



U.S. Equal Employment Opportunity Commission

# CHAPTER 3 ALTERNATIVE DISPUTE RESOLUTION FOR EEO MATTERS

## Management Directive 110

### I. INTRODUCTION

Statutes enforced by the Commission, regulations, and executive orders encourage, with very narrow, mission specific, exceptions, the use of Alternative Dispute Resolution (ADR) in resolving employment EEO disputes.<sup>[1]</sup> EEO ADR is a term used to describe a variety of approaches to resolving EEO disputes rather than traditional adjudicatory methods or adversarial methods. Examples of traditional adjudicatory methods include litigation, hearings, and agency administrative processing and appeals.

The Commission's regulations at 29 C.F.R. § 1614.102 (b)(2) require agencies to establish or make available an EEO ADR program. The EEO ADR program must be available during the pre-complaint process and the formal complaint process. The Commission regulations extend the counseling period when EEO ADR is used. See 29 C.F.R. § 1614.105(f). In the federal EEO process, the

**"parties"** are the agency and the aggrieved/complainant. See **Bates v. Tennessee Valley Authority**

(<https://law.resource.org/pub/us/case/reporter/F2/851/851.F2d.1366.87-7626.html>), 851 F.2d 1366, 1368 (11th Cir. 1988). As such, the manager who was

accused of discrimination does not qualify as a party because that person is not a statutorily proper defendant in the federal EEO process.

Accordingly, once the agency decides to offer EEO ADR, the accused manager has a duty to cooperate, like any witness, in the EEO ADR process, but may not be the agency official that has settlement authority.

Agencies and aggrieved individuals/complainants have realized many advantages from utilizing EEO ADR. EEO ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. EEO ADR usually costs less and uses fewer resources than traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. Early resolution of disputes through EEO ADR can make agency resources available for mission-related programs and activities. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through EEO ADR.

The Commission will review an agency's program and its EEO ADR policies, upon request, for consistency with 29 C.F.R. Part 1614. For more information, please contact the Office of Federal Operations at (202) 663-4599 or **[OFO.EEOC@EEOC.GOV](mailto:OFO.EEOC@EEOC.GOV)**.

## **II. CORE PRINCIPLES OF EEO ADR**

Agencies may be flexible in designing their EEO ADR programs to fit their environment and workforce, provided the programs conform to the core principles set forth below. However, the Commission believes that there are certain requirements that are absolutely necessary for the successful development of any EEO ADR program. The core principles include the concepts of fairness, flexibility, training, and evaluation. Discussed below are these concepts.

### **A. Fairness**

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the EEO ADR proceeding by providing, at a minimum: as much

information about the EEO ADR proceeding to the parties as soon as possible; the right to be represented throughout the EEO ADR proceeding; and an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:

### 1. Voluntariness

Parties must knowingly and voluntarily enter into an EEO ADR proceeding. An EEO ADR resolution can never be viewed as fair if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, the dissatisfaction of one party could lead to conflicts within the workplace or even to charges that the resolution was coerced or reached under duress.

In addition, aggrieved parties should be assured that they are free to end the EEO ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they prefer that process to EEO ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management, EEO officials, or the third-party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

Note: When the agency determines it to be appropriate to offer EEO ADR to an individual, there is no conflict with voluntariness when the agency requires the responsible management official to participate since s/he is not a party and is not the agency official with settlement authority. When the agency offers the individual EEO ADR and the individual agrees to participate, the parties have voluntarily entered into the EEO ADR process.

### 2. Neutrality

To be effective, an EEO ADR proceeding must be impartial and independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator ensures this impartiality. In this Management Directive a

**"neutral"** refers to a third party who has no stake in the outcome of the proceeding whose function is to assist the parties in resolving the matters at hand.

A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve. For example, s/he might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or s/he may be an employee within the same agency as long as s/he can remain neutral regarding the outcome of the proceeding. The agency must ensure the independence and objectivity of the neutral at all times.

### 3. Confidentiality

Confidentiality is essential to the success of all EEO ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in the **Administrative Dispute Resolution Act of 1996** (<https://www.govinfo.gov/content/pkg/PLAW-104publ320/pdf/PLAW-104publ320.pdf>) (ADRA), specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. See 5 U.S.C. § 574 (<https://www.law.cornell.edu/uscode/text/5/574>). Parties who know that their EEO ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of EEO ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices only with a need to have that information. Neither the ADRA nor the Commission's core principles require the parties to agree that a settlement must be confidential.

Confidentiality must be maintained by the parties, by any agency employees involved in the EEO ADR proceeding and in the implementation of an EEO ADR resolution, and by any neutral third party involved in the proceeding. The Commission encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an EEO ADR proceeding in accordance with 5 U.S.C. § 574.

### 4. Enforceability

Enforceability is a key principle upon which a successful EEO ADR program depends. Section 1614.504 of 29 C.F.R. provides that: "Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any

stage of the complaint process, shall be binding on both parties." The regulation sets forth specific procedures for enforcing such a settlement agreement. Agreements resolving claims of employment discrimination reached through EEO ADR are enforceable through this procedure.

## B. Flexibility

The EEO ADR program must be flexible enough to respond to the variety of situations individual agencies face. There is not necessarily one EEO ADR model which will work for all of an agency's programs, or all of its offices within the same program. Because agencies have different missions and cultures, they have flexibility in designing their EEO ADR programs. Agencies must also exercise flexibility in implementing the EEO ADR program. This flexibility will allow agencies to adapt to changing circumstances that could not have been anticipated or predicted at the time the program was initially implemented.

## C. Training

An EEO ADR program, to be successful, will require that the agency at regular intervals provide appropriate training and education on EEO ADR to its employees, managers and supervisors, neutrals, and other persons protected under the applicable laws. See 29 C.F.R. § 1614.102(b)(3).

In order to encourage the successful operation of EEO ADR throughout the agency, all managers and supervisors must receive EEO ADR training, either through an agency-conducted program or through an external source such as another federal agency or a private contractor. The EEO ADR training must include the following, at a minimum:

1. The **ADRA (<https://www.eeoc.gov/federal-sector/federal-sector-alternative-dispute-resolution>)** and its amendments, with emphasis on the federal government's interest in encouraging mutual resolution of disputes and the benefits associated with utilizing ADR;
2. The Commission's regulations and Policy Guidance with respect to EEO ADR: 29 C.F.R. §§ 1614.102(b)(2), 1614.105(f), 1614.108(b), and 1614.603 (voluntary settlement attempts);
3. The operation of the EEO ADR method or methods that the agency employs;

4. Exposure to other EEO ADR methods, including interest-based mediation, if this method is not already in use by the agency; and
5. Drafting the settlement agreement, including the notice provision pursuant to 29 C.F.R. § 1614.504, where the aggrieved party believes the agency failed to comply with the terms of the settlement agreement and any other legally required notices.

## **D. Evaluation**

An evaluation component is essential to developing and maintaining an effective EEO ADR program, and should be in place before an EEO ADR program is implemented. The evaluation will assist in determining whether the EEO ADR program has achieved its goals and will provide feedback on how the program might be made more efficient and achieve better results. Evaluations can range from analyzing the EEO ADR data on an annual basis to interviewing the EEO ADR participants about their experience in the process.

# **III. DEVELOPING AN EEO ADR PROGRAM**

## **A. Written Procedures**

The agency must establish written procedures detailing the operation of its EEO ADR program. The written procedures shall include, at a minimum, the following information:

1. The type or types of EEO ADR resources and techniques that the agency offers;
2. The stages of the EEO process at which EEO ADR will be offered and the appropriate agency official(s) who makes the determination to offer EEO ADR on behalf of the agency (note the responsible management official for the alleged discrimination is not the proper agency official for this decision);
3. The time frames involved in the administrative process and the EEO ADR process;
4. The source or sources of neutrals;

5. Those matters where EEO ADR is not available and the criteria the agency uses to determine when an issue is appropriate for ADR;
6. Assurance to the aggrieved party that EEO ADR is voluntary and that s/he may terminate the EEO ADR procedure at any time and return to the informal EEO process where they will be issued a Notice of Right to File a Formal Complaint or in the formal EEO process to the place where processing had ceased;
7. Assurance to the aggrieved party that its EEO ADR program is fair and that s/he has the right to representation;
8. An explanation to the aggrieved party with respect to confidentiality, neutrality, and enforceability; and
9. An assurance that the agency will make accessible an individual with settlement authority, and that no responsible management official or agency official directly involved in the case will serve as the person with settlement authority.

## **B. EEO ADR throughout the EEO Process**

If a case is appropriate, agencies may offer EEO ADR at any stage of the EEO process. With that said, the Commission encourages agencies to resolve complaints of employment discrimination as early in the process as possible. See 29 C.F.R. § 1614.603.

### 1. EEO ADR during the Counseling Stage

Under 29 C.F.R. § 1614.102(b)(2), agencies must establish or make available an EEO ADR program during the pre-complaint process. Chapter 2 of this Management Directive provides additional guidance concerning the process of offering EEO ADR during counseling.

### 2. EEO ADR after the Complaint Is Filed

Under 29 C.F.R. § 1614.102(b)(2), agencies must establish or make available an EEO ADR program during the formal complaint process. The regulations also state: "Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints." See 29 C.F.R. § 1614.108(b). As such, agencies must design

their EEO ADR program to allow the parties to pursue EEO ADR techniques after various stages of the formal complaint processing period.

### 3. EEO ADR at the Hearing and Appellate Stages

The Commission encourages EEO ADR attempts by the Commission's Administrative Judges prior to arranging a hearing. See Chapter 7 in this Management Directive. However, the parties may also pursue EEO ADR through the agency's EEO ADR program. To do so, the parties must notify the hearing office prior to utilizing the agency's EEO ADR program.

Similarly, EEO ADR may be beneficial at the appellate stage of the administrative process. At this stage, the parties should notify the Office of Federal Operations (OFO) of their interest in EEO ADR. They may utilize the agency's EEO ADR program, or request a neutral from OFO.

## **C. Matters Inappropriate for EEO ADR**

While the Commission contemplates that the majority of matters are appropriate for EEO ADR, the Commission recognizes that there are instances in which EEO ADR may not be appropriate or feasible. See 5 U.S.C. § 572(b) (<https://www.law.cornell.edu/uscode/text/5/574>). Agencies may decline to offer EEO ADR for particular issues related to the agency's mission, such as security clearances, but not for broad issues such as promotions or performance evaluations. Agencies have discretion to determine whether a given dispute is appropriate for EEO ADR. However, agencies may not decline to offer EEO ADR to particular cases because of the bases involved (that is, race, color, religion, sex, national origin, age, disability, genetic information, or retaliation).

## **D. Dealing with Non-EEO Issues**

Although the purpose of the EEO ADR program is to address disputes arising under statutes enforced by the Commission, the Commission has found that many workplace disputes brought to the process often include non-EEO issues. In designing their EEO ADR programs, agencies may provide sufficient latitude for the parties to raise and address both EEO and non-EEO issues (that is, issues that do not fall under the jurisdiction of EEO laws, statutes and regulations) in the resolution of their disputes. However, agencies are still responsible for any other statutory obligations they may have.



## **E. Choosing among EEO ADR Techniques**

Agencies should carefully consider the needs of their workforce when selecting techniques and choose the technique or techniques that are most likely to result in the earliest successful resolution of workplace disputes.

The Commission does not mandate the use of a particular EEO ADR technique in an agency's EEO ADR program; however, the selected technique(s) must be used in a manner that is consistent with the core principles. Additionally, each agency's EEO ADR program shall make available to parties at a minimum one ADR technique which allows for the meaningful participation of all involved parties (such as mediation, facilitation, or settlement conferences). The EEO ADR program must not diminish an individual's right to pursue his/her claim under the 1614 process should EEO ADR not resolve the dispute. For example, an EEO ADR program may not require an individual to waive, as a prerequisite to participation, his/her right to an investigation, to a hearing, or to appeal the final decision to the Commission.

## **F. Time Frames of the EEO ADR Process**

An EEO ADR program must be designed around the time frames of the EEO regulations. For example, 29 C.F.R. § 1614.105(f) provides that if the parties agree to participate in the EEO ADR process, the pre-complaint processing period may be extended not to exceed ninety (90) days. This time frame must be met to be consistent with the regulation. If the dispute is not resolved in this time frame, the agency must advise the aggrieved person not later than the 90th day after the EEO Counselor contact of their right to file a formal complaint. However, resolution efforts may continue so long as the parties and the neutral agree.

Similarly, if an individual enters into an EEO ADR procedure after a formal complaint is filed, the time period for processing the complaint may be extended by agreement for not more than 90 days. If the dispute is not resolved, the complaint must be processed within the extended time period.

## **G. Representation of the Parties**

Aggrieved persons have the right to representation throughout the complaint process, including during any EEO ADR process. While the purpose of EEO ADR is to allow the parties to fashion their own resolution to a dispute, it is important that

any agency 'dispute resolution procedure' provide all parties the opportunity to bring a representative to the EEO ADR forum if they desire to do so. Note, EEO Officials are not eligible to represent aggrieved individuals/complainants in the EEO ADR process. See Chapter 1 Section VI of this Management Directive for more information.

## **H. Spin-Off Complaints**

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

## **I. Collective Bargaining Agreements and the Privacy Act**

Agencies must be mindful of obligations they may have under collective bargaining agreements to discuss development of EEO ADR programs with representatives of appropriate bargaining units. Agencies must also be mindful of the prohibitions of disclosing information about individuals pursuant to the Privacy Act. All pre- and post-complaint information is contained in a system of records subject to the Act. Unless the complaining party elects union representation or gives his/her written consent, such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to the union.

## **J. Recordkeeping**

Pursuant to the Commission's authority set forth in 29 C.F.R. § 1614.602(a) to collect federal complaints processing data and pursuant to the agency's obligation to report EEO activity to the Commission, the Commission requires agencies to maintain a record of EEO ADR activity for annual reporting to the Commission no later than October 31 of each year. This information will be provided to the Commission on the Form 462.

## **K. Independent ADR Office**

In this Management Directive

an "**Independent ADR Office**" refers to an office that functions independently of the traditional EEO Office. In addition to EEO disputes, an Independent ADR Office may attempt to informally resolve a variety of workplace concerns, such as, grievances, or general employee disagreements.<sup>[2]</sup>

The Commission encourages the implementation of an Independent ADR Office as a best practice. A primary advantage of an Independent ADR Office is that the agencies can resolve disputes that do not belong in the EEO process, which then permits the EEO staff to focus on the traditional EEO complaint process. While employees may go directly to the Independent ADR Office without first meeting with the EEO Counselor, an independent ADR office is not an office for the purpose of initiating the EEO process. As a result, during the first contact with an Independent ADR Office, the aggrieved individual must be informed of the need to contact an EEO Counselor and regulatory time frames, should they wish to protect their rights to take the matter through the traditional EEO process.

Where an agency permits ADR office employees to perform any collateral EEO duty (no matter how small or infrequent), the ADR office is no longer independent and therefore any contact by an aggrieved party with the ADR office staff will initiate the traditional EEO process, including EEO counseling and Form 462 reporting. The agency's ADR staff member must provide to the aggrieved person the same information EEO Counselors are required to provide to the aggrieved persons, meet all training requirements of an EEO Counselor, and fully carry out the EEO Counselor's roles and responsibilities. This includes providing the EEO Counselor's report to the EEO Office for issuance in a timely manner. The ninety (90) day pre-complaint processing period will begin from the first contact with the ADR office staff member. Furthermore, an EEO Counselor may not act as a neutral in a case where s/he has previously provided EEO counseling. (See Chapter 2, Section I.E of this Management Directive for guidance on the qualifications, roles, and responsibilities of an EEO Counselor).

## **IV. PROVIDING INFORMATION**

Aggrieved persons need information about all aspects of EEO ADR in order to make an informed choice between EEO ADR and the traditional EEO complaint process. The information provided at the counseling stage largely determines whether aggrieved persons will utilize the EEO ADR process. As such, EEO ADR programs

should ensure that aggrieved persons are informed of all of the various steps in the traditional EEO process before beginning the actual EEO ADR proceeding. The aggrieved persons should also learn about the benefits of resolving the EEO dispute through EEO ADR. Although an informed choice is necessary to conduct an EEO ADR proceeding, an additional value is that once aggrieved persons choose EEO ADR over other alternatives, they have made a commitment to its success.

## **A. Agencies Must Fully Inform Employees about the EEO Process**

C.F.R. § 1614.105(b)(2), which covers pre-complaint processing, requires that the EEO Counselor advise the aggrieved person that s/he may choose between participation in the EEO ADR program offered by the agency and the traditional EEO counseling procedures. Before the aggrieved person makes a choice between counseling and EEO ADR, the EEO Counselor must fully inform the person about the stages of the EEO process. (See Chapter 2 of this Management Directive). The EEO Counselor also must also advise the aggrieved person about other appropriate statutory or regulatory forums, such as the Merit Systems Protection Board or a negotiated grievance process.

## **B. Providing Information about the EEO ADR Program**

1. The EEO Counselor should provide the aggrieved person with information about the agency EEO ADR program, including, but not limited to, the following:
  - a. A definition of the term EEO "alternative dispute resolution (ADR)" - (the definitions in this Chapter can be used);
  - b. An explanation of the stages in the EEO process where EEO ADR is available;
  - c. A thorough description of the particular EEO ADR technique(s) used in the agency's program;
  - d. A thorough description of how the program is consistent with the EEO ADR core principles in ensuring fairness (including the right to representation), which requires voluntariness, neutrality, confidentiality, and enforceability;

- e. An explanation of procedural and substantive alternatives; and
  - f. Information regarding all of the time frames involved in the traditional EEO complaint process and the EEO ADR process.
2. Information about the agency's EEO ADR program may be provided to the aggrieved person through discussions, memoranda, video presentations, booklets, or pamphlets. In addition, the Commission recommends that agencies issue an EEO ADR policy, which shows the agency head's support of the EEO ADR program and encourages all employees to participate in the program.

## **C. Explaining the Benefits of EEO ADR**

To encourage the aggrieved persons to consider participating in the EEO ADR program, they will need to understand the benefits of the EEO ADR process. The Commission recommends that the EEO ADR program prepare talking points to promote the use of EEO ADR. In particular, agencies could identify the following benefits of EEO ADR:

1. EEO ADR saves time and money, as litigation and adjudication generally costs more and can takes years to reach a decision;
2. Settlement agreements do not require admissions of liability;
3. The parties maintain considerable control over the EEO ADR process and will decide their own outcome;
4. Settlement agreements are more durable because there is buy-in from the parties;
5. EEO ADR can improve office morale and productivity by repairing the parties' relationship and avoiding the tension caused by the investigative process; and
6. Unlike decisions which are published, the terms of the settlement agreement are not routinely disclosed.

## **D. Informing the Employee about Filing Rights**

Whether or not the aggrieved person chooses to participate in the agency's EEO ADR program, the EEO Counselor shall advise the aggrieved person of his/her rights and

responsibilities in the EEO complaint process, as set forth in 29 C.F.R. § 1614.105(b).

## E. Pre-EEO ADR Meeting

Once the matter is accepted into the EEO ADR program, either the neutral or a member of the EEO ADR office may hold a pre-EEO ADR meeting. The purpose of this meeting is to provide information about the EEO ADR proceeding and address preliminary matters. For example, the meeting could clarify the issues in dispute, determine the scope of authority among the participants, discuss the role of the representatives, and ask the parties to develop a list of the desired results that s/he would like to achieve through EEO ADR.

## V. NEUTRALS

ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." **5 U.S.C. § 571(9)** (<https://codes.findlaw.com/us/title-5-government-organization-and-employees/5-usc-sect-571.html>). The Act further states that a neutral is a:

permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

**5 U.S.C. § 573 (a)** (<https://www.law.cornell.edu/uscode/text/5/573>).

### A. Sources of Neutrals

EEO ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. An agency should also consider the aggrieved person's perception of the third party's impartiality in appointing a neutral for an EEO ADR proceeding. For the neutral to be effective, the participants in an EEO ADR program must perceive the neutral as completely impartial. The selection of neutrals must comply with the core principles of ADR articulated in Section II above.

An agency may use neutrals for its EEO ADR program, subject to their qualifications, from the following sources:

1. Other federal agencies/sub-components (through a federal neutral sharing program or other arrangement);
2. Private organizations, private contractors, bar associations, or individual volunteers; or
3. Within their own agency, provided that they are impartial and independent of any control by either party, in both perception and reality.

The Commission recommends that agencies disclose their source of neutrals to the parties. Many federal agencies offer external sources of neutrals. Federal Executive Boards (FEB) throughout the nation offer pools of neutrals who are available for federal agency EEO dispute resolution. Similarly, the Federal Mediation and Conciliation Service (FMCS) also provides neutrals throughout the country. Within the metropolitan Washington, D.C., area, the Department of Health and Human Services offers an interagency mediation program called the Sharing Neutrals Program. This program operates a pool of trained and experienced collateral-duty mediators who provide mediation services to agencies in exchange for like services to the program from the recipient agency. More information about these programs may be obtained online at the **[Commission's federal sector ADR page \(https://www.eeoc.gov/federal-sector/alternative-dispute-resolution-adr-overview\)](https://www.eeoc.gov/federal-sector/alternative-dispute-resolution-adr-overview)**.

In the event that an agency uses one of its own employees as a neutral, it must ensure the neutrality and impartiality of the neutral. If EEO Counselors and investigators are used as neutrals, the agency must ensure that they do not serve as a neutral in the same dispute in which they provided counseling or conducted an investigation. Furthermore, an agency may use EEO Counselors and investigators as neutrals if, and only if, they satisfy the minimum training requirements. Agencies should also be aware that having EEO Counselors and investigators switch roles between performing their traditional EEO duties and providing EEO ADR can be confusing to the aggrieved persons and to the EEO staff as to their role in a particular case. To avoid this confusion, agencies must clearly communicate to the aggrieved persons the function being performed by the agency employee, whether EEO counseling, investigating, or EEO ADR. To the extent possible, agencies are

encouraged to designate individuals as EEO Counselors/Investigators or EEO ADR neutrals, and limit the switching of roles between the EEO and EEO ADR programs.

## **B. Qualifications of Neutrals**

### **1. Training in ADR Theory and Techniques**

Any person who serves as a neutral in an agency's EEO ADR program must have professional training in whatever dispute resolution technique(s) the agency utilizes in its program. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession. For example, the Interagency Program on Sharing Neutrals administered by the Department of Health and Human Services requires the following expertise: 1) at least 20 hours of basic mediation skills training; 2) at least three co-mediations with a qualified mediator or five independent mediations and positive evaluations from a qualified trainer/evaluator; and 3) at least two references from two qualified mediators or trainer/evaluators.

### **2. Knowledge of EEO Law**

Any person who serves as a neutral in an agency's EEO ADR program must be familiar with the following EEO laws and areas:

- a. The entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames;
- b. The Civil Service Reform Act and the statutes that the Commission enforces (including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act Amendments Act of 2008, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act of 1963, as amended, and the Genetic Information Nondiscrimination Act of 2008);
- c. The theories of discrimination (for example, disparate treatment, adverse impact, harassment, and reasonable accommodation); and
- d. Remedies, including compensatory damages, costs, and attorney's fees.



## C. Role of the Neutral

In any EEO ADR proceeding conducted under this Directive, the neutral is expected to be "neutral, honest, and to act in good faith." The neutral must also act consistently with the ADRA and strive to ensure:

1. That EEO ADR proceedings are consistent with EEO law and Part 1614 regulations, including time frames;
2. That proceedings are fair and consistent with the core principles in this Chapter, particularly providing the parties the opportunity to be represented by any eligible person of his/her choosing throughout the proceeding (see Section III.G of this chapter for more information);
3. That an agency representative participating in EEO ADR has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative;
4. That any agreement between the parties can be enforced, assist the parties in preparation of the written settlement agreement that includes the signatures of the appropriate agency representative and aggrieved person, and inform the parties of the review process the agency uses to ensure the terms of the agreement are enforceable;
5. Confidentiality, including destroying all written notes taken during the EEO ADR proceeding or in preparation for the proceeding; and
6. Neutrality, including having no conflict of interest with respect to the proceeding (for example, material or financial interest in the outcome, personal friend or co-worker of a party, supervisory official over a party), unless such interest is fully disclosed in writing to the parties and they agree that the neutral may serve.

## D. Promoting Trust

Trust fosters the open and frank communication between the parties that is an essential factor in reaching a fair resolution of an EEO complaint. Once the individual has chosen EEO ADR to attempt resolution, the neutral can develop the parties' trust by:

1. Providing full information about the EEO ADR proceeding as soon as possible, including information on its impartiality, the relative merits of EEO ADR as compared with the traditional form of complaint processing, and the confidentiality of the EEO ADR process;
2. Giving the parties the opportunity to request and obtain relevant information from one another, so that they have sufficient information to make informed decisions; and
3. Explaining the safeguards that are in place to protect parties from pressures to resolve the complaint.

## VI. ADR TECHNIQUES

Numerous ADR techniques are available for use by agencies in their programs. Each agency's EEO ADR program should strive to use those ADR techniques which are a best fit for their culture. While the Commission does not mandate that agencies offer any specific ADR techniques, agencies must at a minimum make available to parties one ADR technique which allows for the meaningful participation of all involved parties in the dispute. Mediation, facilitation, and settlement conferences are common ADR techniques which involve the participation of all parties to the dispute.

Techniques may be combined to provide advantageous aspects of more than one method. For example, an agency may provide coaching to one or more of the parties as a way of preparing parties for mediation. Or, an agency may provide coaching as one of the services after mediation. However, coaching alone would not be sufficient, as it does not allow for meaningful participation of all parties to the dispute. Agencies are not limited to using only one method or technique in their EEO ADR programs. They may find that using various methods in combination may also yield fruitful results and be very effective in reaching resolution. See the **Federal Workplace Conflict Management Desk Reference** (<https://adr.gov/about-adr/workplace-conflict-management/>) at ADR.gov for a non-exhaustive list of ADR techniques.

### A. Mediation

In this Management Directive the term

**"Mediation"** refers to the process where a third-party neutral, who is not a decision maker, facilitates discussion between the parties to help them reach a mutually acceptable resolution.

In a mediation the neutral guides the process and determines when to meet with both parties in a joint session or individually, establishes a tone to help parties engage in meaningful discussion, and creates a safe environment for discussion.

## **B. Facilitation**

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (for example, resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved as the mediator in the substantive issues. The facilitator focuses more on the communication processes involved in resolving a matter.

## **C. Settlement Conferences**

In a settlement conference, disputing parties, their representatives, and a judge or referee hold a meeting designed to bring formal adversarial proceedings to a satisfactory close. The role of a settlement judge is similar to that of a mediator in that s/he assists the parties procedurally in negotiating an agreement.

# **VII. RESOLUTIONS MUST BE IN WRITING**

If the agency and the aggrieved person agree to a resolution of the matter, the Commission regulations require that the terms of the resolution be in writing and signed by both parties to verify they have the same understanding of the terms of the resolution. See 29 C.F.R. § 1614.603; Chapter 12 of this Directive. The written agreement must state clearly the terms of the resolution and contain the procedures available under 29 C.F.R. § 1614.504, in the event that the agency fails to comply with the terms of the resolution. Written agreements must comply with **EEOC's Enforcement Guidance on Non-Waivable Employee Rights under**

**Enforced Statutes (<http://www.eeoc.gov/policy/docs/waiver.html>)**, wherein the Commission sets forth its position that:

"an agency may not interfere with the protected right of employees to file a complaint or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by the Commission."

Additionally, any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA) must also comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA) Pub. L. No. 101- 433 (1990), the **ADEA, 29 U.S.C. § 626(f) (<https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967>)**, and the Commission's regulations regarding Waiver of Rights and Claims under the ADEA at 29 C.F.R. Part 1625. Neither the ADRA nor the Commission's core principles require the parties to agree that a settlement must be confidential.

The agency representative shall transmit a signed and dated copy of the resolution to the EEO Director. The EEO Director shall retain the copy in accordance with the appropriate National Archives and Records Administration schedules.

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[1] Agencies may have additional responsibilities under the Alternative Dispute Resolution Act, 5 U.S.C. § 574. The EEOC does not have jurisdiction to enforce the ADRA on federal agencies.

[2] For more information, refer to the Commission's ADR report, entitled "**Part II - Best Practices in ADR (FY 2003-FY 2004) (<https://www.eeoc.gov/federal-sector/adr-report-part-ii-best-practices-alternative-dispute-resolution-fy-2003-fy-2004>)**".