section D, contains a detailed discussion of confidentiality. In addition, SAF/GCD responds to all requests for guidance on application of the ADRA confidentiality provisions to specific scenarios.

AVAILABLE RESOURCES

The Secretary of the Air Force tasked the Air Force General Counsel's Office to promote the use of ADR to resolve workplace disputes. As a result, the Air Force established an ADR Program that has full-time personnel, funding, and a network of government officials that are all designed to match AF mediation and ADR needs with the appropriate and available resource(s). Listed below are some of the information, services, and funding available through the AF ADR Program.

1. Mediation and ADR Reference Materials

SAF/GCD maintains an extensive collection of ADR reference materials at http://www.adr.af.mil, the internal AF Portal website for AF employees, or by request at SAFGCD.Workflow@pentagon.af.mil, to include:

- A web version of this *Compendium;*
- An annotated bibliography of ADR materials;
- AF and DOD ADR policies and regulations;
- Links to other mediation and ADR web sites (government and non-government);
- Quarterly ADR Newsletter; and
- Web-based videos and other distance-learning tools.

2. Mentoring and Co-mediation Services

Mediators should contact the ADR Manager to arrange for co-mediations with other mediators. Any mediator applying for certification, even seasoned mediators, must verify that they have participated in three co-mediations. A mentor mediation form, found in Appendix 2-J, is beneficial in facilitating discussions between experienced and new mediators.

3. Gaining Experience Mediating Federal Agency Disputes

Federal agencies can work together to develop a local, shared-mediator program. The ADRA makes it easy to locate others who are interested in mediation. Specifically, the ADRA requires each Federal agency to designate a senior official to serve as that agency's Dispute Resolution Specialist (DRS). The DRS is responsible for formulating and implementing the agency's ADR policy. The Department of Justice's Office of Dispute Resolution maintains a listing of all federal agency DRSs.

The DOD Roster of Neutrals (http://www.dod.mil/dodgc/doha/adr/index.html), a roster of mediators available to any DOD agency or component, offers services at no-cost and charges only the travel expenses of the mediator.

Most metropolitan areas of the United States have Federal Executive Boards (FEBs), comprised of the federal agencies with offices in the metropolitan area. Most FEBs

maintain "shared neutral" programs. As the name implies, the FEB maintains a roster of trained mediators or other neutrals employed by member agencies and makes them available to other agencies on a reciprocal basis. Many AF installations use FEB shared neutrals programs to obtain mediation services, as well as to provide additional experience for their own mediators. The U.S. Department of Health and Human Services maintains a large shared neutrals program in the Washington D.C. metropolitan area.

4. Gaining Experience Mediating Private, State, and Local Disputes

Persons who wish to gain experience mediating non-federal agency cases have many options. There are a large number of state, local, and community offices that are looking for trained mediators to provide such services. Some organizations will compensate mediators for their time; others are looking for volunteers.

Many colleges and universities, as well as private training firms, provide training in mediation, ADR, conflict resolution, and other disciplines related to ADR. In addition, the federal district courts have all instituted court-annexed ADR programs pursuant to the ADRA. Some of these programs will provide free training in exchange for a commitment to provide voluntary ADR services for a specified number of days. The AF ADR Program Office can provide additional information.

5. Mediation Training

The AF ADR Program provides central funding for a number of ADR-related training classes every year. The AF ADR Program offers the Basic Mediation training course twice each year. The Basic course teaches attendees about theories, skills, and practices valuable to a beginner mediator. At the end of the basic course, attendees receive certificates of completion. The Advanced Mediation Course is offered once every other year. This course offers experienced mediators a more focused and detailed type of training that takes them to a new level of comprehension and ability regarding the overall mediation process.

a. Basic Mediation Course

The Basic Mediation Course gives AF personnel an introduction to the AF Mediation Model. This course is intended for those civilian or military personnel who will mediate workplace disputes, including EEO complaints, employee grievances and appeals, labor-management negotiations including impasses, and unfair labor practice charges.

Nominees are required to complete a nomination package confirming that they will have an opportunity to use their mediation skills and that they already possess certain demonstrated talents that make them more likely to develop into first-rate mediators. In exchange for this training, nominees are required by AFI 51-1201, paragraph 25.1.3 to agree to serve as a collateral-duty mediator (using up to 20 percent of official time) for up to two years.

At the close of the course, students will:

- Understand which cases lend themselves to mediation and which do not;
- Understand the mediation process;
- Gain familiarity with IBN; several strategies for re-framing questions and statements made by participants; using "active listening" skills; "best practices" in preparing for mediation; and the AF ethical guidelines for mediators;
- Understand the scope and limits of confidentiality in mediation;
- Gain an ability to draft a settlement agreement and be familiar with settlement drafting guidelines;
- Gain familiarity with mediator standards of conduct and how they apply in several situations commonly encountered in a mediation session;
- Gain familiarity with several mediation case studies as well as strategies for successful resolution of ADR cases: and
- Gain some practical experience through role-playing involving a variety of scenarios.

b. Advanced Mediation Course

The Advanced Mediation Course focuses on refining the skills taught to AF mediators in the basic course. It offers intensive work in practical exercises as well as course work designed to make students expert enough to mentor basic course graduates at their installations. The advanced course is intended for mediators who have considerable mediation experience.

CONCLUSION

The Compendium summarizes information about the intricacies of mediation and its value in workplace disputes. It provides guidance on how to manage an installation's mediations as well as how to mediate them. Experience shows that the success or failure of an installation's ADR program depends on much more than knowledge of mediation or running the mediation program. Success depends in large part on the support of key stakeholders at the installation. Marketing, through strong training, education, and coaching initiatives will help obtain the buy-in necessary for a vigorous and successful workplace mediation program. This Compendium is available as a resource guiding ADR Managers, Functional ADR Liaisons (FALs), Support Providers, stakeholders, and mediators towards resolution of workplace disputes. To achieve success in their installation's ADR program, users are expected to consult the references and appendices cited throughout the Compendium. SAF/GCD is committed to assisting the ADR program managers and promoting ADR program growth. Please utilize our office as a resource by consulting the SAF/GCD website at *www.adr.af.mil* for updated information.

APPENDICES

The following Appendices are divided into three major sections. Section 1 contains helpful forms for use in administering the ADR program. Section 2 contains documents, checklists, and forms for the mediator to use while conducting the mediation. Section 3 is the mediator's toolbox containing helpful tips for the mediator.

SECTION 1 - ADR MANAGER FORMS

A. Delegation of Authority for Alternative Dispute Resolution (ADR)/Mediation Involving Workplace Disputes
B. ADR Appropriateness Evaluation Worksheet
C. AF Mediator Case Management Worksheet
D. ADR Union Election Memorandum
E. Mediation Memorandum
F. Agreement to Mediate (not covered by NGP)
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Brief Narrative of Some Forms in Section 1 and 2 Appendices

THE APPENDICES	BRIEF DESCRIPTION
DELEGATION OF AUTHORITY FOR ALTERNATIVE DISPUTE RESOLUTION (ADR)/ MEDIATION INVOLVING WORPLACE DISPUTES	**WHAT IT DOES**: This letter delegates authority to whichever organization named, the express purpose of committing the U.S. Air Force to participate in Alternative Dispute Resolution (ADR), involving workplace disputes.
ADR APPROPRIATENESS EVALUATION WORKSHEET	**WHAT IT DOES**: This evaluation worksheet or checklist provides situations/scenarios where ADR is likely not appropriate. **WHY USE IT?** It is vital that ADR be used only at appropriate times and concerning appropriate subject matter. **WHEN SHOULD IT BE USED?** Either the worksheet or checklist should be used before any offer of ADR.
AIR FORCE MEDIATOR CASE MANAGEMENT WORKSHEET	**WHAT IT DOES**: This worksheet is a great tool for running an organized and effective ADR program office. The worksheet is broken down into sections: **Section 1**, information about all parties involved **Section 2**, brief description of the issue in controversy **Section 3**, schedule for mediation. This section designates a time for the mediation that works for all parties involved. Also this is where any special needs the parties may have are accounted for. This prevents circumstances arising the day of the mediation that could stall or even stop the mediation from occurring. **Section 4**, recommended points for the intake coordinator to cover with the parties so they are clear on their role in the mediation (e.g., the complainant/grievant does not waive right to continue the formal dispute resolution process by attempting mediation, explain it is a voluntary process, explain confidentiality, and the caucus). **Section 5**, the best practices checklist to assure that the intake has been done properly. It lists all the events and actions that should have taken place before the mediation date. The second part is for the actual mediator to assure they have completed the appropriate parts of mediation. **WHY USE IT?** All of these checklists and worksheets are designed to help an ADR intake process run appropriately, timely, organized and successfully.
ADR UNION ELECTION MEMORANDUM	**WHAT IT DOES**: This memorandum is helpful for any Union employee. This memorandum gives the party information on the role they wish the Union to play in their ADR process.

MEDIATION MEMORANDUM	**WHAT IT DOES**: It provides basic information like the date, time, and location of the mediation. It also gives a quick review of important things to know about the mediation process such as: phases of the mediation conference, confidentiality, and right to representation. **WHO IS IT FOR?** This memo is sent to both the grievant/complainant and management official.
AGREEMENT TO MEDIATE	**WHO IS IT FOR?** The Agreement to Mediate is something all participants involved in the mediation must sign. Mediators should always make sure these have been completed before beginning the mediation. **WHAT IT DOES:** The form itself is to assure that the parties acknowledge their understanding of the mediation process and adhere to confidentiality.
CONFIDENTIALITY AGREEMENT WITH ADR SUPPORT PROVIDERS (SUBJECT MATTER EXPERTS)	**WHO IS IT FOR?** Any subject matter or technical experts who provide assistance during mediation sessions. **WHAT IT DOES:** The form should be signed annually by individuals who are privileged to confidential or private information as subject matter experts in mediation sessions. This confirms their adherence to confidentiality standards.
AF ALTERNATIVE DISPUTE RESOLUTION (ADR) PROGRAM NOTICE	**WHO IS IT FOR?** All parties involved in the mediation. **WHAT IT DOES:** The notice serves to educate and proves that the parties acknowledge their understanding of the mediation process.
ALTERNATIVE DISPUTE RESOLUTION QUESTIONNAIRE	**WHO IS IT FOR?** Parties who refuse to mediate. **WHY USE IT?** Asking parties to fill out this questionnaire gives ADR Managers a better understanding of why parties made the decision not to mediate and if analyzed properly can help discover trends or procedures at an installation that may be discouraging the growth of ADR.
AF NEGOTIATION PLANNING WORKSHEET	**WHO IS IT FOR?** Parties and their representatives. **WHY USE IT?** To prepare for mediation.
MODEL MEDIATOR'S OPENING STATEMENT and CHECKLIST	**WHAT IT IS:** This is an example of everything that should be covered by the mediator in their opening statement to the parties. **WHO IS IT FOR?** The Mediator should read before the session. **HOW SHOULD IT BE USED?** The Mediator should never read straight from the model statement in an actual mediation. Mediators are advised to take bullet points with them to the mediation or use the checklist that is provided along with the model mediator's opening statement.
MEDIATION SETTLEMENT AGREEMENT COVER PAGE	**WHAT IT IS:** This serves as a template or the sample agreement for the stakeholders to use facilitated by the mediator once an agreement is reached in the mediation session.

	WHO IS IT FOR? This is for the stakeholders and mediator as well as the appropriate approving officials.
MEDIATION SETTLEMENT AGREEMENT (EEO EXCEPT AGE DISCRMINATION)	**WHAT IT IS:** This serves as a template for agreements involving EEO complaints, THAT ARE NOT AGE DISCRIMNATION **WHO IS IT FOR**? Stakeholders and Mediators.
MEDIATION SETTLEMENT AGREEMENT (EEO COMPLAINT ALLEGING AGE DISCRIMINATION)	**WHAT IT IS:** A template for EEO complaints where complainant is alleging age discrimination. **WHO IS IT FOR**? Stakeholders and Mediators. **IMPORTANT TO NOTE:** In age discrimination complaints at least seven days is given to the Complainant to consider and execute this agreement. Complainant has a right to consult with an attorney before signing this agreement. If this offer is not executed and returned to the agency official presenting the offer within this time frame, this offer of settlement is no longer open for consideration unless the agency renews the offer after seven days.
MEDIATION SETTLEMENT AGREEMENT (USE IN NON-EEO COMPLAINTS)	**WHAT IT IS:** This serves as a template for agreements that are NOT EEO complaints. **WHO IS IT FOR**? Stakeholders and Mediators.
MEDIATION SETTLEMENT AGREEMENT (USE IN NEGOTIATED GRIEVANCE)	**WHAT IT IS:** This template is for agencies in mediations involving bargaining unit employees subject to a collective bargaining agreement. **WHO IS IT FOR**? Stakeholders and mediators to use as a guide. **REMINDER**: This is just a template. There may be language that needs to be changed to fit a bargaining unit agreement.
OPTIONAL SETTLEMENT AGREEMENT PROVISIONS	**WHAT IT IS:** This contains additional settlement provisions that the installation legal office may choose to include. **WHEN USED**? Case-by-case basis.
LESSONS LEARNED CLOSEOUT BY MEDIATOR	**WHAT IT IS:** This sheet provides guidelines for the mediator to consider following the conclusion of mediation. It can be a helpful way for the mediator to reflect, grow, and improve as a mediator. **WHO IS IT FOR?** Mediators wishing to build upon their skill sets.
SAMPLE ADR EVALUATION FORM	**WHAT IT IS:** A form for the participants to rate their mediation experience. **HOW IS IT USED?** This form is provided to the mediation participants after the mediation. The mediator should leave the room while the participants complete the form. **WHY USE IT?** This allows the mediator and ADR Manager to evaluate the performance of the mediator as

	well as evaluate what the participants thought about the process. Mediators should keep a copy of all feedbacks for personal growth and their records.
MENTOR MEDIATOR EVALUATION FORM	**WHAT IT IS:** This form is for the experienced mediator to provide feedback to the new mediator. Often new mediators conduct their first few mediation sessions with an experienced co-mediator. **WHY USE IT?** It is encouraged that mentor mediators provide constructive feedback and new mediators will accept this feedback constructively in order to perfect their mediation skills.
ALTERNATIVE DISPUTE RESOLUTION MEDIATOR APPLICATION	**WHAT IT IS:** This form is for individuals to apply to be mediators at an installation. **WHO IS IT FOR?** Trained mediators to submit it to their installation ADR Manager.

SECTION 1 - ADR MANAGER FORMS

DELEGATION OF AUTHORITY
FOR ALTERNATIVE DISPUTE RESOLUTION (ADR)/MEDIATION INVOLVING WORPLACE DISPUTES
(sample)

1. As the Commander, [installation], I hereby delegate authority to [organizations], for the express purpose of committing the U.S. Air Force to participate in Alternative Dispute Resolution (ADR), involving workplace disputes. The [position] Commander may further re-delegate this authority to his/her subordinate squadron commanders.

2. These organizations are authorized to develop resolution strategies for ADR activities, with the coordination of the local Staff Judge Advocate, personnel office, and other appropriate offices, and to implement those strategies in the form of settlement agreements which bind the Air Force to particular courses of action in resolution of workplace disputes. However, all settlement agreements, which involve backpay, lump sum payment, or compensatory damages, retain the requirement for approval by the _____ when required, prior to implementation. Likewise, settlement agreements, which impact Air Force Civilian Career Programs, must be coordinated with the appropriate Career Program Office.

3. This delegation will remain in effect until superseded or withdrawn.

[Commander Name]
[Rank], USAF
Commander

ADR APPROPRIATENESS EVALUATION WORKSHEET

Derived from AFI 51-1201 (21 May 2009)

The ADR Appropriateness Evaluation Worksheet characteristics are necessarily broad, as ADR is useful in many types of issues in controversy. Air Force personnel can refer to these characteristics to make a preliminary assessment of the possibility of using ADR in a particular case. All ADRs are subject to locally negotiated Union/Management agreements.

22. ADR Case Selection Criteria. All eligible written workplace disputes must be screened utilizing the following criteria to ensure that ADR is an appropriate vehicle for resolving the dispute. The SJA (or designee) is primarily responsible for ensuring that workplace disputes are properly screened to determine suitability for ADR. This screening must be accomplished before ADR is unconditionally offered to either party.

22.5. The Administrative Dispute Resolution Act of 1996 (ADRA) requires federal agencies to consider *not* using ADR if any of the following **circumstances** exist:

_____22.5.1. A definitive decision in the matter is needed as precedent.

_____ 22.5.2. Involves significant issues of government policy.

_____22.5.3. Important need to maintain an established government policy

_____ 22.5.4. The matter significantly affects non-parties.

_____ 22.5.5. Development of a full public record is important.

_____ 22.5.6. The agency must maintain continuing jurisdiction over the matter.

22.6. Under the ADRA criteria, the following types of disputes are considered inappropriate for ADR:

_____ 22.6.1. Disputes presenting significant legal issues of first impression, for which a precedential decision is required or desired.

_____ 22.6.2. Misconduct punishable under the Uniform Code of Military Justice (UCMJ), state, or federal criminal laws.

_____ 22.6.3. Military personnel quality force actions, such as involuntary administrative separations, denials of reenlistment, resignations, promotion propriety actions, and officer grade determinations.

_____ 22.6.4. Complaints under Article 138, UCMJ.

_____ 22.6.5. Civilian position classification appeals.

_____ 22.6.6. Allegations of fraud, waste and abuse or other improper conduct within the jurisdiction of the Inspector General (IG) complaint system.

22.7 Non ADRA bases for considering not to use ADR when certain circumstances exist:

_____ 22.7.1 Disputes in litigation that can be resolved expeditiously such as through summary judgment.

_____ 22.7.2 Disputes in which there is substantial evidence that the claimant initiated action to harass or intimidate or otherwise flagrantly abuse the process.

_____ 22.7.3 Any other dispute in which one or more articulable circumstance exists to justify not offering ADR. (Lack of evidence is not by itself enough.)

If any answers are 'Yes' to any of the questions, additional suitability determinations must follow. Any unsuitability determination in a workplace dispute must be made in writing and approved by the SJA (or designee).

ADR APPROPRIATENESS EVALUATION CHECKLIST

Individual/group issue(s) or concern(s) write here:		
PART I:		
Does the issue or concern fall into one of these categories? If yes, than an ADR approach may by appropriate.		
	YES	**NO**
Both parties volunteer or agree to use it.		
Need a factual interpretation or the parties are polarized into an "all or none" position and believe that an evaluation by a third party Neutral could help resolve the matter.		
One party's view of the case is unrealistic, and a realistic appraisal of the situation by a Neutral third party may help.		
ADR could speed anticipated settlement by streamlining or limiting the exchange of information and time needed to resolve the matter.		
The matter involves employment-related work place conflict(s).		
The matter relates to a factual dispute, not a legal or precedent-setting matter.		
The catalyst for the complaint does not belong to a formal administrative or legal system.		
The matter may need to overcome personality and/or individual communication problems.		
Parties may desire/want to maintain, establish, or restore a good working relationship.		
Interpersonal dispute is impacting unit's productivity and morale.		
The issues must be under the control of installation management.		
Demands/views of either party may be unrealistic; neutral third party may help with a reality-check.		
Traditional processes may be unlikely to successfully resolve the matter.		
Compared to potential cost and disruption of using traditional methods, issues are relatively minor.		

PART II:

Does the issue or concern fall into one of these categories? If yes, than an ADR approach may not be appropriate.		
	YES	**NO**
Allegations or a matter in dispute relate to fraud, waste and abuse.		
Criminal charges are pending, or a likely outcome, regarding the matter in dispute.		
The matter might relate to Uniform Code of Military Justice (UCMJ) charges.		
The dispute involves significant legal or policy matters.		
A definitive or authoritative resolution is needed as a legal precedent.		
Award of compensatory damages is the primary or only motivation.		
The agency must maintain jurisdiction over the matter, not the involved individuals.		
No local party has the authority to settle the case outside the scope of the installation ADR program.		

Suitable		

AIR FORCE MEDIATOR CASE MANAGEMENT WORKSHEET

I. INFORMATION ABOUT THE PARTIES

Name of Employee/Complainant/Grievant:_____

Position and grade or rank:_____

Address:

Phone number:_____ Home phone (optional):_____
Fax number**:**_____ Duty hours:_____
Email:_____

Name of Management Official:_____

Position and grade or rank:_____

Address:

Phone number:_____ Home phone (optional):_____
Fax number:_____ Duty hours:_____
Email:_____

Dates Employee/Complainant/Grievant (and Representative, if applicable) Available:_____

Dates Management Official(s) (and Representative, if applicable) Available:_____

What is the agreed-upon time and place for the mediation conference? _____

II. BRIEF DESCRIPTION OF THE ISSUE(S) IN CONTROVERSY

Employee/Complainant/Grievant Information

1. What is at issue in the dispute(s)?

2. What management official(s) is/are involved in the controversies? To what degree?

Respondent's Information

1. What is at issue in the dispute(s)?

2. Who has settlement authority in this matter?

Who will need to be consulted if an acceptable settlement agreement is crafted? (e.g., legal and personnel offices)

Name: Office: Phone Number:

Name: Office: Phone Number:

Name: Office: Phone Number:

Name: Office: Phone Number:

Name: Office: Phone Number:

III. **SCHEDULING THE MEDIATION**: **ACCOUNTING FOR SPECIAL NEEDS OF THE PARTIES AND THEIR REPRESENTATIVES, IF ANY**

1. Do any participants have any special needs that may require special considerations such as, schedule consideration or ease of access to location?

2. Does either party currently plan to bring a representative (legal or non-legal) to this session? If yes, please answer the following questions. What is their expected role?

2a. Name of Representative for Complainant/Grievant: _____
Expected Role:_____
Phone number(s):_____ Email:_____
Fax number:_____ Duty hours:_____

2b. Name of Air Force Attorney or other management official attending:_____
_____
Expected Role:_____
Phone number(s):_____ Email:_____
Fax number:_____ Duty hours:_____

IV. **RECOMMENDED POINTS TO COVER WHEN EXPLAINING WHAT MEDIATION IS AND ROLES IN THE PROCESS**

Complainant/Grievant does not waive his/her right to continue with the formal dispute resolution process by attempting mediation. If mediation does not succeed, he/she may resume the formal process ***if applicable time limits are met***.

NOTE: IF THE COMPLAINANT/GRIEVANT ASKS WHAT THE APPLICABLE TIME LIMITS ARE, REFER THEM TO THE APPROPRIATE OFFICE TO OBTAIN THIS INFORMATION.

Mediation is a voluntary process. Mediation and any resulting settlement agreement depend on the voluntary agreement of the parties.

Why confidentiality and impartiality are keys to the success of mediation.

What a caucus is and why it makes mediation a powerful dispute resolution process.

Mediation is not a legal proceeding so normal court rules do not apply.

Mediators are not judges; they do not determine who is right as a matter of law, nor do they provide legal counsel or advice to either party.

Parties have a right to bring legal counsel or any other type of representative to the mediation session if they so choose.

During the mediation session, either party is free to consult lawyers or other experts to ensure terms and conditions of a settlement are legal and that the parties have the authority to agree to them.

NOTE: ADR MANAGER SHOULD ARRANGE EXPERTS TO BE AVAILABLE BY PHONE DURING THE MEDIATION SESSION.

The goal is a clearly written agreement acceptable to both parties.

The written agreement, when reviewed for legal sufficiency and determined to be properly authorized, is intended to be binding. [Remind the parties that the written settlement agreement will require a management and legal review before it becomes binding on the Government. Settlement Agreements that result from mediations are enforceable to the same extent as any other administrative settlements for the type of dispute that gave rise to the complaint/grievance.]

Sessions last about four hours, so ensure they schedule at least six hours for the mediation session.

V. BEST PRACTICES CHECKLIST

THE FOLLOWING SHOULD BE COMPLETED BY THE MEDIATOR OR ADR MANAGER OR THE INTAKE COORDINATOR

	Action	Dates
1.	If employee's position is included in the bargaining unit, verify that ADR has been negotiated and any bargaining obligations have been met.	_____
2.	Contacted Complainant/Grievant by phone and explained the mediation process.	_____
3.	Contacted Management Official by phone and explained the mediation process.	_____
4.	Reached a conclusion that the dispute is amenable to mediation.	_____
5.	Ensured that if one party plans to bring a representative to the mediation that the other party is notified of this.	_____
6.	Reserved a mediation conference room on a date and for a time that Complainant/Grievant and Management Official have at least six hours set aside.	_____
7.	Mailed or faxed mediation process letter to Complainant/Grievant so that it is received at least 48 hours prior to the mediation.	_____
8.	Obtained written confirmation that Complainant/Grievant understands and agrees to the mediation process specified in the mediation process letter received at least 48 hours prior to the mediation.	_____
9.	Obtained written confirmation that the Management Official understands and agrees to the mediation process specified in the mediation process letter received at least 48 hours prior to the mediation.	_____
10.	Selected and confirmed an appropriate mediator.	_____

11. Confirmed availability of the mediation conference room prior to the mediation session. _____

12. Confirmed Air Force subject matter experts are available by phone during the time scheduled ***for mediation*** to provide legal, policy, or practical advice regarding potential settlement options or terms. _____

13. Made arrangements with relevant management officials and Air Force attorneys for an immediate, timely and thorough review of the settlement agreement after mediation. _____

14. Ensured appropriate accommodations, if a disability or special need is identified by any of the parties. _____

THE FOLLOWING ARE TO BE COMPLETED BY THE MEDIATOR ONLY

15. Conducted the mediation. _____

16. Completed settlement agreement coordination process. _____

17. Prepared the mediation result and lessons-learned report. _____

18. Submitted mediation results and lessons learned. _____

ADR UNION ELECTION MEMORANDUM

MEMORANDUM FOR _____

FROM: _____
_____
_____

SUBJECT: ADR Election

1. This notice is to inform you that as a bargaining unit employee you are hereby notified that the [insert Union name] was advised of your mediation session.

2. Please provide your position on the union's presence in your mediation by selecting from the following **[PLEASE CHECK ONE]**:

___ I have no objection to the union's presence at any session.

___ I have no objection to the union's presence at the joint discussion but object to having them in my caucuses, private meetings with the mediator.

___ _____ is representing me in this mediation in their full capacity as a representative. The Union Representative present at the session will be _____.

___ I object to having the union's presence at the mediation and request they not be present. (Please consult the LLFSC/Base JA before choosing this option.)

Employee Signature/date _____

3. You must provide your response to the above no later than _____. If you have any questions or need additional information, please call the _____ office at _____ or the Union _____ at _____.

_____
ADR Manager

MEDIATION MEMORANDUM

[**Date**]

TRANSMITTED VIA FACSIMILE

EMPLOYEE/COMPLAINANT/GRIEVANT
[Address]

MANAGEMENT OFFICIAL
[Address]

Re: Mediation Conference Between _____
[Employee/**Complainant/Grievant**] and _____
[**Management Official**]

Dear:_____ [Complainant/Grievant] and _____
[Management Official],

As we discussed, mediation is a voluntary, informal, and confidential process to resolve disputes. I am writing to confirm the scheduling of the mediation conference that we discussed. Because mediation may be new to you, I thought you should know what to expect.

A. Mediation Conference: Schedule and Expected Duration

Your mediator will conduct the mediation (Day, Date, Time, Building Number, address). It is not unusual for the mediation session to last 4-6 hours. If this amount of time is not possible, please advise me immediately and I will reschedule the mediation for another day or time. Trained mediators (Name) & (Name) will conduct the mediation.

B. What is Mediation and How Does it Work?

This is not a legal proceeding. Equally important, your mediator does not provide legal advice or legal counsel. Also important, by agreeing to mediation _____ _____ [**name of Complainant/Grievant**] ***is not*** waiving his/her right to proceed with the formal legal dispute resolution process, provided that he/she files a timely complaint/grievance**.** Accordingly, if you are unsure of the amount of time you have to file a complaint or grievance, please be sure to check with your counsel/representative or the appropriate officials or office.

Success in mediation depends on all participants being prepared to participate fully in the mediation process, including presenting documentation you feel is necessary to support your position.

1. Phases of the Mediation Conference

The mediation conference begins with an opening statement from your mediator regarding his/her role as a neutral. Mediators are not advocates or legal representatives for either party. After the opening statement, your mediator will ask the party who initiated the complaint to speak about the complaint and give potential remedies which may resolve it. The mediator will then give the management official an opportunity to describe the dispute from management's standpoint. After the opening statements, you and the other party will enter into a joint discussion where clarifying questions can be asked, and potential solutions, if any, can be discussed.

At this point, your mediator may ask to meet privately (caucus) at least once with each participant. Information discussed in your caucus that is given to the mediator in confidence will not be shared with anyone else, subject to the limitations discussed below. Following the caucuses, the mediator may reconvene the joint session and determine if there is any area of agreement on any issue. If not, the parties will continue to negotiate, possibly re-caucusing with the mediator until it is clear that a settlement is or is not going to emerge from this session. Either party will be free to consult with appropriate legal, union, or management representatives to apprise them of their legal rights and/or authority to agree to certain terms in the proposed settlement agreement (if there is one).

If a settlement is reached, your mediator will assist you in drafting the terms of a settlement agreement that are acceptable to all parties and, if present, their representatives. Appropriate management or legal personnel will review and authorize a commitment to the settlement terms before it can become effective.

A signed settlement agreement is intended to be binding on the parties. Accordingly, the agreement can generally be used as evidence in a later proceeding in which either of the parties alleges a breach of the agreement. It is also important that the participants understand that any written agreement reached during the course of the mediation could eventually become public record.

2. Confidentiality

Confidentiality is a critical part of the process. If you tell your mediator something in private and ask him/her to keep it confidential, he/she is bound by law not to disclose this information voluntarily. There are some obvious exceptions to this rule. For example, if you announce that you plan to commit an act of fraud, waste, or abuse, or that you plan to commit a violent physical act, your mediator may be required to share this information with appropriate authorities. Or, in another situation, if a judge determines, after an appropriate proceeding is held, that disclosure of our private confidential discussions is necessary to prevent a manifest injustice, or establish a violation of law, or prevent harm to the public health or safety, the mediator may be required by a court to disclose our private discussions.

You must remember that facts discoverable before the mediation session do not become confidential merely because they were presented during the session. It is only those things you say or write in confidence ***to your mediator during the mediation*** that will not be disclosed, unless one of the unusual exceptions discussed above applies. This means that neither the mediation agreement nor the resulting settlement agreement, if any, is confidential. For example, certain Air Force officials will have to review the proposed settlement agreement before it becomes binding on the Air Force -- so the agreement itself cannot be kept completely confidential.

You must agree that, should this mediation not resolve your dispute, you will not request information from your mediator in any future legal proceeding -- unless of course you have a dispute with the mediator as a result of the mediation process. If anyone asks you to provide information about what was discussed in this mediation session, it is very important that you say nothing and that you immediately notify the local ADR Manager or Staff Judge Advocate. Guidance will be provided on how to respond. As a matter of policy, the Air Force will defend you and the mediator against all discovery requests that seek information related to this mediation session.

3. Your Right to Representation

Either party may choose to come to the mediation conference alone, with a representative, or with legal counsel, subject to locally negotiated policies for bargaining unit employees. If you plan to have a representative present, I need to know that prior to the mediation session so that the other party has the opportunity to bring a representative as well. Failure to notify me of your intent to bring a representative prior to the mediation session could lead to a postponement or cancellation of this mediation.

C. Conclusion

To sum up, mediation is an informal process designed to achieve a solution to the problem which satisfies all parties, and negates the need for further legal action on anyone's behalf aside from those steps that may be agreed to as part of a settlement agreement. Your mediator looks forward to working with you in an effort to resolve the dispute to everyone's satisfaction.

_____

[ADR Intake Coordinator/ADR Manager]

AGREEMENT TO MEDIATE
(not covered by NGP)

AGREEMENT TO MEDIATE

1. I have received the mediation memorandum confirming my agreement to mediate for at least four hours at the location, time, and date listed in that letter.

2. I have read and understand the mediation process described in the mediation memorandum. If mediation does not succeed in resolving this dispute, I understand that the formal legal dispute process may be resumed ***as long as applicable time limits are met***.

3. I understand that the entire mediation session is a negotiation. All promises, proposals, conduct, and statements made in the course of the mediation session are confidential and will not be disclosed voluntarily to the extent permitted by law. See 5 U.S.C. **§** 574; Federal Rule of Evidence 408. I also agree that I will not disclose or discuss this settlement with other agency employees (except my representative and responsible management personnel). I recognize and authorize the Air Force to disclose the terms of any settlement agreement to Air Force officials who may need to review and approve the terms of a settlement agreement.

____ I will ____ I will not have a representative present at this mediation session.

Representative's Name and Role _____

_____
Name

_____
Title

_____
Date

Please sign and fax to your ADR Office as soon as possible!

AGREEMENT TO MEDIATE (NGP)

CASE NUMBER: DATE:

I voluntarily agree to participate in grievance mediation. I sincerely agree to attempt to resolve this dispute, agree to cooperate with the mediator assigned to this case, and agree to give serious consideration to all suggestions made in regard to developing a realistic solution to the problem.

I understand that the mediator has no authority to make decisions on issues raised and is not to act as an advocate, attorney, or judge for either party.

I agree that mediation sessions are confidential settlement negotiations and understand that all offers, promises, conduct and proceedings are inadmissible in any litigation, complaint process, or arbitration regarding this dispute. I also agree not to subpoena or request or require the mediator to testify or produce records, notes, or work product regarding discussions or deliberations in any future proceedings.

I understand by agreeing to use the mediation process, I am attempting to resolve my dispute separate from any traditional complaint or grievance process. If I opt out of mediation at any time during the process or have any unresolved disputes at the end of the mediation session, I understand that I have the right to return to the applicable grievance process provided I have met all of the filing requirements and time limits.

I understand that the terms of this Agreement are confidential and that I shall not disclose any of the settlement terms except for the limited purpose of implementation and enforcement of the settlement.

_____	_____	_____	_____
Signature (Employee)	Date	Signature (Mgmt Rep)	Date

CONFIDENTIALITY AGREEMENT WITH ADR SUPPORT PROVIDERS (SUBJECT MATTER EXPERTS)

This office _____ understands that a mediation session is a compromise negotiation. All promises, proposals, conduct, and statements made in the course of the mediation session will not be disclosed voluntarily to any judicial forum except to the extent permitted by law. See 5 U.S.C. § 574; Federal Rule of Evidence 408. The members of this office agree they will not disclose or discuss the contents of individual mediation sessions and settlements with other agency employees. Disclosure of the terms of any settlement agreement will be limited to Air Force officials who may need to review and approve the terms of a settlement agreement. The following individuals assigned to this office are aware of the above confidentiality requirements and agree to assist in accordance with these terms:

Signed:

_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date
_____	_____
Name	Date

(IF APPLICABLE) Docket # _____

AIR FORCE ALTERNATIVE DISPUTE RESOLUTION PROGRAM NOTICE (EEO COMPLAINTS)

I. Air Force ADR Program Policy. It is the policy of the United States Air Force to voluntarily use ADR to the maximum extent practicable and appropriate to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level. Use of these techniques may resolve the entire issue in controversy or a portion of the issue in controversy. See Air Force Policy Directive 51-12 and Air Force Instruction 51-1201 at **www.adr.af.mil** for more details.

II. ADR Program Availability. The Air Force ADR Program recognizes the value in using ADR techniques toward efficient and timely resolution of workplace disputes arising from a variety of administrative dispute procedures.

III. Types of ADR procedures. Generally, the Air Force uses Mediation or Facilitation, although other ADR procedures may be available. The definitions of Mediation and Facilitation are:

Mediation: A structured proceeding in which disputing parties use a trained Mediator to assist the parties in arriving at a mutually agreeable resolution. Mediation conferences usually involve private confidential meetings (caucuses) with the parties.

Facilitation: A flexible proceeding in which the Neutral uses an Interest-Based Negotiation approach to assist the parties in achieving a better understanding of the issue(s) and a resolution of the dispute. Facilitation usually does not involve private meetings (caucuses) with the parties, but may do so depending on the situation. In either case, the neutral may not impose a decision on the parties. If you would like to learn more about how mediation works in the Air Force, please see the Air Force Mediation Compendium at: **http://www.adr.af.mil/compendium.**

IV. Time frames for EEO disputes and using ADR procedures. The EEO administrative process begins with an informal 30-day counseling procedure, involving complaint intake, counselor inquiry and fact-gathering activities. This period can be extended for not more than 60 days with the complainant's consent. If you and management agree to use ADR, this period is automatically extended to 90 days. If this process does not result in resolution, you have the right to file a formal complaint. The formal investigative procedure can take as long as 180 days before you can request a hearing before the Equal Employment Opportunity Commission (EEOC). The EEOC hearing procedure can take between 180 days and 400 days or more. In contrast, the ADR procedure may result in resolution of your issue(s) much earlier than the formal process would. Please note that if ADR is made available in your particular EEO complaint, then it can be attempted at any point during the processing of the complaint.

V. Source(s) of Neutrals. The Air Force has invested time, money, and extensive training to develop a cadre of internal neutrals. At most installations, there are trained neutrals to assist parties through either of the ADR procedures mentioned above. If there

is no neutral available locally, there are neutrals assigned to other Air Force installations that can travel to your installation to assist the parties. In the event there are no neutrals available within Air Force resources, there are contract neutrals that can be assigned by the Air Force General Counsel's Office, who can assist in attempting to resolve your dispute. There is no cost to the complainant for the neutral's services.

VI. Exceptions to ADR availability. In some cases, ADR may not be appropriate because of the nature of the particular dispute. Accordingly, each EEO complaint is evaluated to ensure it is appropriate for resolution through the use of an ADR process. Some examples of complaints that may not be appropriate for ADR include complaints that require a formal written decision setting precedent or that could affect the outcome of other similar, but unrelated cases. In addition, complaints involving potential criminal conduct, such as fraud, waste, or abuse are usually not appropriate for resolution in an ADR process. The Air Force does not, however, exclude complaints from consideration for ADR because of the type of EEO basis (e.g., race, color, religion, sex, age, national origin, disability or reprisal) alleged by a complainant.

VII. ADR is voluntary. The decision to use ADR for a particular complaint is completely voluntary. ***Management and the complainant must both agree to use ADR***. Once the ADR proceeding has begun it can be terminated by either party. If the ADR process is terminated in this manner, the EEO complaint will then proceed into the formal complaint process. Please note that if an Air Force employee acted as the mediator then s/he will not be involved in the further processing of your complaint. A decision to use ADR does not obligate either party to settle the complaint, or to agree to any particular terms of settlement.

VIII. Representation during ADR. You have the right to select a representative unless your selected representative would pose a conflict with his/her official or collateral duties. Your right to have a representative remains in effect during your participation in ADR. The process is fair to both parties and provides an opportunity for individuals to be heard and to develop options for resolution. You cannot be forced to agree to terms or outcomes if they are not satisfactory to you.

IX. Air Force ADR program requirements. The Air Force is committed to providing ADR proceedings that reflect **confidentiality**, **neutrality**, and **enforceability**. Confidentiality applies to ADR proceedings with regard to joint discussions between the parties where the Neutral is providing information to either party and with regard to private discussions (caucuses) held by the Neutral with a respective party. Neutrality is a cornerstone of the Air Force ADR program. Neutrals used by the Air Force are required to practice the highest standards of integrity and ethics in conducting ADR proceedings. Being able to enforce a settlement reached through the ADR process is very important. When reached, resolutions are reduced to writing, and they include appropriate safeguards for individuals if they believe that the terms of a particular written agreement have not been implemented.

X. Air Force policy on settlement authority. If ADR is appropriate, and you and the responsive management official agree to participate, a Neutral will be assigned and a session scheduled in the immediate future. Any resulting settlement agreement will, upon approval by appropriate Air Force officials, be binding on you and the Air Force.

I have been advised of the availability and features of Alternative Dispute Resolution to resolve my complaint, and I have received a copy of this notice.

_____ _____

(Complainant's Signature) (Date) (EO Counselor Signature) (Date)

ALTERNATIVE DISPUTE RESOLUTION QUESTIONNAIRE

In an effort to improve the Alternative Dispute Resolution (ADR) program, we would like to understand why you did not choose to participate in ADR to resolve your dispute. Your responses are confidential—your name and phone number are optional. By including that information, however, follow-up discussions may be held to ensure we understand your responses.

Instructions: Please return this document to _____

Section I

1. Your role in the dispute:

_____ Employee _____ Manager

2. Type of dispute:

_____ Equal Opportunity
_____ Negotiated Grievance
_____ Administrative Grievance
_____ Merit Systems Protection Board (MSPB) appeals
_____ Other

3. Reason(s) why you did not elect ADR (select all that apply):

_____ Was not offered ADR
_____ Did not understand ADR process
_____ Prior experience with ADR was not positive
_____ Was advised by someone not to use ADR
    _____ Friend
    _____ Co-Worker
    _____ Family Member
    _____ Legal Counsel
    _____ Union Representative
    _____ Other _____
_____ Did not think ADR sounded worthwhile
_____ Intimidated by the prospect of speaking face-to-face
_____ Would rather have a neutral person (e.g., judge) evaluate my case
_____ Do not think the specific ADR process (mediation) offered is appropriate

4. Have you previously participated in ADR? _____ No _____ Yes (If yes, what type of dispute? _____)

5. Comments regarding your decision not to participate in ADR:

_____
_____
_____

6. Please describe your experience – include specific positive or negative aspects of that ADR:

_____
_____
_____
_____
_____

Name (*Optional)*: _____

Phone number *(Optional)*: _____

Additional Comments:

_____
_____
_____
_____
_____
_____

MEDIATION CONCEPTS FOR PARTIES NEW TO MEDIATION

Commitment. While no one is asked to commit to settle the case in advance of mediation, all parties should commit to a good faith effort to participate in the proceedings with the intention of settling the dispute.

Mediator. The parties consent to the appointment of the individual named as the mediator in their case. The mediator facilitates resolution and applies his or her best efforts to assist the parties in reaching a mutually acceptable resolution of the dispute.

Mediator's Responsibilities. The mediator will not serve as a mediator in any dispute in which he or she has any financial or personal interest in the result of the mediation. Prior to accepting the appointment, the mediator is to disclose any circumstances likely to create a perception or presumption of bias or prevent a prompt meeting with the parties.

Limit of Authority. The mediator does not have the authority to decide any issues for the parties, but does attempt to facilitate the parties' voluntary resolution of the dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties to achieve settlement. If necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute. Arrangements for obtaining such advice are made by the mediator through the ADR Manager.

Mediation Participants. The parties or their representatives must have the authority to settle the issues. Everyone necessary to the settlement decision shall be present or readily available for consultation.

Representatives. Representatives are optional for the complainant; however, if the complainant has a representative present, the management official is also allowed to have a representative. Representatives may be important during mediation; however, the primary parties have the major role in explaining their views of the dispute.

Parties' Responsibility. The parties understand that the mediator cannot and shall not impose a settlement in their dispute. **The parties are responsible for negotiating a settlement acceptable to them**; however, the mediator will make every effort to facilitate the negotiations. The mediator does not warrant or represent that settlement will result from the mediation process.

Matters in Dispute. At or before the first session, the parties may be required to produce an information sheet setting forth the matters which need to be resolved and this sheet will be provided to the mediator to assist in understanding issues in dispute.

Privacy. Mediation sessions are private. Only the parties and their representatives, if any, may attend the session. Other people, such as mediator trainees, may attend with the consent of the mediator and both parties.

Confidentiality. Confidentiality is a critical part of the process. Confidential information disclosed to a mediator by the parties in the course of the mediation will not be divulged by the mediator even if both parties desire for the mediator to testify. **The only exceptions to the mediator's confidentiality are in the areas of fraud, waste & abuse allegations, UCMJ charges, child abuse, and criminal activity.** The parties must maintain the confidentiality of the mediation and shall not rely on or introduce as evidence in any administrative or judicial proceedings: (a) views expressed or suggestions made by the other party with respect to a possible settlement of the dispute; (b) admissions made by either party in the course of the mediation proceeding; (c) proposals made or views expressed by the mediator; or (d) the fact that the other party did or did not indicate a willingness to accept a proposal for settlement made by the mediator.

Evidence. Parties are welcome to bring documentation they feel is necessary to support their position; however, this is not a legal proceeding and the rules of evidence do not apply. The party (and their representative) should understand, while candor and openness are encouraged in mediation, it is up to each of them to decide what to say and what types of evidence each may wish to bring and present at the mediation session. This is not a trial, but a settlement conference and the parties involved should be the ones who are most familiar with the dispute as well as who have the authority to settle.

Agreements. If an agreement is reached, the parties may decide to voluntarily relinquish certain rights, but they will do so only after going through the process and voluntarily deciding that the agreement developed is an acceptable resolution to the dispute. Parties may wish to have a lawyer and/or management official review the proposed agreement prior to signing.

No Records. There shall be no stenographic record of the mediation process and no one shall tape record any portion of the mediation session. All notes taken during the conference will be confiscated by the mediator.

Termination. The mediation shall be terminated (a) by the execution of a settlement agreement by the parties; (b) by declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile, or (c) after the completion of one full mediation session, by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

Air Force Negotiation Planning Worksheet

Assessing the Negotiation Context	**EMPLOYEE**	**SUPERVISOR**
Position *(Assumed best outcome/solution)*		
Interests (Identify and Prioritize) *(**Why** do I want the outcome/solution?* *How important is the interest to me?)*		
BATNA (**B**est **A**lternative **t**o a **N**egotiated **A**greement) *(What can I do if I don't reach an agreement with the other party?)*		
Options for Mutual Gain *(Satisfying as many interests of both parties as possible)*		
Objective Criteria *(Industry standards, historical data, etc.)*		

Air Force Negotiation Planning Worksheet
(Cooperative Negotiation Strategy Version)

	You	Them
Position *(WHAT do I think I/They want?)* **Aspiration Point** *(What might the best possible outcome be for me? Rationally Bounded)* **Reservation Point** *(What's the minimum I would accept? Rationally Bounded)*		
Prioritized Interests *(Critical Thinking: Why do I want the above outcome? How important are each of the interests? Part of this will be developing assumptions to be tested during the negotiation)*		

Best Alternative to a Negotiated Agreement (BATNAs) *(Critical Thinking: What can I / they do if we don't reach an agreement?)* **Worst Alternative to a Negotiated Agreement (WATNAs)** *(What might be the worst option I / they might have to execute?)*		
Agenda *1. Trust building?* *2. Pre-emptive concessions?* *3. Who opens?* *4. Common interests?* *5. Options presented as full proposal or incremental?* *6. Reciprocity?*		
Cultural Perspectives *(Use High/Low Culture Contrast Tools)* *Define Success?* *Expectation Management?* *Who has Authority?* *Consensus?* *Resources?* *Risk?* *Face?* *Agreement Style?* *Communications?* *Post-Negotiation Expectations?*		

Execution Process	
Zone of Possible Agreement (ZOPA) *The range of possible solutions from your "least" to their "least" possible acceptable solution. Try to define this zone after interests are explored and assumptions validated / rejected.*	
Options for Mutual Gain *(Divergent Thinking: Create ideas that satisfy as many interests of both parties as possible – this process is brainstorming and non-judgmental. Continue to test assumptions with Active Listening as well as using Critical Thinking questions)*	
Objective Criteria *(Using convergent thinking, find the industry standard, historical data, or, for the military context, the option that best meets the priority needs established in the exploration of each sides' interest)*	

SECTION 2—MEDIATOR FORMS AND CHECKLISTS

MODEL MEDIATOR'S OPENING STATEMENT

Good afternoon, my name is _____ and I am serving as your mediator today. I am a [certified*] mediator trained to assist in resolving disputes such as the one before us today. I am pleased to be here to assist you in working through your issues and believe you will find mediation to be a very helpful process. Thank you for committing to be here today.

If any of you have a special need during the session, please let me know now or at any time during this session. Also, please silence all electronic devices during this mediation.

How would each of you like to be addressed in our session today?

Do you have the authority to settle and sign an agreement if one is reached?

Let me begin by stating that I am not acquainted with the parties involved in this dispute.

Have any of you met me before this session?

Mediation is a voluntary process in which a neutral, impartial person assists parties who want to generate options for resolving their issues.

Are you all here voluntarily?

My role as the mediator is to facilitate the discussion and negotiation and help you capture any agreement into appropriate settlement terms. Your attendance at this mediation does not imply any admission of guilt or wrongdoing. If you would like to take a break, meet with me privately, or end the mediation, please let me know and we'll address those matters at that time.

My goal is to assist each of you in communicating clearly with one another and reaching a mutually acceptable settlement of this matter. I am not here to represent any particular side and will not provide advice or guidance. You are entitled to seek representation and subject matter experts that can be called to provide information, if necessary. I have no power to impose a decision on you or to decide how this matter should be settled. This is where mediation differs from other forms of dispute resolution. You are empowered with the ability to design your own solution that meets your needs and addresses your interests.

Did each of you receive a letter or in-brief outlining what you can expect in a mediation session and asking you to verify that you willingly accept the opportunity to participate?

Each of you signed agreements to participate in good faith. "Participating in good faith" means that you are entering with an open mind, that you will be respectful of the other person, and that you will listen to one another.

Are you here in good faith?

Before I discuss the mediation process, are there any questions about what I've covered so far?

Before we begin, let me explain the process we will use. When I complete these preliminary remarks each of you will have an uninterrupted period of time to explain what brought you to this session and to describe the problem as you see it. It is customary for the party that brought the matter to our attention to begin first, therefore, [NAME] I will ask you to begin. When you have completed your opening remarks, I will ask [NAME] to make an uninterrupted statement. Let's abide by the rules of common courtesy and avoid interrupting or using inflammatory language. After you have both given an overview, we will transition into a joint discussion where we can more fully discuss the nature of the workplace dispute as well as negotiate possible solutions to resolve it. I ask that each of you be thinking of how you might like to resolve this matter. At some point, I may meet with each of you separately. This is called a "caucus," or individual meeting. I will use the caucus to help clarify some concerns I may have as we talk, and to be of more assistance in helping you resolve your dispute. Either one of you may call a caucus as well if you feel you would like to share something in confidence; remember you both control the outcome of the mediation. We may use the caucus any number of times. If I caucus with one party, I will also caucus with the other if desired. Please do not assign significance to the length of each caucus. The information you share during the caucus is also confidential and will not be shared during joint discussion unless you specifically give consent to such disclosure.

Confidentiality is a critical part of the process. Generally, if you tell me something in private and ask me to keep it confidential, I am bound by law not to disclose this information voluntarily. There are some exceptions to this rule, but I do not expect them to arise during our mediation. For example, if you confess to or allege the commission of a criminal offense, or to an act of fraud, waste, or abuse, or that you plan to commit a violent physical act, I may be required to share this information with appropriate authorities. You will see me taking notes during the session, which are just for me to organize my thoughts. I have provided paper for you to take notes, too. I encourage you to record any notes on that paper. At the end of the session, I will shred my notes, as well as the notes you take today.

I want to remind you that this is not a legal proceeding. Should you desire, at a later time, to pursue this matter in a court or an administrative system, this session will not delay or interfere with your right to do so. I, however, will not willingly testify for or against either of you regarding the information unique to this session if you decide to pursue this matter formally. If a judge determines that disclosure of our private confidential discussions is necessary to prevent a manifest injustice, establish a violation

of law, or prevent harm to the public health or safety, I may be required by a court to disclose our private discussions.

Both the mediation agreement and the resulting settlement agreement, if any, are not confidential. Certain Air Force officials, such as legal and personnel, will have to review and authorize the proposed settlement agreement before it becomes legally binding; so the agreement itself cannot be kept completely confidential. If an agreement is reached, it will be written and signed by you, and each of you will be provided with a copy of the agreement, when it becomes a legally binding document after the necessary approvals are granted.

Do you understand the confidentiality requirements and will you follow these requirements?

Thank you for being here. Your presence today demonstrates your willingness to attempt cooperative problem-solving. *Would you like to suggest any ground rules for the session today?* All I ask is that you sincerely agree to attempt to resolve this dispute, agree to treat one another with mutual respect (by talking one at a time and avoiding the use of profanity), and agree to give consideration to all suggestions made in regard to developing a realistic solution to the problem.

Are there any questions at this point?

If not, let's begin with [NAME of the party who brought the matter forward].
I know very little about the dispute so please tell us what brings you to mediation.

***** Use "certified" in AF disputes only when SAF/GCD awarded certification.

MEDIATOR'S OPENING STATEMENT CHECKLIST

____ INTRODUCE yourself and (if applicable) your co-mediator. Ensure NO CONFLICTS OF INTEREST.

____ LOGISTICS: electronic devices, restrooms, accommodations needed?

____ NAMES: How would everyone like to be addressed? Have parties and representatives met one another before?

____ SETTLEMENT AUTHORITY: Do you have the authority to settle/sign any agreement?

____ DEFINE MEDIATION: A process in which a neutral person assists others in resolving disputes.

____ VOLUNTARY: Are all of you here voluntarily?

____ ROLE of MEDIATOR: neutral, not a judge or advocate. Parties have a right to bring representation if needed.

____ ROLE OF PARTIES: Good faith, open mind, listen & use questions.

____ PROCESS: stages, CAUCUS

____ WON'T TESTIFY: destroying notes, won't willingly testify.

____ CONFIDENTIALITY: Mediator will keep session confidential unless required to share info with appropriate authorities. Exceptions include confession to the commission of a criminal offense, or to an act of fraud, waste, or abuse, or that you plan to commit a violent physical act, or if a judge determines that disclosure is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety.

____ SETTLEMENT AGREEMENT: legal document, binding, review necessary through chain of authorities.

____ GROUND RULES: Mutual respect, one person talks at a time.

____ QUESTIONS? If not, person who raised the issue goes first.

MEDIATION SETTLEMENT AGREEMENT COVER PAGE

1. Name and organization of Complainant/Grievant:_____

2. Is Complainant/Grievant a member of a Collective Bargaining Unit?
_____Yes _____No

3. Name and organization of Responsible Management Official:_____
_____

4. Legal basis for the dispute that was the subject of this mediation?

_____EEO Complaint _____Negotiated Grievance

_____Agency Grievance _____Unfair Labor Practice

_____MSPB Appeal _____Other (please specify)

5. Please provide a brief description of the issues in controversy that triggered this dispute/ complaint/grievance._____

_____

_____

_____

6. Does the proposed settlement affect the Employee's/Complainant's/Grievant's benefits?
_____Yes _____No

7. Does this settlement agreement propose the Government make a payment to the Employee/Complainant/Grievant? _____Yes _____No

MEDIATION SETTLEMENT AGREEMENT

ALL EEO COMPLAINTS, EXCEPT THOSE ALLEGING AGE DISCRIMINATION

_____,
Complainant,

EEOC No. _____

Agency Nos. _____

v.

DEPARTMENT OF THE AIR FORCE,
Agency

Date: _____

SETTLEMENT AGREEMENT

The Complainant, _____, in exchange for the promises of the Department of the Air Force (the Agency) contained in this Agreement below, hereby agrees, to dismiss with prejudice the above actions before the Equal Employment Opportunity Commission, EEOC No. _____ (Agency Nos. _____) and all other complaints, appeals, grievances, or other administrative proceedings which may be pending in an administrative, civil, military, or criminal court. The Complainant agrees to release the government, the Agency, its employees, in both their official and individual capacities, from any and all liability, claims, and/or causes of action resulting from or relating to, in any manner whatsoever, the subject matter of this settlement, and her employment with the Agency, this agreement being a complete accord and satisfaction of any and all claims, including any and all equitable and legal relief, except what is included herein. The parties agree to the following:

1. The Agency agrees to _____
_____
_____.

2. The Complainant agrees not to institute a lawsuit against the Agency, any affiliated Agency, or any employee or former employee thereof, under the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. Sec. 2 et seq., the Handicap Discrimination Act, 29 U.S.C. Sec. 791, et seq., the Civil Rights Act of 1866 and 1871, 42 U.S.C. Secs 1981, 1983 and 1985, the Age Discrimination in Employment Act of 1967 as amended, the Rehabilitation Act of 1973, as amended, the United States Constitution, or any other state, local or federal law. The Complainant will waive of all claims under the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. Sec. 2 et seq., the Handicap Discrimination Act, 29 U.S.C. Sec. 791, et seq., the Civil Rights Act of 1866 and 1871, 42 U.S.C. Secs 1981, 1983 and 1985, the Age Discrimination in Employment Act of 1967 as amended, the Rehabilitation Act of

1973, as amended, the Uniformed Services Employment and Reemployment Rights Act of 1994, the United States Constitution, or any other state, local or federal law. This includes state and local law. The Complainant waives any and all claims to any additional compensatory and consequential damages aside from that already described in this agreement. This release covers both claims and predicates to those claims the Complainant knows about, or she has reason to know about, and includes all claims up to and including the date of the signing of the agreement.

The Complainant also agrees to _____
_____
_____.

3. This agreement constitutes the complete understanding between the Complainant and the agency. No other promises or agreements will be binding unless signed by both parties.

4. This Agreement provides that no monies, including attorney fees, will be paid by either side unless specifically set forth in this Agreement.

5. The terms of this agreement will not establish any precedent, nor will the Agreement be used as a basis by the Complainant or any representative organization to seek or justify similar terms in any subsequent case.

6. This agreement may be used as evidence in a later proceeding in which either of the parties alleges a breach of the agreement. The parties agree that if the Agency does not carry out or rescinds any action specified by this agreement, except for that relief described in paragraphs five and six, for any reason not attributed to acts or conduct or the Complainant, the Agency will, upon the Complainant's written request, reinstate the Complainant's complaint and appeal for further administrative proceedings. Complainant may also seek to enforce the terms of this agreement. The Complainant understands that if the proceedings are ultimately found to be in the favor of the Agency, Complainant is responsible to return all benefits received hereunder plus interest to the Agency.

7. In accordance with 29 C.F.R. § 1614.504, the parties further agree that, if the Complainant believes that the provisions of this negotiated settlement agreement are being violated, he may take the following actions:

(a) The Complainant must notify, in writing the EO Director at _____ within 30 calendar days of becoming aware of or should have known of a breach of this agreement. The Complainant's exclusive remedies for an alleged breach are to request that the terms of the settlement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The Commander has 30 days from the date of the Agency's receipt of the Complainant's written allegations of noncompliance with the settlement agreement to resolve the matter and respond to the Complainant in writing.

(c) If, after 30 days from the date of the Agency's receipt of the Complainant's written allegation of noncompliance with the settlement agreement, the Agency has not responded to the Complainant in writing, or if the Complainant is not satisfied with the Agency's attempt to resolve the matter, the Complainant may appeal to the Commission for a determination as to whether the Agency has complied with the terms of the settlement agreement. The Complainant may file such appeal 35 days after he has served the Agency of allegations of noncompliance, but must file an appeal within 30 days of receipt of an Agency's determination. The current address of the Commission is:

Equal Employment Opportunity Commission
Office of Federal Operations (EEOC/OFO)
P.O. Box 77960, Washington, D.C. 20013-8960

8. This Agreement does not constitute an admission or acknowledgment by the Agency, or the Complainant of any guilt, fault, or wrongdoing, or any violation of any federal, state, or agency rule or regulation and is made solely to settle all of the issues of any complaint, grievance, or appeal pending against the Agency, any affiliated agency, or any employee or former employee thereof.

9. This Agreement was freely and voluntarily entered into without threats, coercion or duress and the parties fully understand and accept the terms of this Agreement. All parties have been afforded the opportunity to carefully review this Agreement, read and raise questions about its meaning, and consult with counsel or another representative prior to signing.

10. The parties agree that in the event it is determined that a provision(s) of this settlement agreement is contrary to law or regulation or is otherwise unenforceable, only that provision(s) shall be considered null and void and all other provisions shall remain in full force and effect.

11. In accordance with the Older Workers Benefit Protection Act (OWBPA) amendment to the Age Discrimination in Employment Act, the Agency advises the Complainant to consult with an attorney before signing and delivering this agreement. The Complainant understands that the decision whether to consult an attorney rests with the Complainant.

THE COMPLAINANT ACKNOWLEDGES THAT SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND IS VOLUNTARILY ENTERING INTO IT.

PLEASE READ THIS AGREEMENT CAREFULLY, IT CONTAINS A RELEASE OF KNOWN AND UNKNOWN CLAIMS.

_____	_____
[Typed Name of Complainant] Complainant	DATE
_____	_____
[Typed Name of Complainant's Rep] Complainant's Representative	DATE
_____	_____
[Typed Name of Settlement Authority] [Typed Title of Settlement Authority] Agency Settlement Authority	DATE
_____	_____
[Typed Name of Agency Representative] Agency Representative	DATE

THIS AGREEMENT IS SUBJECT TO FINAL REVIEW AND APPROVAL BY APPROPRIATE AIR FORCE PERSONNEL.

MEDIATION SETTLEMENT AGREEMENT

EEO COMPLAINT ALLEGING AGE DISCRIMINATION

_____,
Complainant,

EEOC No. _____

Agency Nos. _____

v.

DEPARTMENT OF THE AIR FORCE,
Agency

Date: _____

SETTLEMENT AGREEMENT

The Complainant, _____, in exchange for the promises of the Department of the Air Force (the Agency) contained in this Agreement below, hereby agrees, to dismiss with prejudice the above actions before the Equal Employment Opportunity Commission, EEOC No. _____ (Agency Nos. _____) and all other complaints, appeals, grievances, or other administrative proceedings which may be pending in an administrative, civil, military, or criminal court. The Complainant agrees to release the government, the Agency, its employees, in both their official and individual capacities, from any and all liability, claims, and/or causes of action resulting from or relating to, in any manner whatsoever, the subject matter of this settlement, and her employment with the Agency, this agreement being a complete accord and satisfaction of any and all claims, including any and all equitable and legal relief, except what is included herein. The parties agree to the following:

1. The Agency agrees to _____
_____
_____.

2. The Complainant agrees not to institute a lawsuit against the Agency, any affiliated Agency, or any employee or former employee thereof, under the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. Sec. 2 et seq., the Handicap Discrimination Act, 29 U.S.C. Sec. 791, et seq., the Civil Rights Act of 1866 and 1871, 42 U.S.C. Secs 1981, 1983 and 1985, the Age Discrimination in Employment Act of 1967 as amended, the Rehabilitation Act of 1973, as amended, the United States Constitution, or any other state, local or federal law. The Complainant will waive of all claims under the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. Sec. 2 et seq., the Handicap Discrimination Act, 29 U.S.C. Sec. 791, et seq., the Civil Rights Act of 1866 and 1871, 42 U.S.C. Secs 1981, 1983 and 1985, the Age Discrimination in Employment Act of 1967 as amended, the Rehabilitation Act of 1973, as amended, the Uniformed Services Employment and Reemployment Rights Act of 1994, the United States Constitution, or any other state, local or federal law. This includes

state and local law. The Complainant waives any and all claims to any additional compensatory and consequential damages aside from that already described in this agreement. This release covers both claims and predicates to those claims the Complainant knows about, or she has reason to know about, and includes all claims up to and including the date of the signing of the agreement.

The Complainant also agrees to _____
_____
_____.

3. This agreement constitutes the complete understanding between the Complainant and the agency. No other promises or agreements will be binding unless signed by both parties.

4. This Agreement provides that no monies, including attorney fees, will be paid by either side unless specifically set forth in this Agreement.

5. The terms of this agreement will not establish any precedent, nor will the Agreement be used as a basis by the Complainant or any representative organization to seek or justify similar terms in any subsequent case.

6. This agreement may be used as evidence in a later proceeding in which either of the parties alleges a breach of the agreement. The parties agree that if the Agency does not carry out or rescinds any action specified by this agreement, except for that relief described in paragraphs five and six, for any reason not attributed to acts or conduct or the Complainant, the Agency will, upon the Complainant's written request, reinstate the Complainant's complaint and appeal for further administrative proceedings. Complainant may also seek to enforce the terms of this agreement. The Complainant understands that if the proceedings are ultimately found to be in the favor of the Agency, Complainant is responsible to return all benefits received hereunder plus interest to the Agency.

7. In accordance with 29 C.F.R. § 1614.504, the parties further agree that, if the Complainant believes that the provisions of this negotiated settlement agreement are being violated, he may take the following actions:

(a) The Complainant must notify, in writing the EO Director at _____ within 30 calendar days of becoming aware of or should have known of a breach of this agreement. The Complainant's exclusive remedies for an alleged breach are to request that the terms of the settlement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The Commander has 30 days from the date of the Agency's receipt of the Complainant's written allegations of noncompliance with the settlement agreement to resolve the matter and respond to the Complainant in writing.

(c) If, after 30 days from the date of the Agency's receipt of the Complainant's written allegation of noncompliance with the settlement agreement, the Agency has not responded to the Complainant in writing, or if the Complainant is not satisfied with the Agency's attempt to resolve the matter, the Complainant may appeal to the Commission for a determination as to whether the Agency has complied with the terms of the settlement agreement. The Complainant may file such appeal 35 days after he has served the Agency of allegations of noncompliance, but must file an appeal within 30 days of receipt of an Agency's determination. The current address of the Commission is:

Equal Employment Opportunity Commission
Office of Federal Operations (EEOC/OFO)
P.O. Box 77960, Washington, D.C. 20013-8960

8. This Agreement does not constitute an admission or acknowledgment by the Agency, or the Complainant of any guilt, fault, or wrongdoing, or any violation of any federal, state, or agency rule or regulation and is made solely to settle all of the issues of any complaint, grievance, or appeal pending against the Agency, any affiliated agency, or any employee or former employee thereof.

9. This Agreement was freely and voluntarily entered into without threats, coercion or duress and the parties fully understand and accept the terms of this Agreement. All parties have been afforded the opportunity to carefully review this Agreement, read and raise questions about its meaning, and consult with counsel or another representative prior to signing.

10. The parties agree that in the event it is determined that a provision(s) of this settlement agreement is contrary to law or regulation or is otherwise unenforceable, only that provision(s) shall be considered null and void and all other provisions shall remain in full force and effect.

11. In accordance with the Older Workers Benefit Protection Act (OWBPA) amendment to the Age Discrimination in Employment Act, the Agency advises the Complainant to consult with an attorney before signing and delivering this agreement. The Complainant understands that the decision whether to consult an attorney rests with the Complainant.

12. The OWBPA also provides that Complainant will be given a reasonable period of time in which to consider this agreement. The Complainant understands that he may have up to 21 calendar days from receipt of the agreement to review and consider the agreement before signing it. Therefore, the Complainant acknowledges that he must give his written acceptance by _____, by delivering this signed settlement agreement to the Agency representative. The Complainant further understands that he may use as much or as little of the 21-day period as he wishes prior to signing and delivering the agreement. If Complainant does not sign and deliver this agreement by _____, the settlement offer set forth in this Settlement Agreement is withdrawn by the Agency.

THE COMPLAINANT ACKNOWLEDGES THAT SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND IS VOLUNTARILY ENTERING INTO IT.

PLEASE READ THIS AGREEMENT CAREFULLY, IT CONTAINS A RELEASE OF KNOWN AND UNKNOWN CLAIMS.

_____ _____
[Typed Name of Complainant] DATE
Complainant

_____ _____
[Typed Name of Complainant's Rep] DATE
Complainant's Representative

_____ _____
[Typed Name of Settlement Authority] DATE
[Typed Title of Settlement Authority]
Agency Settlement Authority

_____ _____
[Typed Name of Agency Representative] DATE
Agency Representative

THIS AGREEMENT IS SUBJECT TO FINAL REVIEW AND APPROVAL BY APPROPRIATE AIR FORCE PERSONNEL.

Optional Provision: The Complainant's signature affixed immediately below this paragraph shall serve as an acknowledgment that Complainant was advised in writing of the content, intent, and meaning of this paragraph and knowingly and voluntarily executes this settlement agreement waiving all consultation rights under the Age Discrimination in Employment Act without waiving his/her revocation rights.

NAME: _____ DATE: _____

(Reference 29 U.S.C. 626(f)(1)(A)-(E) and 29 U.S.C. 626(f)(2)

(Note: The Appellant may voluntarily sign the agreement sooner than 21 calendar days after having signed the provision above. The day after the Complainant shall serve as the first day for counting purposes towards the seven day revocation period.)

MEDIATION SETTLEMENT AGREEMENT

USE IN NON-EEO COMPLAINTS

Preamble:

Employee, _____, and the Department of the Air Force (the Agency) enter into this settlement agreement to completely resolve the issues currently in dispute between the parties. The number assigned to this case is _____.

1. The parties mutually agree:

a. This Agreement constitutes the complete understanding between them and is binding upon them, their successors, and any representatives with signatures on this Agreement. No other terms, promises, or agreements will have any force or effect unless reduced to writing and signed by all parties to this Agreement.

b. The terms will not establish any precedent nor will be used as a basis by the Employee, the Agency, or any representative organization to seek or justify similar terms in any subsequent case.

This Agreement does not constitute an admission of liability, fault or error by the Agency, its employees or representatives, and/or any violation of Title VII of the Civil Rights Acts of 1964 and 1991, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Rehabilitation Act of 1973, as amended, the Master Labor Agreement, or any other federal or state statute or regulation.

This Agreement provides that no monies, including attorney fees, will be paid by either side unless specifically set forth in this Agreement.

c. The Mediator, Agency, and Employee will ***immediately notify*** the servicing Alternative Dispute Resolution (ADR) Manager and/or servicing Staff Judge Advocate (SJA), if anyone seeks information about confidential discussions that took place during this mediation session. The ADR Manager and/or SJA will provide guidance about how to respond.

2. In exchange for the promises made by the Respondent in paragraph three of this Agreement, the Employee freely and voluntarily agrees:

That execution of this Agreement operates as resolution of all issues in dispute and the withdrawal of any and all complaints and/or grievances, identified by the case number found in the Preamble above.

a. Not to institute a lawsuit and waives all right to personal recovery, including but not limited to compensatory damages, in any lawsuit brought against the Responding

Management Official or the Agency by either Employee or the Equal Employment Opportunity Commission, or any other civil and criminal litigation in any court or other administrative forum, for all acts, events and circumstances arising out of or connected with the facts upon which the issues in dispute, as identified by the case number found in the Preamble above, are based, including, but not limited to actions brought under Title VII of the Civil Rights Acts of 1964 and 1991, as amended, the Rehabilitation Act of 1973, as amended, or any other federal or state statute or regulation. The Employee specifically and voluntarily affirms that he/she has no other claims made under the Age Discrimination in Employment Act, as amended.

b. That in the event the Complainant believes that the Agency has violated a term or condition of this Agreement, to notify in writing the ADR Manager within 30 calendar days of the alleged violation and request that the terms of the Agreement be specifically implemented.

3. In exchange for the promises made by the Employee in paragraph two of this Agreement, the Agency agrees:

a. _____
b. _____

4. By signing below, the Employee and Responding Management Official acknowledge reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enter into this Agreement without coercion or duress.

Signed:

_____	_____ __	_____	_____
Employee	Date	Responding Management Official	Date
_____	_____ __	_____	_____
Employee's Representative	Date	Agency Representative	Date

MEDIATION SETTLEMENT AGREEMENT

USE IN NEGOTIATED GRIEVANCE

CASE NUMBER: DATE:

The Grievant, _____ and the Department of the Air Force (the Agency) enter into this Agreement as a result of mediation.

1. The parties mutually agree:

a. This Agreement constitutes the complete understanding between the Grievant and the Agency and is binding upon the parties and their successors. No other terms, promises or agreements will have any force or effect unless reduced to writing and signed by all parties to this Agreement.

c. The terms will not establish any precedent nor will it be used as a basis by the Grievant, the Agency, or any representative organization to seek or justify similar terms in any subsequent case.

d. This Agreement provides that no monies will be paid unless specifically set forth in this Agreement.

2. In exchange for the promises made by the Agency in paragraph three of this Agreement, the Grievant freely and voluntarily agrees:

a. To immediately withdraw his/her grievance and his/her signature on this Agreement is effective for this purpose. The Grievant further agrees not to seek to reinstate his/her grievance or to otherwise attempt to challenge or litigate the agency action leading to this settlement or any matter or issue reasonably included therein, in any administrative, grievance and arbitration, or judicial forum. Further, the Grievant waives any claim or suit in any forum or court that he/she may have against any officer, agent or Grievant of this agency for any matter or issue arising from the facts and circumstances that led to the action that is the subject of this Agreement. Specifically and not exclusively, the Grievant waives any claim he/she may have against any officer, employee or agent of the agency by reason of his/her testimony or statement given in the investigation and/or litigation of this case. Further, the Grievant agrees to never challenge the validity of this Agreement in any administrative, grievance and arbitration, or judicial forum.

b. In the event that the Grievant violates the terms of this Agreement or the covenants related to not challenging or litigating the matters leading to this Agreement in any administrative, grievance or judicial forum as set forth in sub-paragraph 2a above, the Agency will have the right to obtain any remedy for such violation that it may have available to it under law. The parties specifically agree that in the event of such violation

of the terms of this Agreement, the Agency may, at its option and in addition to such other rights and remedies it may have, return the Grievant to the *status quo* as it existed at the time of this Agreement by taking back any relief or action (including back pay, if awarded by this Agreement) that results from this Agreement and placing the Grievant, as near as may be possible, in the status he/she was in prior to the execution of this Agreement. Such return to the status quo may, at the option of the Agency and also without limitation, include the reinstatement of a Notice of Proposed Action to impose discipline or a Notice of Decision to impose discipline, as initially taken, if such were the subject of or affected by this Agreement.

c. In the event the Grievant believes that the Agency has violated a term or condition of this Agreement, he/she will notify in writing the ADR Manager within 30 calendar days of the alleged violation.

d. The Grievant agrees to withdraw the following grievance(s) dated ___.

3. Further, the local union agrees to never challenge the validity of this agreement in any administrative, grievance and arbitration, or judicial forum.

4. In exchange for the promises made by the Grievant in paragraph 2, and the local union in paragraph 3, the Agency agrees:

_____

_____

Appropriate action to accomplish this Agreement will be initiated within _____working days of after completion of the review and coordination process by the appropriate Agency officials.

The parties have read and understand the terms of this Agreement and acknowledge that it is the product of their free will and not the result of any coercion or duress.

The parties agree and understand that the Defense Finance and Accounting Service (DFAS) will make financial disbursements if applicable under this Agreement, and that the Agency has no control over DFAS. Accordingly, the Agency cannot be held responsible for any oversights or delays that may occur as a result of action or inaction by DFAS. The agency shall use its available resources to ready this action for disbursement through DFAS.

Signed:

_____

Grievant Date

_____

Union Representative Date

_____

Designated Agency Official Date

_____

Agency Attorney Date

Optional Settlement Agreement Provisions

This Agreement binds the signatories upon their signature. Both parties understand and agree that the Agreement must be coordinated through the Legal Office and the Personnel Office to determine if the remedies allowed herein can be affected without violating applicable laws, regulations, or procedures governing the accomplishment and recording of personnel actions and will become final and binding only upon completion of that coordination. To that end, the coordination sheet shall become a part of this Agreement.

Processing of any personnel action required by this agreement will be done as expeditiously as possible dependent upon availability of the mechanized system and amount of actions pending at the time of submission.

The parties agree and understand that the Defense Finance and Accounting Service (DFAS) will make financial disbursements if applicable under this agreement. The Complainant understands that DFAS is a separate agency, and the Air Force has no control over how quickly DFAS will process the payment. Typically, such payments may take up to 120 days to be deposited into Complainant's account. Accordingly, the Agency cannot be held responsible for any oversights or delays that may occur as a result of action or inaction by DFAS.

If you must use a confidentiality clause, here are two preferred ways to phrase it:

1) The Mediator, Agency, and Complainant/Grievant will ***immediately notify*** the servicing ADR Manager and/or the servicing Staff Judge Advocate (SJA) if anyone seeks information about confidential discussions that took place during this mediation session. The ADR Manager and/or SJA will provide guidance about how to respond.

2) The Agency and Complainant agree that this settlement, its terms and conditions, are confidential.

(a) The Agency will handle this agreement confidentially in accordance with the Privacy Act, 5 U.S.C. 552a. The Complainant agrees to keep the fact and terms of this Agreement private.

(b) Any disclosure of the fact or terms of the Agreement by the Complainant shall be considered a material breach and will constitute a waiver of the Complainant's protection under the Privacy Act and will be an authorization to release the fact and terms of the agreement as the Agency deems necessary. In addition, any breach of this confidentiality provision may result in adverse employment actions. The Agreement may be used as evidence in a later proceeding in which either of the parties alleges a breach of the Agreement; such a use would not, in itself, constitute a breach by either party.

(c) The Complainant or any management official is authorized to disclose the details of this agreement or the Complainant's case with government investigators who may seek an interview to obtain information for the purposes of adjudicating a security clearance as relates to outside employment.

(d) Management officials are authorized to disclose the details of this agreement or the Complainant's case to those officers and employees of the Agency who have a need for such information in the performance of their duties, or as otherwise required by law, consistent with the Privacy Act.

LESSONS LEARNED CLOSEOUT BY MEDIATOR

Date:	Length of Session:	Mediator:
Grievant/Complainant Office Symbol:		Co-Mediator:

Was an agreement reached? YES NO

Was this a union agreement violation? YES NO

Main issue(s) to overcome:

Root cause(s):

Do you think mediation was an effective technique for this case? YES NO

If not, why? What might have been more appropriate?

Please evaluate the following features of GRIEVANT/COMPLAINANT:

	YES	NO	N/A
Identified root cause(s) related to grievance			
Proposed more than one option for resolution			
Communicated/participated in mediation			

NOTES:

Please evaluate the following features of the MANAGEMENT REPRESENTATIVE:

	YES	NO	N/A
Identified root cause(s) related to grievance			
Proposed more than one option for resolution			
Communicated/participated in mediation			

LESSONS LEARNED:

SAMPLE ADR PARTICIPANTS EVALUATION FORM

Date of Mediation: _____ Time Mediation Started: _____ Time Mediation Ended: _____	Mediator Name(s): _____ _____

1. What was your role in the case? ( ) Employee ( ) Union ( ) Agency ( ) Other (please specify) _____

2. How would you compare the amount of time taken to resolve this case using the mediation process compared with what you believe would have been required if a formal dispute resolution had been used to resolve this dispute? Mediation was:

   ( ) Significantly faster ( ) Somewhat faster ( ) Same amount of time
   ( ) Somewhat slower ( ) Significantly slower

3. **Mediation Process:** The following questions concern your experience with the Mediation Process. Please tell us how satisfied you were with each of the following features of the process. (For each feature, check the column corresponding to your opinion)

Feature	Very Satisfied	Satisfied	Neutral	Dissatisfied	Very Dissatisfied
Clarity, quality, and quantity of information you received about the process.					
Amount of control you had over the outcome.					
Opportunity to present your side of the dispute.					
Fairness of the process.					
Overall outcome of the process.					
Efficiency with which the dispute was resolved.					

Outcome of the process compared to what you expected it to be before it took place.					
Overall, how satisfied were you with the process?					

4. **<u>Mediator/Facilitator</u>**: Please take a moment to evaluate your mediator/facilitator using the following chart.

	Excellent	Good	Average	Fair	Poor
Neutrality (Did the mediator/facilitator have the appearance of impartiality, without favoritism or bias?)					
Communication (How well did the mediator/ facilitator facilitate communication between the parties?)					
Managing the ADR Process (Did the mediator/facilitator effectively handle conflicts, suggest movement ideas, propose problem-solving solutions, and ask relevant questions to keep the process moving forward?)					
Patience (Did the mediator/facilitator devote the necessary time and attention to the parties to keep the process moving without appearing to rush or be in a hurry to complete the process?)					
Competence (Did the mediator/facilitator demonstrate the necessary expertise to mediate this type of dispute by understanding the issues and options presented?)					
Overall Ability of the Mediator/Facilitator in General					

5. Outcome of the Mediation (Please check one): ( ) Full Settlement ( ) Partial Settlement ( ) Did not Settle

6. Would you recommend this process? ( )Yes ( )No

7. Would you recommend this Mediator/Facilitator for future mediations? ( )Yes ( )No

   Comments:

   _____

MENTOR MEDIATOR EVALUATION FORM

Please provide constructive feedback for the mentee mediator					
OPENING					
	Excellent	Good	Average	Area to Develop	N/A
Environment of mediation session					
Party Greeting/Introduction					
Check for Conflicts of Interest					
Explain neutrality					
Explain voluntariness					
Explain roles					
Explain confidentiality					
Explain process (and caucus)					
Explain note-taking					
Explain ground rules (take ground rule suggestions)					
Check settlement authority					
Ask if there are questions					
Transition to parties' opening statements					
PARTIES OPENING STATEMENTS					
Asks appropriately structured questions					
Handles Interruptions					
Recognizes need to reframe/rephrase and does so appropriately					
Identifies key issues					
Summarizes interests					

THROUGHOUT MEDIATION					
	Excellent	Good	Average	Area to Develop	N/A
Generates creative options when necessary					
Maintains control of the ADR Process					
Takes appropriate notes					
Caucus (breaks at appropriate time, handles confidentiality)					
Appropriate Use of Experts					
Settlement Agreement Drafting ability					
Closure					
Models Effective Listening					
Maintains Neutrality					
Communication - facilitate conversation between parties					
Employs impasse techniques					
Time Management - devote necessary time and attention to the parties					
Expertise – Knowledgeable enough to mediate this type of dispute					
Overall ability of neutral in general					

Additional Comments:

_____

_____

Items to Discuss with Mentee:
Mentee's own experiences and thoughts during the mediation session
Praise specific actions
Clarify techniques that may not have worked
Pose hypothetical alternatives
Identify personal styles of mediation and options for the next mediation

Alternative Dispute Resolution Mediator Application

Name: _____

Email: _____

Organization Location:
_____

Home Address (optional, to receive literature from other ADR programs):

_____

_____

Phone: Home (optional):(___)_____ Work:(___)_____ Fax:(___)_____

Duty Hours: _____ Duty Days: S__M__T__W__TH__F__S__

Position Title, Pay Plan, Grade or Rank, and Series: _____
_____

How did you learn about the (Installation's name) ADR Program?

_____

_____

If selected, what do you expect to gain from the Training?

_____

_____

Why do you want to be a Mediator in the (Installation's Name) ADR Program?

_____

_____

_____

_____

What qualities do you possess that you feel would make you an effective mediator?

_____

_____

Do you have any experiences with a mediation process?

_____

_____

Please initial next to each statement indicating an affirmative response.

___ Management indicated their willingness to release me to mediate for this program.

___ I can mediate **at least** one or two cases per month.

___ I understand I **will not** be monetarily compensated for mediation services nor reimbursed for expenses incurred while mediating on base.

___ I understand my role as a mediator is to remain neutral.

___ I will refrain from giving advice in order to allow the parties to create their own solution to their dispute.

___ I will abide by all confidentiality provisions and will safeguard all information entrusted to me before, during and after mediation.

___ I will become an important part of a program that provides a valuable service to employees of the Air Force, the Union, and the Federal Government.

___ If selected for the free federally-sponsored certification training, I understand the return on investment is my ***voluntary*** **commitment for two years**.

___ I am willing to travel on government per diem to act as a mediator at other Air Force installations. (Advanced Mediators Only)

_____ _____ _____

Signature Printed Name Date

If you have additional comments please provide them on a separate sheet of paper.
Please return to: Installation ADR Program Office

AIR FORCE MEDIATOR STANDARDS OF CONDUCT

Standard 1: Self-Determination

Standard
A mediator shall respect and encourage self-determination by the parties in their decision to resolve their dispute, and on what terms, and shall refrain from being directive or judgmental regarding the issues in dispute and options for settlement.

Comments
The mediator must leave to the parties' full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may and should assist the parties in making informed and thoughtful decisions, but should never substitute his or her personal judgment for that of the parties.

The mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility of proposed options for settlement, including their impact on affected third parties. The mediator may also make neutral suggestions for the parties' consideration, but at no time is the mediator allowed to make decisions for the parties, or directly express his or her opinion about or advise for or against any proposal under consideration.

If, in the mediator's informed judgment, an agreement desired by the parties could not be enforced because it is illegal, unconscionable, or for other reasons, the mediator is obligated to so inform the parties. If the parties insist on that agreement, the mediator should discontinue the mediation, but may not violate the obligation of confidentiality.

Standard 2: Impartiality

Standard
A mediator shall maintain impartiality and evenhandedness toward the parties and the issues in dispute. Where the mediator's impartiality is in question, the mediator shall decline to mediate or shall withdraw from the mediation.

Comments
The concept of impartiality is central to the mediation as it directly affects the mediator's ability to facilitate a fair and even-handed process.

Impartiality means an absence of favoritism or bias (i.e., no expressed sympathy or antipathy) toward a position taken by a party to mediation. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

To ensure not only the fact but also the appearance of impartiality, the mediator is obligated to disclose to the parties, at the earliest moment, any conflicts of interest, or any present or prior relationship, personal or professional, between the mediator and any party or party representative.

The mediator is obligated to decline to serve (or, if the case has begun, to withdraw) as the mediator if:

- As a result of the disclosure of a prior relationship, any party or representative objects to the mediator's serving

- The mediator's own judgment is that a relationship with a party or representative will compromise impartiality, or appear to do so, even after full disclosure

- The mediator or any party believes that, apart from relationships, the fact or appearance of impartiality is compromised either by the mediator's personal reaction to any party (or party position) or by the mediator's background or experience

The mediator should make every effort not to show partiality or bias based on a party's behavior, appearance, or actions at the mediation.

The mediator should exercise discretion and due regard for the appearance of impartiality in establishing new relationships with parties to past mediations.

Standard 3: Conflicts of Interest

Standard
A mediator shall avoid conflicts of interest and in any event, shall resolve such conflicts in favor of the mediator's primary obligation to impartially serve the parties to the dispute.

Comments
The mediator must disclose to the parties all actual and potential conflicts of interest and obtain the consent of the parties before proceeding with the mediation. If, despite full disclosure and acceptance by the parties, the existence of a conflict calls into question a mediator's impartiality, the mediator shall decline to mediate or shall withdraw from mediation.

Under EEOC guidance in MD-110, an EEO Investigator or Counselor should not serve as a mediator in an EEO case he or she has investigated or counseled the complainant. Conversely, an EEO Counselor who serves as a mediator in an EEO case should not thereafter serve as a counselor or investigator in the same case.

A mediator who is a lawyer must not advise or represent either of the parties in future proceedings concerning the subject matter of the dispute, and a mediator who is a

therapist must not provide future therapy to either of the parties or both of them regarding the subject matter of the dispute.

A mediator must not review for regulatory or legal compliance a settlement agreement resulting from a dispute in which he or she was the mediator.

Standard 4: Confidentiality

Standard
A mediator shall maintain confidentiality of the mediation process and communications made in connection with the process, to the extent necessary to comply with the law and the reasonable expectations of the parties.

Comments
Apart from statutory or other legal duties to report certain kinds of information, a mediator is not obligated to disclose to a nonparty, directly or indirectly, any information communicated to the mediator by a party during the mediation process.

In communicating with the Air Force or any of its agents, officers or employees who did not participate as a party or party representative in the mediation, the mediator may disclose only whether or not a settlement was reached.

Absent statutory or other legal duties, a mediator must not disclose, directly or indirectly, to any party to mediation, information communicated to the mediator in confidence by another party unless that party expressly gives permission to do so.

Where confidential information from one party might, if known to the other party, change the second party's decision about whether to accept or reject certain terms of a settlement, the mediator may encourage the first party to permit disclosure of the information to the second party, but absent such permission, the mediator may not disclose it.

A mediator cannot ensure the confidentiality of statements parties make to each other, or of any memoranda, documents, or other tangible evidence shared between the parties during the mediation.

In addition to this ethical standard of confidentiality, Air Force mediations are subject to statutory confidentiality requirements, 5 U.S.C. § 574.

Neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask neutrals to reveal confidential communications. Agency policies should provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

Standard 5: Quality of the Process

Standard
A mediator shall conduct the mediation in a fair and diligent manner. The mediator shall protect the integrity of the mediation process by encouraging mutual respect between the parties and by taking reasonable steps, subject to the principle of self-determination, to limit abuse of the process, including discontinuing the mediation if necessary.

Comments
The mediator is obligated to make reasonable efforts not only to promote full dialogue and prevent manipulation or intimidation by either party, but also to promote each party's understanding and respect for the concerns and positions of the other, even if they cannot agree.

Where the mediator discovers an intentional abuse of the process, such as deliberate nondisclosure or falsification of vital information, the mediator is obligated to encourage the offending party to alter the conduct in question. The mediator is not obligated to discontinue the mediation, but may do so if it appears necessary to avoid abuse of the process. When discontinuing mediation under these circumstances, the mediator should not reveal the reasons for discontinuance if to do so would breach the mediator's obligation to maintain confidentiality of communications made within the mediation process.

Standard 6: Competence

Standard
A mediator shall maintain professional competence in mediation skills and, where lacking the skills necessary for a particular case, shall decline to serve or shall withdraw from serving as a mediator. Installation ADR Managers are responsible for ensuring that collateral-duty mediators are provided sufficient training and mediation experience to meet this obligation.

Comments
A mediator must meet the minimum qualifications set forth in AFI 51-1201, paragraph 25.3 before mediating Air Force workplace disputes.

The mediator should maintain and upgrade skills and substantive knowledge appropriate to his or her area of practice (e.g., a mediator must meet EEOC subject-matter knowledge criteria before mediating EEO complaints).

The mediator should disclose to the parties the limits of his or her skills or substantive expertise whenever such limits may be pertinent to the mediator's handling of the case.

Beyond disclosure, the mediator should exercise his or her own judgment in determining whether his or her skill level or substantive knowledge is sufficient to meet the demands of the case and, if not, should decline to serve or withdraw as the mediator.

A Note on EEO Mediation

Mediators in EEO complaints need to be aware of restrictions imposed by the EEOC. First, the EEOC generally forbids a mediator from mediating the same complaint in which he or she has also served as an EEO counselor or investigator. (MD-110, Chapter 3, Section IV.a). In addition, a mediator who mediates EEO complaints must understand federal agency EEO complaint procedures contained in 29 C.F.R. Part 1614, and MD-110. Mediators in EEO cases must have a working knowledge of the following federal anti-discrimination laws: Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended (including the standards in the Americans with Disabilities Act of 1990 applicable to the Rehabilitation Act); the Age Discrimination in Employment Act, as amended; and the Equal Pay Act, as amended. The mediator must also have a basic understanding of the various theories of unlawful discrimination (e.g., disparate treatment, adverse impact, reprisal, harassment and reasonable accommodation); and available remedies, including equitable relief, compensatory damages, costs, and attorney's fees. (MD-110, Chapter 3, Section IV.b; AFI 51-1201, paragraph 24).[86]

[86] Although these requirements are specific to EEO complaints, mediators in non-EEO disputes should also have at least a general, working knowledge of the legal standards underlying the disputes they are mediating.

REPHRASING AND REFRAMING

Rephrasing and **Reframing** are two important active listening techniques that promote constructive dialogue between parties attempting to negotiate a resolution to a dispute, or any other issue, for that matter. It is an indispensable tool in the mediator's toolbox. It can be especially useful when mediating disputes involving multiple parties or groups.

Rephrasing (or paraphrasing) lets a person know that he or she has been heard and, more importantly, correctly understood by the listener. It is used to prevent misunderstandings. Rephrasing is not simply a restatement. It does at least the following three things:

- For the speaker, rephrasing reinforces your expectation that others are actually listening to what you have to say, while providing you the opportunity to clarify your intent.

- For the listener, rephrasing validates what you have heard by checking your understanding, either reinforcing it or modifying it based on the speaker's agreement or disagreement and clarification.

- Rephrasing defuses "loaded" terms or connotations by demonstrating an understanding and validation of the (often negative) emotions behind the statement, yet casting the statement in a much more positive, less emotional fashion.

Examples:

Validating emotions:
"Sounds like you felt attacked."
"This seems to have made you angry."
"Seems like you felt ignored or unappreciated."

Conveying that you understand what is being said:
"You were upset when ..."
"You believe that..."
"You seem to be saying..."

Revealing a concern, worry or desire:
"If I understand you correctly, you want..."
"You seem to be concerned that..."
"What seems most important to you is..."

Reframing is a bit more complex. It is the arrangement of a collection of ideas, feelings, facts, and/or concerns into a single common theme, often moving the parties in a more constructive direction. Reframing ties separate and scattered statements together and often gives the parties a common, perhaps previously unrecognized, focus or theme.

In the example below, a type of reframing is illustrated which identifies the issue as a mutual one and states it in such a fashion that it can be a springboard or transition into creative ideas, options, and solutions. The frame of reference shifts away from blame for past failures toward a testing of commitment for future joint initiatives.

> *"Based upon various concerns that have been raised so far, you seem to be talking about discovering new ways for labor and management to work together."*

*Remember to **validate**! *Never assume* that your rephrasing or reframing is accurate until it is confirmed by the speaker. Sometimes, other group members will be able to perform the tasks of rephrasing or reframing because of familiarity with the work situation and the speakers.

Common Interests of Parties in Discrimination Complaints

Six common areas that generate discrimination complaints include Disciplinary Actions, Appraisals/Evaluations, Promotions/Selection Actions, Harassment Complaints, Performance-Based Actions, and Reasonable Accommodations. Within each area, there are underlying interests commonly expressed by the complainant and management. This chart does not provide an exhaustive listing of the parties' potential interests, but can assist you in identifying potential underlying interests. Identifying the interests of the parties is critical to helping the parties reach a mutually acceptable resolution of their dispute. Success or failure to identify the correct interests at issue can mean the difference between a successful or unsuccessful mediation.

Possible Interests of Complainant	Possible Interests of Management
Money/Financial Security	Desire to Contain Costs
Pride/Desire to Appear Strong	Pride/Desire to Appear Strong/Control
Dignity/Self Esteem	Dignity/Self Esteem
Reputation	Reputation
Future Relationship	Future Relationship
Save Time/Efficiency	Save Time/Efficiency
Saving Face	Saving Face
Hidden Personal Agenda	Hidden Personal Agenda
Perception of Fairness/Equality	Perception of Fairness/Equality
Job Security	Desire to be a Model Employer
Career Development and Advancement	Future Career Impact/Building Career
Desire to Minimize Discomfort (Physical and/or Mental Disability)	Verification of Disability
Vindication	High Morale
Revenge	Setting a Precedent
Benefits (Health, Life, Retirement)	Need to Control Work Environment
Trust	Need to Correct Behavior
Accurate Ratings (Evaluations)	Need to Minimize Workplace Disruption
Accurate Workplan	Desire to Minimize Hassle
Training	Compliance with Laws & Regulations
Praise/Approval/Acknowledgment	Meet Mission Requirements
Recognition for Duties Performed	Motivation of Employees
Safety	Getting the Best Person for the Job
Desire to Have Harassment Stop	Rewarding Good Performance
Equal Access and Participation	Adequate Representation in the Workplace
	Harassment-free Workplace
	Need to Improve Performance
	Ensure Employee Meets Job Requirements
	Minimize Disruption in the Workplace
	Placing Employee in Best Situation to Succeed

POINTS ON CAUCUS

Purpose--A caucus benefits both the mediator and the parties. It provides the mediator with an opportunity to meet individually with each party to determine what additional information is needed; what private information, if any, can be discussed; and what areas of settlement can be negotiated. The caucus provides parties, who may feel suspicious of one another or uncomfortable with the other party, the opportunity to talk openly with the mediator as a confidant.

Preparing To Caucus--The mediator should state as clearly as possible to the disputants the procedures that will be followed for caucusing. Refer back to the remarks you made during your opening statement about caucusing. Remind the parties that what is said during caucus is confidential.

Reasons for Calling a Caucus:

- Gather information that parties may be reluctant to share in joint session
- When the parties are at an impasse
- Regain control if the parties are engaging in a heated discussion
- Generate ideas by asking "what if" questions
- Do reality checks
- Coach the parties on how to approach direct dialogue
- Deliver information to the parties that they are reluctant to give themselves (Do this only with permission from the respective party)
- Find a common interest to encourage the parties to begin talking to each other to reach resolution
- When one or both parties request a caucus

Starting the Caucus:

- Reemphasize confidentiality and tell the party to indicate what he/she wants to remain confidential
- Begin with an open inquiry rather than a targeted question

During Caucus:

- Allow presentation of additional information
- Cultivate the relationship with each party
- Acknowledge and allow expressions of feelings
- Be the agent or medium for reality testing
- Allow a change of pace
- Enable the parties to examine their positions
- Recognize potential areas of agreement
- Encourage a party to concentrate on the possible agreements(s)
- Guide the discussion toward a future based, forward-looking view of the solution

Ending the Caucus: At the end of the caucus, the mediator should summarize to the participating party the information shared by him/her during caucus. This step is important for three reasons. First, summarizing the information gives the mediator the chance to confirm the information that was conveyed during the caucus. Second, summarizing gives the party an opportunity to correct and/or add information prior to finishing the caucus. Finally, the mediator must ask what information, if any, shared during caucus is confidential and cannot be shared with the other party**.**

Transition: This is now the time for reconvening the parties after the caucuses. At this time the mediator's transition statement might be, "I'd like to thank each of you for meeting with me privately. I now have a clearer understanding of the issues. At this time I would like us to review some of the possibilities that have been discussed in caucus." Or the mediator might say, "I'd like to thank each of you for meeting with me privately. I'm concerned that there seems to be no areas about which you can agree. We need to decide where to go from here. Do either of you have any suggestions?"

GETTING PAST IMPASSE TIPS

1. **Start gently and with generalities -** don't get too specific too early. Use your active listening skills and build into problem-solving. For example: "*So it sounds like you need a redefinition of your job and a fresh start. Is that something you want to pursue here?"* At the beginning of problem-solving, you are still in the mode of listening much and saying little.

2. As you begin to get into problem-solving, look for opportunities to **emphasize the future and de-emphasize the past.** This provides a nice transition into more active problem-solving, and allows the parties to recognize and affirm the change. Examples (in ascending order of directiveness):

- At some convenient point, perhaps after a break, say something like: "*We've spent a lot of time exploring where you are and how you got here, and that's important to help me - and you as well - understand what the problems and concerns are. I'd like to suggest we now begin to focus on the future: Where you'd like to be six months from now and how we can get there. Is that OK with you?"*

- If one or both parties seem stuck in the past like a broken record, try being a little more directive (first, of course, do a "self-check" to make sure your party feels heard). You might pause, and say something like: "*It's clear to me how strongly you feel about what happened here. I think I've got a pretty good understanding of the problem. At this point in the mediation, I'd like to suggest that we kind of change direction and commit to finding ways to solve the problem. And what this means is that we'll need to keep focused on the future - not the past. That may not always be easy. Would you like to try it this way?"*

- If a party commits in principle to "the future" but continues reflexively to wallow in the past, you might remind him/her of the agreement, and suggest a "ground rule" that will allow you to bring them back to the future.

3. **Follow the parties.** It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going in the direction you think would be best, there's a good chance you shouldn't be trying to go there.

4. Remember that (a) parties will resist moving to closure too fast, and (b) parties faced with a settlement option reasonably may display discomfort about details and the unknown, although the core idea is good. Therefore, use the "in principle" technique, by saying something like: *"Now I know there's a lot of important considerations and details to work through, but IN PRINCIPLE, if you could get a good job in the other division, do you think that might work for you?"*

5. Also, resolve issues involving complex details "in principle" and move on. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement; you can come back to the exact wording of the letter later.

6. Help the parties **convert their statements** of interests and their ideas, and even their objections, into things that you can work with. To do this, look for opportunities to use transformations like the following:

- *"Would you like to propose that idea as a solution?" or "can I take that to [other party] as an offer?*"

- "*So you would like [x]. Is there a way we can develop that into a plan?" or "How can you get from here to there?"*

7. An **easel or blackboard** is a powerful tool, a way to display information and options visually, get the parties focusing together on the same "page," and let you organize how information is translated and displayed.

8. Where there's an absence of ideas, consider using "**brainstorming**" (in caucus or joint session). This means the parties are encouraged to suggest as many ideas as they can create, without any criticism or interruption; later, they return to the ideas and eliminate or develop them.

9. Help a party find ways to deal with his/her discomfort or caution in reacting to a proposal by saying something like "*I see that the proposal doesn't appear to meet your needs, but let me ask, what would make that proposal into something you could accept?"*

10. Help a party reality-check his/her own idea to find ways to deal with the other party's potential discomfort: "*What do you think it would take for [other party] to accept your proposal?"*

11. Hypothetical scenarios are a non-threatening and non-coercive way for you to introduce ideas for parties to consider, and can be an entry to brainstorming. The classic hypothetical is the "**what if**." Say something like, "*I'm just wondering - what if they were to provide a retroactive QSI - might that be an option in lieu of promotion to meet them half-way?"* Be careful not to overuse "what ifs" to the degree that the parties stop being creative themselves and look only to you.

12. A party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it's possible. You can ask if it's OK for you to take implied ownership of the idea and test it with the other party, e.g., "*I have an option that I'd like to float for consideration; what if . . ."*

13. Particularly in cases where the issue is money and valuation is imprecise, parties may be anxious about "going first." You might offer both parties the opportunity to have you simultaneously disclose a mid-point or range between them. This may also be more appropriate for discussion in caucus.

14. Where there is a substantial difference between the parties' demands (or lack of clarity about valuation), try "**decision analysis**." Although details of this technique are beyond the scope of this list of tips, briefly it works this way: In caucus, emphasizing confidentiality, work with each party to develop "best case" and "worst case" scenarios, both in terms of dollar valuations and percentage likelihood of outcomes on motions for summary judgment, etc. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes quite substantially. Then, discuss with the parties how they would like you to use the information you've developed (for example, by disclosing overlapping valuations or a mid-point). Helping the parties see the issues from the perspective of a timeline may also help to focus the discussion on the areas for which a monetary solution is appropriate. Considerations such as duration, frequency, and severity are important factors in developing a mutually understood valuation of the case.

15. **Precedents:** Sometimes, one party (typically an employer) will be concerned about setting a precedent. Some options to explore include: a clause specifying the agreement's non-precedential nature; a confidential agreement; narrowing/isolating/removing a particular issue from the agreement; writing the agreement to make the case unique; reality-testing to see if a precedent is really such a big deal; contrasting the risk of no agreement.

16. Psychologists say that people tend to react negatively to any offer or information presented by an adversary ("reactive devaluation"). Couple this with "selective perception" (the tendency to screen out data which does not fit preconceived views) and you can see why disputants need mediators. You, as the trusted neutral, can carry exactly the same messages without the same negative burden. In practical terms, this means you can introduce and reexamine ideas that the parties on their own have rejected.

17. Impatience is always your enemy. In fact, as you grow more experienced as a mediator and become more able to predict outcomes, impatience becomes an ever more subtle enemy. Be on guard.

18. The overall mediation should be a "**settlement event**," meaning that everyone should develop the expectation that they've come to work on resolving the matter and that it *can* happen. During problem-solving, reinforce the psychology of the "settlement event" by keeping the momentum going, keeping things positive, reminding them of the time constraints, focusing them on the investment of their time thus far, and reinforcing the agreements so far. The parties will begin to believe a settlement should and will happen, which is powerful motivation for resolution.

OPTIONS FOR RESOLUTION

This appendix is meant as a tool to jumpstart settlement negotiations which have reached impasse. It should not be used by the mediator to start discussion.

1. **Disciplinary Actions**

Mediations of disciplinary actions will most likely occur after action by the deciding official and after a grievance or appeal of the disciplinary action has been filed. If the action is one that may be appealed to the Merit Systems Protection Board (MSPB) (e.g., removals or suspensions greater than 14 days), MSPB rules allow an additional 30 days for the employee to file the appeal if the parties attempt ADR. See 5 C.F.R. § 1201.28.

a. Holding the penalty in abeyance

Holding the penalty in abeyance for a period of time (generally not more than three years) on the condition the employee either admits to the misconduct and/or agrees not to engage in misconduct (specificity as to *what type of misconduct* as defined by the parties) during the abeyance period as evidence of rehabilitation. This is not an escape from *discipline*, but rather a conditional reprieve from the *punishment.* It promotes the underlying premise of discipline, which is rehabilitation.

b. Reducing Severity of the Penalty (either proposed or imposed)

This means to reduce the severity of the penalty, such as reducing a 14-day suspension to a 10- or 5- day suspension, either as a result of mitigating or extenuating factors or in exchange for the employee admitting to the misconduct and/or agreeing not to engage in misconduct in the future. "Last Chance" agreements can also bring about the desired behavior modification and provide for the retention of an employee who would otherwise be removed. The installation labor attorney has more information on the requirements of engaging in last chance arrangements.

c. Change Removal/Termination to Voluntary Resignation

Changing a removal/termination to a voluntary resignation means to replace the annotation on the SF-50 (Notification of Personnel Action) under the block marked 'reason for action' from removal to resignation.

d. Recommendations to future employers

A letter either recommending an employee for future employment or providing a neutral recommendation may be issued when the employee has been separated from employment. The employee may write or assist in writing the recommendation subject to the concurrence of management. Conversely, the parties may also agree that the employee will not seek a recommendation.

e. Rescind the action

Rescinding the action terminates the process and expunges the record.

2. **Performance-Based Actions**

Mediations of performance-based actions will most likely be at the stage between placement on a **P**erformance **I**mprovement **P**lan **(PIP)** and action by the deciding official. Therefore, the mediator must be mindful as to whether the parties are attempting to settle the *underlying reasons for the performance improvement plan*, or the *actual decision reached.*

a. Reassignment

Permanently moving an employee from one position to another position without promotion or demotion, at the same pay plan and grade, but not necessarily the same occupational series.

b. Voluntary Change to Lower Grade

An employee-requested action to be reduced in grade.

c. Voluntary Resignation

A voluntary resignation is when an employee voluntarily agrees to quit.

d. Extend Performance Improvement Period

An extension of the employee's performance improvement period (opportunity period).

e. Training

Management provides the employee with additional instruction to help performance reach an acceptable level.

f. Retroactive Step Increase

This provides the employee the within-grade increase otherwise denied due to less than acceptable performance.

3. **Evaluations/Appraisals**

Change the Overall Appraisal rating, Performance Elements or Appraisal Factors Change an appraisal rating by changing the rating on a performance element and/or appraisal factors with an amended rating.

a. Grant Award

Grant the requested cash and/or time-off award in exchange for rescinding the complaint.

b. Out-of-Cycle Replacement Rating

An employee's performance is re-evaluated after a specified amount of time to record any demonstrated improvement. Performance ratings are normally given only during the annual rating cycle. There are, however, instances when a rating may be given outside the normal rating cycle. The rating from the re-evaluated performance rating then replaces the previous annual rating.

c. Develop a New Performance Plan

Rewrite the performance elements and/or standards to clarify performance expectations for the employee, thereby permitting the supervisor to accurately evaluate job performance. The newly developed plan should reflect current, relevant requirements of the employee's position.

d. Performance Counseling Schedule

Plan systematic discussions between the rating official and employee during the rating period regarding the employee's performance. During these sessions the employee is able to discuss the feedback and use it to improve performance, if necessary, to achieve the desired rating.

e. Performance-Related Training

The offer of job-related training to improve performance potentially impacting the next year's appraisal rating. The employee is authorized attendance at job related training that he/she believes will enhance performance and potentially impact future performance ratings.

f. Assignment to High Visibility Project

Placing an employee on a project with more visibility offers an opportunity for the employee to shine and show their ability to meet greater performance levels.

4. **Promotion/Selection**

a. Placement in Next Vacancy

Arranging the mandatory selection for the next occurring vacancy for which the employee is qualified or the next like position. This is a non-competitive action. [Note: A number of legal and policy concerns are implicated by this proposed solution. Consultation with the local Air Force Attorney and Civilian Personnel Officer are highly recommended before the parties agree to this action.]

b. Priority Consideration for Next Vacancy

Agreeing to priority consideration for the next position vacancy for which the employee is qualified for consideration. Under priority consideration, the employee's name is forwarded to the selecting official for selection consideration before other names of eligible candidates. The EEOC interprets priority consideration as meaning that a complainant must be considered before any formal action to recruit for the vacancy, and must be given *bona fide* consideration on his/her own merit, without competition with other potential candidates. See *Bush v. Department of the Army,* EEOC Appeal No. 01960709 (February 1, 2000). Therefore, parties must realize that the EEOC views Priority Consideration as nearly as a guarantee of promotion to an employee, when considering it as a term of settlement.

c. Training

An offer of training made to supplement, improve, or add to an employee's skills, knowledge, and abilities in a current or related field of work.

5. **Career Counseling**

Career counseling is a meeting between an employee and a qualified official to review the employee's experience, education, training and personal development. The counseling typically includes suggestions on self-development, on-the-job training, and job-related, government-sponsored training opportunities for career growth.

6. **Desk Audit**

Is an interview for fact-gathering purposes conducted by a person competent in classification to verify or gather information about the current duties and responsibilities of a position, and the accuracy of the description of those duties and responsibilities.

7. **Grant the Promotion**

The complainant is non-competitively promoted into the contested or similar position. An over-hire position may be created for settlement purposes. It is imperative that you seek the advice of a subject matter expert when exploring this term of resolution and that

the subsequent agreement is immediately reviewed and coordinated with the Civilian Personnel Office and the installation legal office.

8. **Harassment**

a. Sensitivity Training

Training designed to facilitate an understanding of human diversity based on culture, gender, and ethnicity. It helps one cope with workplace conflicts and communication differences that may result from workforce diversity.

b. Reassignment

Reassignment is the permanent movement of an employee from one position to another position without promotion or demotion, at the same pay plan and grade, but not necessarily the same occupational series. Note: The EEOC does not look on reassignment for the complainant – *unless the complainant specifically requests it* – favorably.

c. Apology

An expression of one's regret for having injured, insulted, or wronged another individual. The injury, insult, or wrong may be real or perceived. The apology can be oral or written.

9. **Reasonable Accommodation**

a. Provide Accommodation

Accommodation is a modification of an employee's environment or duties to allow performance of the essential functions of the job. Some examples of accommodation are employer purchased equipment and/or services such as voice-activated computers or interpreters and readers, office relocation or modification, or modified work schedules to include alternative work schedules or flexible leave policies.

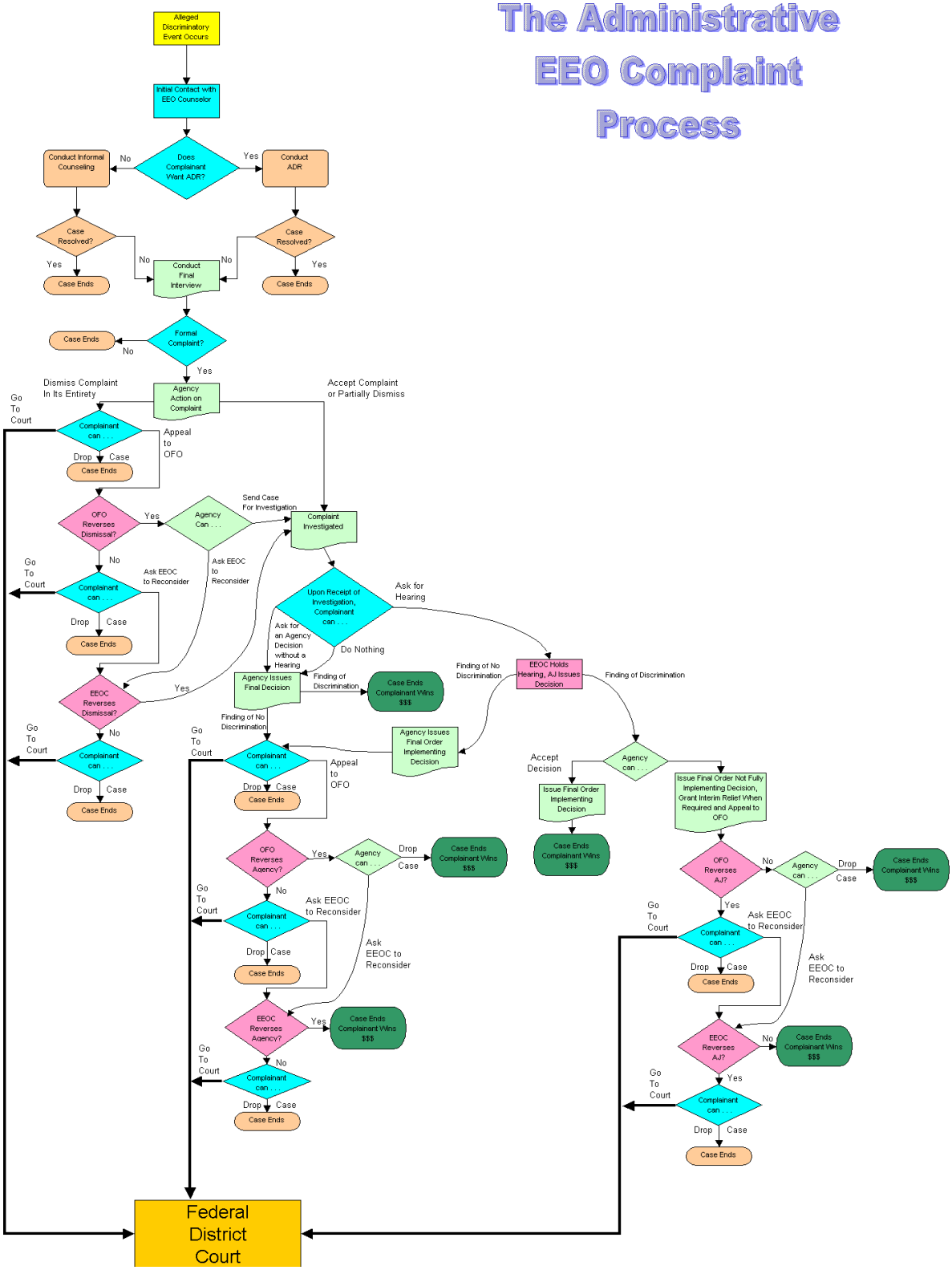
b. Reassignment

Reassignment is usually thought of as the permanent movement of an employee from one position to another position without promotion or demotion at the same pay plan and grade, but not necessarily the same occupational series; in other words, a "lateral" move. However, a reassignment does not necessarily have to be in the same series or grade.

c. Voluntary Change to Lower Grade

An employee requested action to be reduced in grade.

The Administrative EEO Complaint Process



Developed by the Air Force Central Labor Law Office, March 2000 Version 5.0

EMPLOYING REALITY CHECKING TECHNIQUES

Types of Legal Theories, Proof Analysis, and Terms in Discrimination Cases for Use by Mediators

GENERAL PRINCIPLES

In a discrimination case, a complainant must present a sufficient "threshold" of evidence. In analyzing a case for potential litigation risk and possible settlement, it is necessary to determine whether the complainant has met this minimum threshold. There are four theories of discrimination with which you may be involved: (1) disparate treatment, (2) disparate impact, (3) failure to make reasonable accommodation in religious discrimination or disability claims, and (4) reprisal or retaliation.

Disparate treatment is probably the most common form of discrimination--that is, different treatment because of an individual's race, color, sex, religion, national origin, age, or disability. Disparate impact means that a policy or program may appear, on its face, to treat everyone equally, but in application it actually discriminates. Examples of disparate impact are general intelligence tests or educational requirements that disproportionately disqualify members of certain protected groups and are not job-related. Examples of a reasonable accommodation may be making a jobsite readily accessible or restructuring a job for the disabled employee or modifying work schedules for religious accommodation. Reprisal or retaliation involves adverse action suffered by individuals because of their engagement and/or participation in protected activity or because of their opposition to discrimination.

As applicable in most cases, the complainant may prove the discriminatory intent by either direct or indirect evidence. Direct evidence is rare--for example, is there a memorandum written by the selecting official stating that he did not select the complainant because she is a female, or because he is a Hindu or because she is a Hispanic. Indirect evidence is circumstantial in nature--the evidence does not by itself prove a motivation--but rather it allows one to infer the existence of a fact. For example, management records demonstrate that the selecting official, although provided numerous opportunities to do so, has never hired a woman, a Hindu, or a Hispanic. In most cases, there will not be that "smoking gun" of direct evidence and the complainant will need to prove discrimination indirectly by inference.

The adjudication of a complaint of discrimination by indirect evidence follows a three-step evidentiary analysis adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). This three-step process has been applied in cases brought under Title VII of the Civil Right Act of 1964, Age Discrimination in Employment Act of 1967, and Rehabilitation Act of 1973.

A complainant must first present a *prima facie* case of discrimination. A *prima facie* case is that minimum amount of evidence necessary to raise a legitimate inference of discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). (The specific elements required in particular types of cases are addressed in detail below.)

Second, if the complainant meets the burden of presenting a prima facie case, then management has a burden of production to articulate some legitimate, nondiscriminatory reason for its actions. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981). The evidence presented by management need not establish management's actual motivation, but must be sufficient to raise a genuine issue of material fact as to whether management discriminated against the complainant. Examples of this second step include lesser comparative qualifications of the complainant than the selectee, complainant's inability to get along with supervisors or co-workers, or the complainant's past poor job performance.

Third, in order to prevail, the complainant must show by a preponderance of the evidence[87] that management's stated reason is pretext for discrimination. The complainant may show pretext by presenting evidence that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the complainant's protected class, that management has discriminated against the complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities. The complainant must prove *both* that the reasons given were false, *and* that the real reason was discrimination (i.e., *pretext*). In the end, the intent to discriminate can be found in the strength of the complainant's *prima facie* case, plus how poor the employer's legitimate nondiscriminatory reasons were, plus whatever other evidence the complainant has. See *Reeves v. Sanderson Plumbing Products*, Inc., 530 U.S. 133, 120 S.Ct 2097, 197 L.Ed 2d 105 (2000).

Protected Groups and Similarly Situated Employees

Two very common terms in EEO complaints require specific attention. The first term "protected category," "protected class," or "protected group" represents a group that is recognized *by the law* to have protection against discrimination. The second term is "similarly situated employees." The EEOC explains similarly situated employees as: "the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command." See EEOC MD-110, Chapter 6, VII, B,1. The term has also been defined in MSPB cases to mean a person or group of persons who are of the same series, share the same or similar occupation, share the same line of supervision, and are in the same office for the purposes of comparing the treatment received. In EEOC decisions the following consideration is offered: "In order for two or more employees to be considered similarly situated for the purpose of creating an inference of disparate treatment, [complainant]

[87] Preponderance of the evidence is that degree of proof which is more probable than not; it does not necessarily mean the greater number of witnesses or the greater amount of documentary evidence.

must show that all of the relevant aspects of his employment situation are nearly identical to those of the comparative employees whom he alleges were treated differently." See *Wickersham v. DHS*, EEOC Appeal No. 0120061742 (July 16, 2007). Therefore, who are the proper comparative employees in the complainant's disparate treatment claim is not subject to a restrictive test, but requires a review of the totality of the circumstances to determine the degree of commonality shared between the comparative employees and the complainant.

ELEMENTS OF PRIMA FACIE CASES FOR DIFFERENT PROTECTED GROUPS

Race, Sex, Color, Religion, and National Origin

Regardless of whether the claim is discrimination based on race, sex, color, religion or national origin, the elements of a disparate treatment *prima facie* case are the same. The complainant must prove that:

a. He/she is a member of a protected class,

b. The complainant experienced an adverse action, and

c. The complainant was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.

To establish a *prima facie* case of disparate impact discrimination, a complainant must show that a challenged practice or policy disproportionately impacted members of his/her protected class. Specifically, the complainant must:

a. Identify the specific practice or policy challenged;

b. Show a statistical disparity; and

c. Show that the disparity is linked to the challenged policy or practice.

A harassment case is also possible under these protected categories as well as under disability. Generally, the important aspects of a harassment case are whether the complainant can establish that the complained of conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In a harassment case, there is no requirement for the victim to demonstrate serious psychological distress in order to prevail. See *Harris v. Forklift Systems Inc*., 510 U.S. 17 (1993). See definition in EEOC Guidelines, 29 C.F.R. §§ 1604.11(a) and (g); see also *EEOC Policy Guidance on Current Issue of Sexual Harassment*, March 19, 1990, http://www.eeoc.gov/policy/docs/currentissues.html.

In harassment cases, the legal standard used to assess the agency's liability depends upon whether the harasser was a supervisor or a co-worker. An employer is liable for co-worker harassment if it had actual or constructive notice of the harassment and failed to take reasonable steps to correct it. An agency is strictly liable for sexual harassment by supervisors. If, however, the supervisor took no "tangible employment action," the employer may avoid liability by proving the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or failed to avoid harm otherwise. See *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *City of Boca Raton v. Faragher*, 524 U.S. 775 (1998).

Although not as important as in the past, the Supreme Court noted in *Burlington Industries, Inc. v. Ellerth*, that the distinction between the terms *quid pro quo* and hostile work environment is still relevant to Title VII litigation to the extent those terms illustrate the distinction between cases involving a threat that is carried out and cases involving offensive conduct in general. Furthermore, the terms are relevant when there is a threshold question of whether a plaintiff can prove discrimination in violation of Title VII. Specifically, when a tangible employment action results from refusing a supervisor's demands, that employment decision is actionable because it changes a term or condition of employment (*quid pro quo*). On the other hand, a hostile environment claim still requires a showing of severe or pervasive misconduct. In either case, the terms *quid pro quo* and hostile environment are not determinative in determining vicarious employer liability.

Religious Discrimination-Failure to Offer a Reasonable Accommodation

A "failure to accommodate" religious beliefs *prima facie* case requires the complainant to establish:

a. Complainant has a bona fide religious belief that conflicts with an employment requirement;

b. Complainant informed the employer of the belief; and,

c. Complainant was disciplined for failure to comply with conflicting employment requirement. See *Weber v. Roadway Express*, 199 F.3d 270 (5th Cir. 2000).

Age Discrimination

While the elements of a *prima facie* case are the same for age as for race, sex, color, religion, and national origin, the protected group is specifically identified as persons 40 years of age and older. *Prima facie* case for age complaint is:

a. Complainant is in protected age group (40+);

b. Complainant is qualified for the position;

c. Complainant suffered as a result of a personnel action; and complainant was disadvantaged in favor of a "younger" person. A seven year difference has been held to support this element, *Rivera-Rodriquez v. Frito Lay Snacks Caribbean*, No. 01-1023 (1st Cir. 2001), but courts have held a difference of less than five years does not. See *Williams v. Raytheon Co*., 220 F.3d 16, 21 (1st Cir. 2000). In a 2006 case, a court held that less than ten years was not enough to make out a prima facie case. See *Steward v. Sears, Roebuck & Co.*, Case No. 02-8921 (June 13, 2006, E.D. Pa. 2006). A six-year younger interim replacement followed by a selectee of one year younger than the plaintiff was held not to make out a prima facie case of age discrimination. *Lewis v. St. Cloud State University*, 02-8921 (October 31, 2006, 8th Cir.). See EEOC regulations on age discrimination, 29 C.F.R. Part 1625 (at www.eeoc.gov).

Disability Discrimination and Failure to Offer Reasonable Accommodation

There are three theories of discrimination applicable to disability cases: disparate treatment, disparate impact, and failure to offer a reasonable accommodation. For example, complainant alleges the agency treats individuals with disabilities different than those without, by imposing heavier discipline or failing to promote. In these cases, *McDonnell Douglas* analysis is used. In the disparate impact case, the complainant identifies a facially neutral policy that has a disparate impact on individuals with disabilities. In reasonable accommodation cases, the complainants must establish an entitlement to an accommodation because of their disabilities and the failure of the agency to provide a reasonable accommodation.

In all disability cases, complainants must prove they have a *disability* and are *qualified* for the position. Complainants must fit in a restricted range. Complainants must have a disability, but be able to establish that they can still perform the job with a reasonable accommodation. See 38 F.E.P. 732, 736 (C.D.Ca. 1984). It is important to note that an agency cannot be held liable for disability discrimination if it does not know the complainant has a disability. See *Stuart v. Postmaster General*, EEOC Appeal No. 01983179 (2001).

In order to establish a *prima facie* disability case,[88] complainant must prove s/he has a:

1. Physical or mental impairment that substantially limits a major life activity; or has a record of an impairment (i.e., has had the condition in the past); or is regarded as having a disability. See 29 C.F.R. § 1614.203(a);

2. Complainant must establish a causal connection between the disability and the adverse employment action and that the disability was known to the employer; and,

3. In addition to proving a disability, complainant must show s/he is qualified for the position with or without accommodation. In order to be qualified, complainant must be able to perform the essential functions of the job.

Once complainants have established that they are qualified persons with a disability, then the next phase of the analysis is the complainant proves disparate treatment or disparate impact as delineated in the previous sections above, or that the Agency failed to accommodate the disability.

An "individual with a disability" is defined as "one who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." 29 C.F.R. § 1614.203(a)(1).

Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203 (a)(3). A "qualified individual with a disability" is one who meets the education and/or experience requirements for the job and can perform the essential functions of the job with or without reasonable accommodation. 29 C.F.R. § 1614.203(a)(6).

Reprisal/Retaliation

Complainants may establish reprisal cases under Title VII through direct or indirect (circumstantial) evidence. A direct evidence case is built on explicit evidence of the intent to punish the complainant for engaging in some protected activity. It is more common to find direct evidence in a reprisal case than in any other cases brought to the EEOC. A case built on indirect evidence follows the familiar *McDonnell Douglas* analysis. The complainant must establish a *prima facie* case as follows:

a. The complainant engaged in a protected activity;

b. The responsible management official(s) knew about the activity;

[88] The definition of a disability has broadened and burden of establishing a disability has lessened with the passage of the ADA Amendments Act of 2008 (P.L. 110-325).

c. The complainant was subjected to an adverse employment action within a reasonable amount of time following the protected activity; and

d. There is a causal connection between the action and the protected activity.

PRIMA FACIE ELEMENTS FOR COMMON TYPES OF UNLAWFUL DISCRIMINATION COMPLAINTS

Not Selected For Promotion

The *prima facie* case in a non-selection complaint is:

a. The complainant meets the basic qualification standard for the job;

b. The complainant is a member of a protected class;

c. There was a vacancy for which the Agency sought applicants and the complainant applied;

d. The complainant was not selected; or

e. The Agency continued to seek applicants with similar qualifications and selected someone not in the complainant's protected group.

Disciplinary Actions

The common *prima facie* case in a complaint regarding disciplinary action is:

a. The complainant is a member of a protected class;

b. The complainant was subjected to a disciplinary action; and

c. The Agency treated him/her more harshly than similarly situated employees who were not part of the protected group.

Appraisals

In an appraisal complaint, the complainant must establish that:

a. The complainant is a member of a protected class;

b. The complainant is similarly situated to employees outside his protected class; and

c. The complainant received a lower performance rating.

COMPENSATORY DAMAGES IN DISCRIMINATION CASES

Damages in cases of intentional discrimination in employment

I. Definition of Compensatory Damages

Compensatory damages are awarded to compensate a complainant for losses or suffering inflicted due to intentional discriminatory conduct. *EEOC: Enforcement Guidance-Compensatory and Punitive Damages under § 102 of the Civil Rights Act of 1991, (July* 7, 1992), http://www.eeoc.gov/policy/docs/damages.html.

II. Statutory Basis for Compensatory Damages

Section 102 of the Civil Rights Act of 1991, codified at 42 U.S.C Sections 198la(a)(1) and 1981(h)(1), authorizes compensatory damages against the federal government for intentional employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Rehabilitation Act of 1973.

III. Categories and Examples of Compensatory Damages

Compensatory damages "may be had for any proximate consequences which can be established with requisite certainty." 22 Am Jur 2d, Damages, Section 45 (1965). Such consequences may include:

> Past pecuniary losses, which are monetary or out-of-pocket expenses, such as medical, moving, or job search expenses, which the complainant has already incurred as a result of the discriminatory conduct.
>
> Future pecuniary losses are out-of-pocket expenses, such as medical care or counseling, which will be incurred in the future because of the discriminatory conduct.
>
> Non-pecuniary losses are non-monetary harms or injuries, which are impossible to quantify exactly, such as pain and suffering, or loss of enjoyment of life.

IV. Exclusions and Limitations on the Award of Compensatory Damages

Compensatory damages are not available in cases brought under the Age Discrimination in Employment Act. *Taylor v. Department of the Army*, EEOC No. 05930633 (January 14, 1994); *Amaro v. Postmaster General*, 01A20929 (2003); *Shaffer v. Rumsfield*, EEOC No. 01A2062 (2006). However, recovery is allowed under Title VII based on other claims of discrimination. *Kim v. Secretary of Agriculture*, EEOC No. 07A10096 (2008); *Schmidt v. Postmaster General*, EEOC No. 0720080030 (2008).

Compensatory damages do not include punitive damages. The Civil Rights Act of 1991 specifically excludes punitive damages in actions brought against the federal government. 42 U.S.C. 1981a(b)(1).

The Act specifically provides that compensatory damages are not available in disparate impact cases. 42 U.S.C. 1981a(1).

Compensatory damages are not available in mixed motive cases, that is, where discrimination is shown, but management demonstrated that it would have taken the same action in the absence of the impermissible discriminatory motive. 42 U.S.C. 1981a(2).

Compensatory damages are not available in Rehabilitation Act cases where the issue is failure to accommodate a disability, and the employer has made a good faith attempt at reasonable accommodation. 42 U.S.C. 198la(a)(3); *Teshima v. Runyon*, EEOC No. 01961997 (May 5, 1998).

Awards of compensatory damages are subject to statutory caps, depending on the size of the agency. 42 U.S.C. 198la(b)(3). Within the Department of the Air Force, the Act limits the damage awards to *$300,000 per complaint*.

V. Burden and Standards of Proof

Compensatory damages must be proven by the complainant. *Carey v. Piphus*, 435 U.S. 247 (1978). In contrast to equitable relief, compensatory damages are not awarded solely by virtue of a finding of discrimination. Non-pecuniary losses, in particular, will not be presumed.

The complainant also has the burden of proving the amount of the damages. *Prunty v. Arkansas Freightways*, 16 F.3d 649, 64 FEP Cases 451, fn. 10 (5th Cir. 1994). The complainant's testimony, *alone*, may be sufficient. *Lawrence v. U.S. Postal Service*, EEOC No. 01952288, April 18, 1996.

Generally, the complainant must prove damages with "reasonable certainty," or, in other words, must establish each element of the damages by a preponderance of the evidence. 22 Am. Jur. 2d, Damages, Section 902 (1988).

VI. Elements of Proof

In broad terms, the complainant must show by objective evidence that the damages occurred and that they were caused by the discrimination. With respect to the three specific categories of harms or losses, the complainant must demonstrate the following elements:

Past pecuniary losses - Evidence of such damages must establish the actuality and amount of the damages and must establish the causal relationship between the

discriminatory conduct and the alleged damages. These could be moving costs, job search costs, medical bills, physical therapy, etc.

Future pecuniary losses - Evidence of such damages usually requires expert testimony, and must establish the likelihood of future expenses, the approximate amount of future expenses, and the causal relationship between the discriminatory conduct and the future expenses. This could be future medical expenses and professional counseling.

Non-pecuniary losses - Evidence of non-pecuniary loss must show the nature, duration, and severity of the claimed harm, loss, or injury, and their causal relationship to the discriminatory conduct.

More information on compensatory damages is available through the LLFSC. Additional information is available at *EEOC: Enforcement Guidance-Compensatory and Punitive Damages Under § 102 of the Civil Rights Act* of 1991 (July 7, 1992), http://www.eeoc.gov/policy/docs/damages.html.

When complainants request compensatory damages under 42 U.S.C. §1981(a), they may request a jury trial under 42 U.S.C. §1981 (a)(c).

UNION PRESENCE AT MEDIATION

LUKE AIR FORCE BASE vs. FEDERAL LABOR RELATIONS AUTHORITY
AFGE Local 1547

1999 U.S. App. LEXIS 34569 (United States Court of Appeals for the Ninth Circuit, December 30, 1999)

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner-cross respondent Air Force Base sought review of the decision of respondent-cross petitioner Federal Labor Relations Authority (FLRA) finding it had violated 5 U.S.C. § 7114 by not giving respondent-intervenor union notice and opportunity to be represented at a meeting settling a discrimination claim.

OVERVIEW: The collective bargaining agreement between respondent-intervenor union and petitioner-cross respondent Air Force Base excluded discrimination claims from its grievance procedure. A union member filed claims pursuant to Equal Employment Opportunity Commission (EEOC) regulations rather than the grievance procedure and designated the president of respondent-intervenor union, as her personal representative. A settlement agreement was signed without the president's presence and respondent-intervenor union filed unfair labor practice charges. Respondent-cross petitioner FLRA found that petitioner-cross respondent Air Force Base violated 5 U.S.C. § 7114 (1998) by not giving respondent-intervenor union notice and opportunity to be represented at the settlement meeting. The court held that: (1) "grievances" under § 7114(a)(2)(A) did not include the discrimination complaints that were brought pursuant to EEOC procedures; (2) therefore respondent-intervenor union had no right of representation at the settlement meeting; and therefore (3) petitioner-cross respondent Air Force Base did not violate § 7114.

OUTCOME: Decision reversed; "grievances" under the labor statute did not include discrimination complaints brought pursuant to EEOC procedures; therefore respondent-intervenor union had no right of representation at the settlement meeting; and petitioner-cross respondent Air Force Base did not violate statute.

DOVER AIR FORCE BASE 436TH AIRLIFT WING
vs. FEDERAL LABOR RELATIONS AUTHORITY AFGE LOCAL 1709

316 F.3d 280 (United States Court of Appeals for the District of Columbia Circuit Jan. 17, 2003)

DISPOSITION: Air Force's petition for review denied and FLRA's cross-application for enforcement granted.

PROCEDURAL POSTURE: Petitioner, the Air Force, sought review of an order from the Federal Labor Relations Authority (FLRA) finding it committed an unfair labor practice by conducting a formal discussion with a bargaining unit employee concerning the mediation of a formal Equal Employment Opportunity (EEO) grievance without affording his labor union notice under *5 U.S.C. § 7114*(a)(2)(A). The FLRA sought enforcement of its order.

OVERVIEW: The Air Force argued an EEO complaint was not a "grievance" under Federal Service Labor-Management Relations Act, *5 U.S.C. § 7103*(a)(9) and, thus, it did not trigger the union's formal discussion rights under *5 U.S.C. § 7114*(a)(2)(A). The Air Force also argued the FLRA's interpretation of §7114(a)(2)(A) was impermissible. The court agreed with the FLRA that its interpretation was permissible. The Air Force had a contract with Resolution Group to provide mediation services. The court's analysis relied upon the text, structure, and legislative history of the Act and did not rest on the type of grievance in question. Because the case involved a "grievance," formal discussion rights were triggered, and the FLRA's construction passed Chevron muster, as a natural reading of the broad statutory language. An **exclusive representative** had the right to be present at any formal discussion of a grievance between management and a bargaining unit employee. Also, **the employee did not object to union presence** at the mediation proceeding. Accordingly, the **Air Force committed an unfair labor practice** in failing to give the union notice of and the opportunity to be present at the mediation.

OUTCOME: The court denied the Air Force's petition for review and granted the FLRA's cross-application for enforcement of its order. The Court of Appeals held that EEO complaint was a "grievance" under the Federal Service Labor-Management Relations Act (FSLRA), and therefore, employee's union was entitled to notice and opportunity to be heard at mediation of the complaint.

Selected ADR Statute Provisions

APPROPRIATENESS OF ADR

5 U.S.C. § 572. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an **issue in controversy** that relates to an administrative program, if the **parties agree** to such proceeding.

(b) An agency shall consider **not** using a dispute resolution proceeding if:

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter [5 USC § 571, *et seq*.] are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

CONFIDENTIALITY IN ADR PROCEEDINGS

5 U.S.C. § 574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be

required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless--

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the

provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

Commonly Used AF ADR Terms

Some of the following ADR terms are derived from The Administrative Dispute Resolution Act (ADRA) of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) and are designated with a 5 USC §571 notation. The rest of the terms are from AFI 51-1201, Attachment 1.

ADR Attempt: An ADR attempt occurs when an ADR technique is offered, all parties voluntarily agree to its use, and the parties actually attend the ADR session. Simply informing the parties about the option of ADR does not count as an attempt. Use of multiple ADR techniques in a single proceeding (e.g., mediation and early neutral evaluation) is one ADR attempt for SAF/GCD data collection purposes. The willingness to try ADR and attempts to schedule a session do not count as an ADR attempt.

ADR Manager for Workplace Disputes: An individual appointed or designated at the MAJCOM and installation level to promote the use of ADR processes for resolving workplace disputes, to facilitate the development and implementation of the organization's workplace disputes ADR plan, and to provide oversight of the organization's workplace disputes ADR program. Depending on the installation, the title for the individual performing these duties may be ADR Manager for Workplace Disputes, ADR Champion, ADR Program Administrator, ADR Program Coordinator, or ADR Program Liaison Officer. AFI 51-1201.

ADR Stakeholder: An organization or individual with an official or, in the case of a complainant, claimant, or grievant, a personal interest in the initiation, processing, and resolution of one or more workplace disputes. Commanders, supervisors, individual employees, dispute program owners (e.g., Civilian Personnel or EEO) and legal and other advisors are all ADR stakeholders.

ADR Support Providers: Individuals, employed by the Agency, who provide technical assistance to either party to an ADR proceeding or neutral as requested. Support Providers are usually made available to the parties and the neutral during the proceeding by telephone. The ADR Manager should arrange for individuals from certain key installation functions such as Civilian Personnel, Labor Relations, Equal Opportunity, Legal, and Finance to be available on a regular and recurring basis. The same confidentiality requirements that apply to the parties apply to Support Providers as non-party participants in ADR proceedings.

Agency: Each executive department or independent agency of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -- (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; and (D) the government of the District of Columbia.

Alternative Dispute Resolution (ADR): Any procedure, in which a neutral is appointed and specified parties participate, that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trials, arbitration, and the use of ombuds, or any combination thereof. See 5 USC § 571(3).

AFI 51-1201, *Alternate Dispute Resolution Processes in Workplace Disputes*, Attachment 1, defines specific ADR proceedings as follows:

> **Facilitation:** An unstructured and flexible process in which a trained third party neutral (not necessarily a mediator) assists the parties in resolving issues in controversy by utilizing interest-based negotiation techniques.
>
> **Mediation:** A structured process in which parties seek the assistance of a qualified mediator to help them in resolving their issue in controversy. The primary attributes of mediation are a structured process, use interest-based negotiation techniques, and the use of separate and confidential caucuses between each party and the mediator.
>
> **Fact-finding**: A relatively informal process in which a neutral examines the evidence to determine the facts giving rise to the dispute, in order to assist the parties in negotiating a resolution.
>
> **Arbitration**: Arbitration involves the parties' mutual selection of a neutral third party, an arbitrator, to decide the issue in controversy after hearing witnesses, considering other items of evidence, and listening to the arguments of each side. The arbitrator's decision, called an award, can be binding or nonbinding, depending on the parties' agreement, but Air Force policy generally precludes binding arbitration outside of the collective bargaining context. Although commonly considered an ADR process, arbitration is not favored as an alternative process for resolving Air Force workplace disputes because of its use as the final step of negotiated grievance procedures in Air Force collective bargaining agreements.
>
> **Ombuds:** A neutral employee appointed to receive and investigate complaints, provide guidance, answer questions, and refer inquiries and complaints to appropriate outside resources. In the Air Force, an ombuds must be officially appointed in writing by the installation, Field Operating Agency, or Direct Reporting Unit.
>
> **Other ADR:** Other forms of ADR not specifically identified in the ADRA include peer review panels, which are panels consisting of employees, or a combination of employees and management officials, appointed to review the facts, hear arguments, and render decisions on issues in controversy. Alternatively, an organization may employ a technique that is considered part of another agency's ADR program, such as the FLRA or EEOC. In addition, a dispute may be resolved by the use of a Federal court's ADR program

Confidential Information in Mediation: Information provided with the expressed intent of the source that it not be disclosed; or under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed. 5 USC §571. The presumption is that information shared with the mediator in caucus, for the purposes of a dispute resolution proceeding, is protected from voluntary or compulsory disclosure, unless the party gives permission to the mediator to share it.

Conflict Coaching: Instruction, training, or tutoring of individuals and organizations on effective management of conflicts on a daily basis to prevent small disagreements from degenerating into disputes. Coaches help identify best ways to uncover and overcome obstacles to resolution and assist individuals in healthy effective ways of responding, reacting, or addressing conflict.

Dispute: See workplace dispute.

Dispute Resolution Communication in Mediation: Any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant. A written agreement to enter into a dispute resolution proceeding or final written agreement reached as a result of a dispute resolution proceeding, is not a dispute resolution communication. 5 USC § 571(5).

Dispute Resolution Proceeding: Any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate. 5 USC § 571 (6).

***Ex Parte* Communication:** An oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

Functional ADR Liaisons (FALs): (Formerly ADR Functional Area Managers) Individuals assigned to organizations with the functional responsibility for workplace dispute programs who are designated by the ADR Manager to help facilitate the use of ADR in the program they administer.

SAF/GCD: General Counsel of the Air Force provides overall policy and guidance for the Air Force ADR Program pursuant to AF Policy Directive 51-12. The Deputy General Counsel of the Air Force for Dispute Resolution (SAF/GCD) is the Air Force Dispute Resolution Specialist.

Issue in Controversy: An issue that is material to a decision concerning an administrative program of an agency, and with which there is disagreement between an agency and persons who would be substantially affected by the decision; or between persons who would be substantially affected by the decision. 5 USC § 571 (8).

Labor Law Field Support Center (LLFSC): The office within the General Litigation Division of the Air Force Legal Operations Agency that is responsible for providing legal services to installations and commanders in civilian labor and employment disputes. It coordinates base-level legal services with the installation Staff Judge Advocate (SJA).

Neutral: An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy. 5 USC § 571(9). For more specific information, 5 U.S.C. § 573 defines the "neutral" in detail.

Non-ADR: Interest-based attempts to resolve an issue-in-controversy by a person who is not a neutral.

Party: A person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes. See 5 U.S.C. § 571(10). An individual supervisor, manager, or other management personnel is not a party to an Air Force workplace dispute but may participate in an ADR proceeding as a representative of the Air Force or a subordinate Air Force organization. "Party" does not refer to the representatives or subject matter experts attending the mediation sessions.

Qualified Mediator: An individual who meets the Air Force criteria for mediating Air Force workplace disputes and who acknowledges and complies with the Standards of Conduct for Air Force Mediators.

Remedy: The whole or a part of an action, taken by an agency or other official administrative or judicial authority, in response to and in consequence of a grievance, complaint, or other workplace dispute. A remedy may consist of: (A) grant of money, assistance, license, authority, exemption, exception, privilege, or other relief; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person.

Roster: A list of persons qualified to provide services as neutrals. 5 USC § 571. Each base should manage a current roster of AF mediators.

Workplace Dispute: A formal or informal claim or issue in controversy that arises out of an existing or prospective employment relationship between the Air Force and its civilian employees, applicants for employment, or military members, or which otherwise materially affects conditions of employment for Air Force civilian employees, for which a remedial process is authorized by law, regulation, or policy. For purposes of application of ADR principles, a workplace dispute may be written or oral. Such disputes typically include EEO complaints (formal and informal), employee grievances under a negotiated and agency grievance procedure, MSPB appeals, unfair labor practices (ULPs), and other undefined disputes arising out of the Air Force employment relationship.

The Air Force Alternative Dispute Resolution program at SAF/GCD is committed to assisting Air Force mediators and program managers throughout the mediation process. More information is available through our public website (www.af.mil/ADR), internal AF Portal website (https://www.my.af.mil/gcss-af/USAF/site/HAF/SAF_GC/SAF_GCD) or by email to SAFGCD.Workflow@pentagon.af.mil.