AIR FORCE MEDIATION COMPENDIUM:

HOW TO MEDIATE CIVILIAN PERSONNEL WORKPLACE DISPUTES

(THIRD EDITION)

SEPTEMBER 2004

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Other ADR and Mediation Resources Available on the Internet:

Air Force ADR Website
(*www.adr.af.mil*)

Air Force Policy Directive 51-12 (9 January 2003)
(*http://www.e-publishing.af.mil/pubfiles/af/51/afpd51-12/afpd51-12.pdf*)

Air Force Instruction 51-1201 (21 April 2004)
(*http://www.e-publishing.af.mil/pubfiles/af/51/afi51-1201/afi51-1201.pdf*)

ADR Program Implementation Resource Guide (PIRG)
(*http://www.adr.af.mil/afadr/adrpirg/index.html*)

SECAF Memo to Senior Commanders on ADR Implementation
(*http://www.adr.af.mil/afadr/MemofromSAFtoCmdrs.pdf*)

AFMC/CC Memo to Commanders on ADR Implementation
(*http://www.adr.af.mil/afadr/3AFMCCC.pdf*)

FOREWORD

Welcome to the Third Edition of *The Air Force Mediation Compendium: How to Mediate Air Force Civilian Personnel Workplace Disputes.* For many years the *Compendium* has served as the principal guidance for training new Air Force mediators and for helping all mediators and other Alternative Dispute Resolution (ADR) practitioners to perform their duties in a fair, competent, and consistent manner. It applies to mediation of all Air Force civilian personnel disputes, including Equal Employment Opportunity complaints, Merit Systems Protection Board appeals, employee grievances for both bargaining unit and non-bargaining unit employees, labor-management disputes, and other disputes arising out of the employment relationship between the Air Force and its civilian personnel.

The *Compendium* is divided into two major sections: The narrative section provides substantive and procedural guidance for initiating and conducting Air Force workplace dispute mediations. The appendix section includes useful tools and information for intake personnel, mediators and participants in the mediation process. This new edition has been updated to reflect the publication of Air Force Instruction 51-1201, *Alternative Dispute Resolution in Workplace Disputes* (21 April 2004). Among the significant changes are an expanded explanation of the standards of ethical conduct applicable to mediators and other neutrals, a more detailed discussion of the mediation intake process, updated guidance concerning the participation of unions in certain mediation processes, and revisions and additions to the appendices. An online version of the *Compendium* is also available at http://www.adr.af.mil/compendium/.

The *Compendium* is a collaborative effort of the Dispute Resolution Division of the General Counsel's Office (SAF/GCD), the Air Force Civilian Personnel School, and experienced Air Force mediators/trainers. Special acknowledgments to Sandra McGruder, Leonard Gonzales, Leigh Ann Bryson, Laverne Aldrich, Kevin Broussard, Mary Bishop, and Solomon Starks for their vital contributions to this edition of the *Compendium*.

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PART ONE

INTRODUCTION

This Compendium describes the process, techniques and best practices for utilizing mediation as an alternative dispute resolution (ADR) tool in civilian workplace disputes. The Air Force has adopted the Facilitative Model of mediation for all workplace dispute matters. Grievances or complaints arising under Equal Employment Opportunity Commission (EEOC) procedures, negotiated grievance procedures, agency grievance procedures, or under the jurisdiction of the Federal Labor Relations Authority (FLRA) procedures (such as unfair labor practice allegations), or the Merit Systems Protection Board (MSPB) (such as disciplinary and performance actions), as well as generic, informal workplace issues, are all included within the scope of this Compendium. The Compendium provides practical advice and resources to successfully mediate civilian workplace disputes. 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 sample forms, checklists, and other helpful material to conduct mediations.

Air Force workplace dispute mediations are governed by the Administrative Dispute Resolution Act of 1996, 5 U.S.C. sec. 571, *et seq.* (ADRA), as implemented by Air Force Policy Directive (AFPD) 51-12 (9 Jan 03) and Air Force Instruction (AFI) 51-1201 (21 Apr 04). Selected provisions of ADRA are in Appendix 25. The ADRA defines an ADR procedure as one 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."[1] Mediation is just one of the many types of ADR techniques and is defined as follows:

> A structured process in which disputing parties seek the assistance of a qualified mediator to help them in resolving their issue(s) in controversy. The primary attribute of mediation is the process in which the mediator assists parties involved in a dispute in the use of interest-based problem solving techniques that allow for resolution of their dispute. In order to reach a settlement, the parties are able to participate in separate and confidential caucuses with the mediator, where possible settlement options can be thoroughly explored.

The fundamental principle underlying the mediation process is self-determination. This means the parties must be free to craft a mutually acceptable resolution to their dispute. The role of the mediator is to facilitate the parties' resolution of the dispute through the use of the mediation process; the mediator does not decide the case or dictate the terms of a settlement.

The three essential elements of mediation are:

a) The parties agree to use a qualified mediator to resolve their dispute;
b) A qualified mediator assists the parties in using facilitative, interest-based negotiation techniques to resolve their dispute, and the parties contemplate meeting with the mediator

[1] Public Law 104-320, 5 U.S.C. § 571(6) (1999) (*See* Appendix 25)

in separate confidential caucuses; and

c) A closure of the process either with or without a settlement.

The EEOC's regulations governing federal agency EEO complaints at Title 29, Code of Federal Regulations (CFR) § 1614.102 (b)(2), require agencies to establish or make available an alternative dispute resolution program in both the informal pre-complaint and formal complaint stage of the EEO complaint process. In addition, the Commission has developed an ADR Policy in Chapter 3 of Management Directive 110 (MD-110) that sets forth core principles regarding the use of ADR. The EEOC has mandated that, while Agencies are allowed to be flexible in the development of their ADR programs, the programs must adhere to certain core principles.[2] These principles are to further the EEOC's mission to enforce the anti-discrimination laws applicable to federal agencies, and to provide **fairness**, **flexibility**, and **training and evaluation**. Included in **fairness** are the principles of voluntariness, neutrality, confidentiality and enforceability. The Air Force Mediation program tracks the requirements of the EEOC, addresses all the core principles, and is appropriate for use in resolving EEO and other civilian workplace disputes.

MEDIATION STANDARDS

1. The Provision of Mediation Services.

AFPD 51-12, as implemented for workplace disputes by AFI 51-1201,[3] requires each Air Force installation to have an ADR Champion, who is responsible for the provision and oversight of ADR services, including mediation, at that installation. Subject to this general program oversight, an Air Force mediator appointed or designated to mediate a workplace dispute is responsible for ensuring that:

1. All parties understand the mediation process, the role of the mediator, the relationship between the parties and the mediator, and that the agreement to mediate is voluntary;
2. All appropriate steps are taken to prepare for the mediation;
3. The mediation services are provided promptly and conducted properly according to the Air Force Mediator Standards of Conduct (see paragraph 2 below);
4. The settlement agreement, if any, is coordinated with and reviewed by appropriate Air Force officials, such as Air Force attorneys, personnel specialists, commanders or others, prior to final approval; and
5. Either the settlement agreement, or the absence of an agreement communicated via an impasse memorandum, is provided to the appropriate Air Force official.[4]

[2] EEOC ADR Policy statement. See MD-110, Ch. 3 (Section II)

[3] Electronic versions of both publications are available on the Air Force publications web site at http://www.e-publishing.af.mil.

[4] This step should be made known to the parties prior to entering into an agreement to mediate and should be understood in the context of the confidentiality and enforcement procedures unique to the type of dispute being mediated. *See, e.g.,* 5 U.S.C. § 574(h).

How these steps are accomplished, and who accomplishes them, will vary from base to base. However, the mediator must ensure he/she understands the base policy/process prior to starting the mediation session.

2. Air Force Mediation Model.

The Air Force Mediation program uses a facilitative mediation model, which requires the mediator, as an impartial third party, to assist parties in the resolution of their dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. 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. As suggested, facilitative mediation utilizes an *interest-based* problem-solving approach to dispute resolution, which is characterized by four core principles: (1) Separate the ***people*** from the ***problem***; (2) Focus on ***interests***, not ***positions***; (3) Create ***options*** for mutual gain; and (4) Use ***objective criteria*** to ensure legitimacy of any agreement. Because interest-based problem-solving techniques are so central to the Air Force facilitative mediation model, Air Force mediators must be properly trained in and understand their use before attempting to mediate workplace disputes. The principles of Interest-Based Negotiation, or IBN, are discussed in greater detail in Part 2 of this Compendium.

Consistent with the facilitative model and the use of the interest-based approach, Air Force mediators have considerable flexibility and discretion in how the mediation is conducted. Facilitative mediation differs from other popular forms of mediation, such as evaluative and transformative mediation, through the use of questioning by the mediator to help guide the parties in creating their own solution to their dispute, rather than evaluating the strengths and weaknesses of their legal positions or broadly transforming the parties' working environment.

Like other forms of mediation, facilitative mediation usually involves the mediator conducting private, confidential one-on-one discussions with each party, known as *caucuses.* As will be discussed in greater detail later, confidentiality in the caucus is of utmost importance, in order to promote the free and open discussion that is so often crucial to resolving a dispute.

3. Air Force Standards of Conduct for Mediators and Other Neutrals.

Several years ago, a consortium of the American Bar Association, American Arbitration Association, and the Society for Professionals in Dispute Resolution ("SPIDR," which has since merged into the Association for Conflict Resolution) developed model standards of conduct for mediators to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.[5] The Air Force has adopted a variation of these model standards in AFI 51-1201, paragraph 23. These seven standards govern all Air Force workplace dispute mediations and other ADR proceedings utilizing a third-party neutral. Compliance with the ***standards*** is mandatory. Failure to follow these standards may result in the mediator no longer being able to

[5] As of the date of this *Compendium*, the model standards are being studied for possible revision.

participate in Air Force mediations. The ***comments*** accompanying each standard are to provide guidance in applying each standard, but are not mandatory.

Standard 1: Consent

Standard: A mediator shall make reasonable efforts to ensure that all parties understand the mediation process, the options available to them, and that the parties are free to make whatever choices they desire regarding specific settlement options.

Comments:

- *The mediator is obligated to explain the mediation process to the parties, including the mediator's role and function, and to inform the parties of their right to refuse any offer of settlement and to withdraw from mediation at any time and for any reason. This obligation continues throughout the mediation.*
- *The mediator must avoid exerting undue pressure on any party to participate in mediation or to accept a settlement. The mediator may, however, encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.*
- *Where a party appears to be acting under coercion, intimidation, or fear, or without capacity to comprehend the process, the mediator must explore the circumstances with the party and, unless the party objects, discontinue the mediation. If the party insists on continuing, the mediator must do so, but should continue to raise the question and check for willingness to proceed.*

Standard 2: 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 party's 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 3: 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—e.g., expressed sympathy or antipathy—toward any party or 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; or*
    - *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 4: 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 5: 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 a 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, discussed in the next section.*

Standard 6: Integrity 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 7: 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 Champions 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 22.2 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. (References: MD-110, Chapter 3, Section IV.b; AFI 51-1201, paragraph 24).[6]

STATUTORY CONFIDENTIALITY

In addition to the ethical standard of confidentiality, there is a statutory confidentiality requirement in federal ADR proceedings, including mediation. The ADRA[7] prohibits a mediator (or any other third-party neutral) from voluntarily disclosing, or from being compelled to disclose, a confidential "dispute resolution communication," unless an exception to confidentiality applies (see discussion below). A "confidential dispute resolution communication" is an oral or written communication made during an ADR proceeding, for the purpose of the proceeding, given with the express intent of the source of the communication that it not be disclosed, or given under circumstances that create a "reasonable expectation" that the communication not be disclosed. Dispute resolution communications include oral and written statements between the mediator and a party during private caucus, as well as written notes created by the neutral and the parties during the mediation. Communications disclosed in violation of confidentiality cannot be admitted into evidence in any future legal proceeding.[8] Confidentiality is a powerful component of ADR so as to allow the parties a full opportunity to explore the issue(s). The parties' expectations regarding confidentiality are important; the mediator should ensure these expectations are realistic and consistent with existing law and policy. Air Force policy is to support the confidentiality of dispute resolution communications in Air Force mediations whenever it is consistent with the ADRA to do so.[9]

While Congress recognized that confidentiality is essential for mediation to be effective, there is a strong public interest in open government, requiring a balance to be struck. 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 may 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

[6] 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.
[7] 5 U.S.C. § 574.
[8] *Id.* Similar restrictions are observed in administrative EEO complaints. EEOC MD-110, Chapter 3, Section III(D), provides, "Nothing said or done during attempts to resolve a complaint through ADR, including the failure by the agency to provide a neutral, can be made the subject of an EEO complaint."
[9] AFI 51-1201, ¶ 30.

guidance from the ADR Champion, installation legal office, and the Dispute Resolution Division of the Air Force General Counsel's Office (SAF/GCD), whether disclosure is permitted.[10]

The exact contours of confidentiality under the ADRA are often complex and not readily apparent, especially where the exceptions are concerned. However, Air Force 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:

1. Agreements to Mediate; [11]
2. Settlement Agreements reached as a result of an ADR proceeding;[12]
3. Dispute resolution communications the parties agree in writing can be disclosed; [13]
4. Communications that exist in the public domain prior to the mediation.
5. Information that is required by statute to be made public;[14]
6. 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;[15]
7. 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.[16]

Mediators, before disclosing the content of any communication that may be confidential under the ADRA, must contact the local ADR Champion and/or Staff Judge Advocate for advice. The ADR Champion and SJA will coordinate this advice with SAF/GCD. **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 *to avoid a waiver of any objection to the neutral's disclosure of the information.*[17]**

Mediators should also keep in mind that other statutes, e.g., the Privacy Act, may make certain information confidential. This is true for EEO complaints as well as employee grievances under a negotiated grievance procedure or agency grievance process. As such, information contained in these records of which the mediator becomes aware may be protected from disclosure under those statutes. Mediators and ADR practitioners should refer all issues related to disclosure of possibly confidential material to the ADR Champion and legal office for guidance.

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[10] *Id.*, ¶ 34.
[11] *Id.*
[12] *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.)
[13] *Id.,* § 574(a)(1) & (b)(2) (Note: If a nonparty participant provided the confidential dispute resolution communication, that participant also must consent in writing.)
[14] *Id.,* §§ 574(a)(3) & (b)(4). For example, in response to a Congressional subpoena.
[15] *Id.,* §§ 574(a)(4) & (b)(5).
[16] *Id.*, § 574(f).
[17] AFI 51-1201, ¶ 34. *See* Footnote 10 and accompanying text.

Other alternatives to the ADRA for maintaining confidentiality include contractual agreements between the parties. For example, while a settlement agreement resulting from mediation is expressly not confidential under the ADRA, the parties can agree to make it confidential between themselves by adding a clause in the agreement to that effect. In practice, most Air Force settlement agreements in workplace disputes routinely include a confidentiality clause. An example of a settlement agreement with such a clause can be found in Appendix 12.

It is neither necessary nor particularly helpful for the parties in Air Force 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. Beyond that, mediators are once again reminded that if requested or directed to disclose information that might be confidential, they are not to decide for themselves whether disclosure is permitted or not. Bring the matter to the ***immediate*** attention of the ADR Champion and legal office, who will coordinate the determination with SAF/GCD.

PART TWO

INTAKE

For a mediation to be successful, there are certain things that must be accomplished. It is vital that: (1) the parties to a mediation process make a voluntary and informed choice about agreeing to mediate their dispute; and (2) that the process is conducted fairly, impartially, and effectively. This means gathering sufficient information about the dispute to provide meaningful guidance, educating the parties about the process, ensuring the case is amenable to mediation (i.e., screening it to determine whether ADR is appropriate), offering or declining ADR, securing the parties' written agreement to mediate if mediation is elected, and coaching. Some of these must be accomplished before the mediation, some after. Initial data gathering, including interviewing the parties, ensuring the dispute is amenable to mediation, offering (or declining an offer of mediation), educating and coaching the parties, and getting the parties to sign the agreement to mediate are all accomplished during case intake, before the mediation. How this is handled varies widely across the Air Force. In some Air Force organizations, one individual is responsible for all coordination from intake through closure. In other Air Force programs, separate people handle intake, mediation, and coordination. While there is no one right way to design and implement a mediation program, case 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, it should be ensured that the following issues have been addressed prior to the mediation:

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 parties should be interviewed as part of the intake process. Information obtained from the

parties during an intake interview is confidential under the ADRA if the person taking the information is designated as a neutral by the ADR Champion or other competent authority for purposes of confidentiality protection.[18] Intake officials designated as neutrals for such purposes are referred to as "administrative neutrals," as opposed to "session neutrals," e.g., mediators, who actually conduct the ADR proceeding.

2. Ensuring the Dispute is Amenable to Mediation.

Once sufficient information has been gathered, it must be determined whether ADR is appropriate to resolve the dispute. Although Air Force policy is to maximize the use of ADR to resolve disputes, not all disputes are necessarily appropriate for mediation. Air Force Policy Directive 51-12 favors the use of ADR to resolve disputes when it is "practicable and appropriate" to do so.[19] 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 21 makes the base legal office primarily responsible for case screening, with coordination by the ADR Champion and other affected offices such as the Civilian Personnel Flight and EEO Office. Other options available for case screening are outlined in paragraph 21.3 of AFI 51-1201.

Depending on a base's volume of workplace disputes, case screening may be accomplished by intake personnel using checklists and guidelines approved by the legal office and ADR Champion, or it may be done on a case-by-case basis. However case screening is accomplished, the determination of whether a dispute is amenable to ADR must be done ***before*** mediation is offered. Keep in mind also 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[20] after the event giving rise to the grievance, conducting the mediation does not toll the running of that 20 day period unless the grievance procedure specifically allows a longer period when mediation is attempted, or the parties expressly agree to extend the period. In EEO complaints, the EEOC has addressed time limitations somewhat by automatically extending the informal processing period from 30 days to 90 days when ADR is chosen.[21] In adverse personnel actions, the Merit Systems Protection Board allows the employee an additional 30 days to appeal if mediation is attempted.[22]

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:

1. 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.

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[18] AFI 51-1201, ¶ 31.2.
[19] AFPD 51-12, ¶ 3. *See also,* AFI 51-1201, ¶ 2.
[20] This time period is notional. Actual time limits are set forth in the NGP.
[21] 29 C.F.R. § 1614.105(f).
[22] 5 C.F.R. § 1201(b)(1).

2. There are underlying issues propelling the dispute that are not part of the formal dispute and that cannot be remedied through the traditional process.

3. A continuing relationship between the parties is important or desirable.

4. 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.

5. Traditional settlement negotiations have reached an impasse and the parties wish to avoid establishment of precedent.

6. The parties wish to resolve disputes involving MSPB appeals, EEO complaints,[23] administrative grievances, and grievances under a negotiated grievance procedure that provides for ADR.

7. The parties wish to resolve disputes involving labor unions, including bargaining impasses; allegations of unfair labor practices; and union or management initiated grievances under a negotiated grievance procedure. Management and the union may also agree to mediate a grievance under a negotiated grievance procedure (NGP) that is silent as to ADR. Consult the 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.

8. 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.[24] Disputes having one or more of the following characteristics may not be not good candidates for mediation. Again, the list is not exhaustive:

1. An indication that fraud, waste or abuse was committed by either party.

2. Allegations of criminal misconduct.

3. Position classification appeals. Classification appeals involve the technical interpretation and application of Office of Personnel Management position classification standards.

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[23] 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 (e.g., race, color, sex, national origin, handicap) from ADR consideration. MD-110, Ch. 3, Section II(A)(5).

[24] 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.

4. The case involves significant legal, policy, or constitutional issues, and one of the parties desires a precedent. Note: ADR/Mediation program officials unsure of whether a particular case touches on one of these issues should consult the appropriate specialist in the Civilian Personnel Flight and an attorney in the base legal office.

5. 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.

6. There is a need for uniform treatment toward an issue or disputant, e.g., the issue has nationwide impact or many similar suits are pending and there is no legitimate reason to settle with only one party.

3. Determining When Mediation Should be Offered.

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 on. Thus, if a dispute is considered appropriate for mediation, then mediation generally should be offered as soon as practicable, consistent with Air Force 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 complaint/grievance processes if relevant time standards are met. Also, unsuccessful mediation at an early stage of a dispute does not preclude successful mediation later on. Sometimes parties may feel uncomfortable settling a dispute at an early stage because they don't know enough 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.

Below are some general guidelines about when mediation can or should be offered.

A. Equal Employment Opportunity (EEO) Complaints.

Mediation can be used at any point[25] during the life cycle of an EEO complaint, preferably at the earliest stage possible, such as directly following the initial contact with the complainant.[26]

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[25] Ensure appropriate collective bargaining obligations are fulfilled if EEO complaints are included in the negotiated grievance procedure.

[26] Remember, 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.

Note: When using mediation in the pre-complaint stage, the complainant ***must be advised*** that s/he 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 (See 29 CFR §1614.105(f)). If the complaint is not resolved through the use of mediation within 90 days, then the complainant will be issued a notice of a right to file a discrimination complaint. In short, the complainant must understand that s/he is making an either/or choice between ADR and the traditional EEO counseling process.

It is acceptable (and encouraged by the EEOC) to engage in mediation more than once during the life cycle of an EEO complaint such as in the informal stage and then again after a formal complaint has been filed. In cases where the complainant has filed a civil suit in federal district court, contact the Employment Litigation Branch of AFLSA/JACL, DSN 426-9281, and SAF/GCD, DSN 227-0379, prior to the use of mediation.

B. Administrative Grievances.

AFI 36-1203 encourages use of mediation during all phases of the administrative grievance procedure, up to the final agency decision. The deciding official may decide to turn the grievance procedure into a mediation session at any time up to the final agency decision.

C. Negotiated Grievances/Unfair Labor Practices.

The mediator/case intake official should review the applicable collective bargaining agreement (CBA) or Memorandum of Agreement (MOA) with the union, and consult with the Air Force labor-relations specialist as well as the base ADR Champion to determine if mediation is appropriate, when it may be offered, and what unique constraints may apply.

D. Merit Systems Protection Board Appeals.

The mediator/case intake official should coordinate with the local Staff Judge Advocate or labor attorney and possibly the Civilian Personnel Officer (CPO) prior to and after mediation of cases involving Merit System Protection Board appeals. This is also true of potential mixed cases also involving allegations of discrimination made through the local EEO offices.

E. General Workplace Issues (Non-Process Disputes).

Guidelines and procedures for undefined, non-process disputes will vary from installation to installation and depend on the local ADR plan.

4. Educating the Parties (Coaching).

All parties agreeing to consider mediation must be given complete information about the particular mediation program at the base before being asked 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.

A. The following is a list of the topics and issues Air Force mediators/case intake officials should cover with each party to a dispute to ensure that the decision to mediate is an informed one. In circumstances where the case intake official is someone other than the mediator, the case intake official can convey this information to the parties either orally or in writing. Regardless, the mediator or intake official should confirm the parties' understanding before starting the mediation. The following must be understood by the parties in order to make an informed decision about whether to mediate. (Please also note that these items are listed in a checklist in Appendix 1.V.).

1. Complainant/Grievant does not waive his/her right to continue with the formal dispute resolution process by attempting mediation. If mediation does not succeed, the complainant/grievant may resume the formal process as long as applicable time limits are met. It is also necessary to comply with the policies and regulations of other organizations that have responsibilities for resolving civilian workplace disputes. If the parties ask the potential mediator/case intake official to advise them as to what the applicable time limits are, they must be referred to the appropriate Air Force official, Civilian Personnel Flight, regulation, or other document(s).

2. The mediation process and how it differs from other ADR procedures, such as arbitration, or the non-ADR procedures it is being used in lieu of, such as the negotiated grievance procedure or the EEO complaint process, must be understood. Remind the parties that mediation, and any resulting settlement, depends on the voluntary agreement of the parties. The parties cannot be forced to settle on terms unacceptable to them. Be certain the parties understand what a caucus is and why it makes mediation a powerful dispute resolution process. Explain confidentiality and impartiality, and why they are keys to the success of mediation.

3. The parties must be informed of any information concerning the mediator that might create a reasonable question of conflict of interest or impartiality of the mediator. This could include any acquaintance between the mediator and any of parties and/or their representatives. For mediators who are Air Force civilian/military personnel, it would also include unit of assignment. For Air Force civilian employee mediators who are also union officials, the union affiliation should also be disclosed.

4. The interested parties should be informed about how a case is scheduled; whom they can bring with them to the table; assignment of a mediator; what happens if there is no agreement, and applicable timelines for resuming or commencing other dispute resolution processes. It is important that the parties are informed that they have the right to be represented during a mediation session. This means that, at their option, they can have their representative present during the mediation session or simply have him or her available by phone for consultation. [27]

5. The Air Force official who approves or authorizes any Air Force action in the dispute must be informed of the complainant's/grievant's desire to mediate. Case screening

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[27] See "Getting the Right People to the Table," below.

must be conducted to ensure the matter is appropriate for a mediated resolution. In addition, the responsible management official and others who might need to attend the mediation must be contacted and given the same information about the process that was given to the complainant/grievant. The Air Force management officials then need to decide if they are willing to participate and, if so, who should be at the table.[28] See section 7.A below for more information on management participation.

B. The following is a list of additional topics and issues Air Force mediators/case intake officers should cover with each party to a dispute to ensure that parties are well prepared for their negotiation session and have fewer questions/concerns:

1. Where the session will be conducted
2. How long to plan out of their schedule for the session
3. No beepers, cell phones, palm pilots, laptops or pagers will be allowed
4. Breaks may be taken by the parties as needed
5. The mediator/neutral will explain the mediation process again to them
6. Each party will need to be prepared to make an opening statement
7. Taking notes during the negotiation session will be allowed but they will be taken and shredded at the end of the session to preserve both parties rights to confidentiality
8. Parties are allowed to bring documents to the session and take them back with them when they leave
9. Mediation is for the parties involved in the issue brought to the table. Any resolution does not apply to anyone outside the session
10. Explanation of co-mediation, mentor mediation or observers if used
11. Explanation of the coordination process for agreements if it applies
12. Parties should keep an open mind as well as helpful hints for successful negotiations
13. Who the parties may need to notify if the case does not resolve

Allegations of wrongdoing or other adverse information against a senior officer (GS-15, Colonel or Colonel-select) or senior official (SES or General Officer) must be reported to SAF/IG through IG channels for possible investigation. *See* AFI 90-301, paragraph 1.26 and 1.27 and Chapter 3.[29] If an EEO formal complaint or MEO pre-complaint against a senior officer is settled through mediation, a copy of the settlement agreement must be provided to SAF/IG. AFI 90-301, Table 1.1, NOTE. Senior management officials need to be aware of this fact before they agree to mediate and must be advised of their right to have a representative present during the mediation process. In addition, complaints of sexual harassment must be reported through command channels if a complainant requests an investigation pursuant to 10

[28] *Id*. It is important to remember that in a workplace dispute, the Agency, not the individual supervisor, manager, or other management official, is the 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 that an individual employee has. For this reason, many bases 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. See section 7.A below for additional discussion on management participation in mediation.

[29] A pending revision to AFI 90-301 will require EEO offices to report senior officer and senior official allegations to SAF/IG through the Air Force Civilian Appellate Review Office (AFCARO) in SAF/MRBA.

U.S.C. § 1561, irrespective of whether an EEO complaint has been filed. A respondent (who is also the alleged offender) in mediation of a sexual harassment complaint must also be advised of his or her right to have a representative present. See section 7.A below for a discussion of having the right people at the mediation table, especially for management.

5. Preparing for the Mediation.

Once the foregoing notifications are made and the complainant, management, union, or other representatives agree to mediate, and the case intake information is processed, the case intake official proceeds to work out the logistics of finding a mutually acceptable time, place, and date to hold the mediation. (See Appendix 1, Section III) Special attention should be paid to the following: (1) neutrality of the location; (2) availability of a caucus room; (3) access to telephones; and (4) access to a computer and printer to assist in the drafting of a settlement agreement. The person making the arrangements must also consider the special needs of the parties or non-party participants, such as accommodations for any person with a disability.

6. Agreement to Mediate.

It is wise to confirm the parties' agreement to mediate their dispute in writing. A signed letter will suffice. This letter should state the time, place, and likely duration of the mediation session. In addition, the Air Force highly recommends the mediator reiterate what the parties should expect from the mediation process.

Appendix 2 is a Sample Mediation Memorandum. It provides a thorough explanation of what mediation is, and what it is not. The confidentiality and representation sections of this memo are especially important in this regard. Appendix 3 contains a Sample Mediation Agreement. Its purpose is to confirm the parties' understanding about the mediation process and serve as the basis for the agreement to mediate. Accordingly, the Agreement to Mediate 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 hours, some even less. In more complex cases, however, mediations can take longer, either stretching into the evening or over two or more days. The case intake official should ensure that the parties schedule the appropriate amount of time for the mediation.[30]

7. Getting the Right People to the Table.

A. Parties, Representatives and ADR Support Providers.

AFI 51-1201, paragraph 27 addresses participants in mediation. The mediator must always be present, and the parties to the dispute, of course, have the right to be present, and to have representatives if they so choose.[31] For mediation apprenticeship or mentoring training, and with the parties' consent, a co-mediator or mediation mentor/mentee may also be present at all stages

[30] For planning purposes, the parties should set aside at least six hours for the mediation session.
[31] Review the installation ADR plan or policy and collective bargaining agreements for any local attendance and participation requirements.

of the proceedings, including private caucuses. ADR Support Providers[32] may attend to the extent necessary to provide technical support or special expertise. Generally, the mediator may limit the number of non-party participants in the mediation room at any one time to ensure confidentiality and an orderly process. ADR Support Providers should be standing by or be available by phone to answer technical or other questions that may arise during mediation.

The parties in mediation of an Air Force workplace dispute consist of the employee and the agency or one of its subordinate organizations ("management"). Although management decides who represents it at the table, the mediator is well advised to consider the issues that go into such a choice because they often will determine the course and outcome of the mediation. Who should represent management at the table? Should it be the immediate supervisor or someone higher up in the chain? Should it be the official who took the action complained of, or an official who was not involved? The answer will depend on the facts and circumstances of each case. Normally, the immediate supervisor is the appropriate official to represent management in most workplace mediations because he or she has knowledge of the events and probably has sufficient authority to agree to any reasonably foreseeable settlement terms. If the immediate supervisor is not the management official in a particular mediation, it is recommended that he or she have input to any preparation or planning meetings prior to the mediation session.

There will be cases when the immediate supervisor is not the best choice to represent management. For example, if the immediate supervisor is accused of sexual harassment, he or she may have a personal stake in the outcome that conflicts with what might be the best outcome for the agency, making him or her an inappropriate choice for mediation. In such a case, an official higher in the chain or outside it altogether will be a better choice. On the other hand, management officials not personally involved in the events giving rise to the complaint 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 should examine each case on its merits to determine the right person to represent management in mediation.

Regardless of who represents management, that person should have sufficient authority to agree to reasonable settlement terms on behalf of management. If authority is lacking or the representative is uncertain whether it exists, the official with authority should be known to the parties and the mediator and be readily available by phone or in person. If the mediator is in doubt as to the management representative's authority to agree to a term, the mediator may discuss it with the official having such authority.

B. Union Participation in Mediation.

Unions can participate in workplace mediations in two ways. One is as the representative of a bargaining unit employee. The other is to be present in its own right on the ground that mediation is 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. Generally, unless the CBA or other negotiated agreement states otherwise, the

[32] AFI 51-1201, ¶ 17.

union has a right to be present during mediation of a negotiated grievance. In the case of mediation of EEO complaints, the issue is much less clear.

The Federal Labor Relations Authority has taken the position that 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,[33] giving the union the right to attend the mediation even if the union is not representing the complainant. This position has generated considerable litigation and the Air Force has historically taken the position that EEO complaints are not "grievances" for which the union has any formal discussion rights. In 1999, in *Luke AFB v. FLRA* (Appendix 22), the U.S. Court of Appeals for the 9th Circuit agreed with the Air Force and reversed the FLRA. But because the *Luke* decision was unpublished, it had little or no effect outside the western United States under the 9th Circuit's jurisdiction. 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* [34] (Appendix 23). 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.

Following the *Dover* decision, SAF/GCD issued guidance for mediators presented with a union demand to attend a formal mediation (Appendix 24). That guidance specifies that since union attendance in mediation under the "formal discussion" rule in the FSLMRS is a legal issue, the mediator is to defer to the judgment of the base labor law attorney and labor relations officer before proceeding with or without the union's presence. Actions to allow or bar the union from attending must be made by management acting through its legal and labor relations personnel, not the mediator. If the union does assert a right to attend mediation after the mediation session has commenced, the mediator should pause the mediation until the union's status and continuing presence is determined by base legal and labor relations personnel. If the union does attend, the mediator should ensure that suitable precautions are taken to protect the confidentiality of the proceedings consistent with the ADRA and the reasonable expectation of the parties. The mediator should work with the attorney, labor relations personnel and, if necessary, SAF/GCD, to ensure adequate precautions are in place before resuming the mediation.

Questions about the union's "formal discussion" rights and their applicability to mediation of a workplace dispute should be directed to the base Labor Relations Specialist, labor law attorney, or the Air Force Central Labor Law Office at DSN 426-9158.

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

[33] 5 U.S.C. § 7114(a)(2)(A).
[34] 316 F.3d 280 (D.C. Cir. 2003).

opening statement; 2) Parties' opening statements; 3) Joint discussion; 4) Caucus; and 5) Closure. The following is a graphic representation of the mediation process:

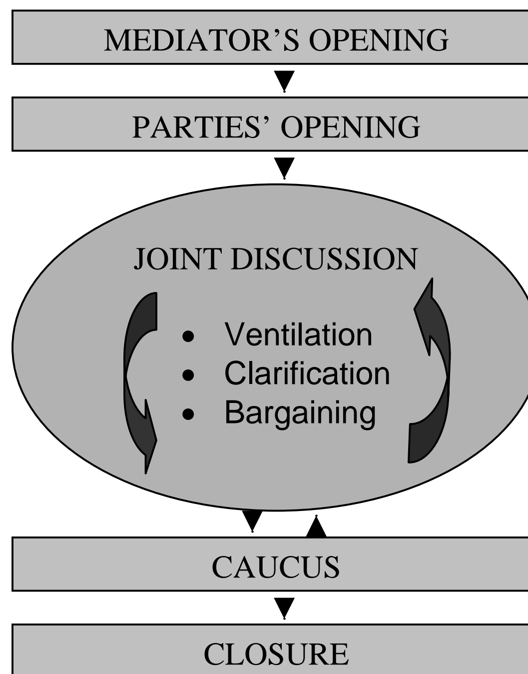

Figure 1. Air Force Mediation Model.

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 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, it is strongly advised that the mediator be prepared with what he/she will say. Many mediators, once they have developed a good opening statement, always use that same opening statement. Good speaking skills are helpful for the mediator, especially in the opening statement. An inexperienced mediator should practice the opening statement until he/she is thoroughly familiar with it. This will not only make the mediator more comfortable in the mediation's opening minutes, it will 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 4.

The first thing a mediator should do in the opening statement is to identify himself or herself to the parties. This introduction not only includes the mediator's identity, but also the qualifications of the mediator. The mediator should explain that he/she is qualified to be the

neutral because 1) he/she has been duly appointed to be the mediator; and 2) he/she has been adequately trained in mediation. Of course, any prior experience in mediations should be highlighted.

Another important part of the introduction is for the mediator to acknowledge any acquaintances associated with the parties to the mediation or their representatives and assert his or her neutrality and impartiality in the process. If the mediator is also an Air Force employee or a union official, it is also important for parties to know the mediator's unit of assignment or union affiliation.[35] 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.

The mediator should next confirm receipt of the mediator's letter and agreement to mediate with the parties in which they agreed to mediate the dispute.[36] This confirmation emphasizes to the parties that the other side is there 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 makes its use later in the process easier. [37]

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.[38] 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 Complainant, goes first. The mediator should allow the party to fully explain his or her position. 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 complaint.

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[35] To preserve the appearance of impartiality, a mediator who is also an Air Force employee should never be assigned to the same functional organizational unit as either party.
[36] 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 3.
[37] See the section on impasse for more on this use of the agreement.
[38] Some sample rules are included in Appendix 4.

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 problem. This type of information is invaluable later when getting the parties to focus on interests instead of positions.[39]

The opening statement of the parties can also allow mediators to note how far apart the parties are at the onset. This will give the mediator an initial view of the challenge ahead as well as assist him/her in determining when and if caucuses should be utilized. Of course, the attitudes of the parties and the ability of each party to articulate their positions will also be evident. This information will assist the mediator in determining who may be in need of caucuses more often and how much the mediator will need to assist the parties in understanding the other party's views on the issues.

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. Clarifying questions should then be asked of each party so the issues can be properly identified. 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. Caucus may be the more appropriate forum 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 conversation is case-specific and depends on how the parties are able to interact, and whether the emotions or the abilities of the parties 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 the buffer between the two.

If joint discussion breaks down, or issues arise which are sensitive or which might be confidential, the joint discussion should be suspended and the mediator should move to a caucus. However involved the mediator may be in the 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 with the Parties.

A caucus is a private meeting between the mediator and one party. 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 a party, the mediator should explain the rules on confidentiality before starting the sessions. To avoid confusion, the

[39] See Part 2, Interest-Based Negotiation

mediator should verify, at the end of each private session, what information the party wishes to keep confidential and what information can be disclosed to the other party. A party is free to reveal its own communications offered in caucus.[40]

Caucuses may be called when the parties need to cool off and refocus, when confidential information needs to be discussed in a protected setting, when options for settlement need to be explored in a secure setting, or when a party needs to save face in front of the other party.

In caucus a mediator can accomplish a number of things beyond getting additional information that the party may not feel comfortable discussing in open session, such as disclosure of possible compromises. While the mediator cannot disclose this information without the express permission of the party, the information may nevertheless be invaluable in assisting the parties to recognize interests as opposed to positions, thus moving them toward settlement. Before leaving the caucus, the mediator should get a clear understanding from each party as to what can and cannot be disclosed to 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 has faith in 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. While this can be an incredibly powerful tool in getting a party to a reasonable outlook, it can be the most difficult to execute correctly. A discussion of reality checking can be found in the Dynamics section below in Getting Past Impasse. Tips for caucus can be found in Appendix 7.

B. Mediator's Caucus.

Sometimes a caucus is necessary, not because a party needs it, but because the mediator needs it. This is an acceptable reason to call for a caucus. The mediator is responsible for being the calmest, most controlled person in the mediation. If the circumstances of the mediation make meeting this responsibility difficult, the mediator should take a mediator's caucus. In other circumstances, issues will arise during the mediation where the mediator will need guidance from the ADR Champion, SJA, or SAF/GCD. This is another situation where a mediator's caucus is appropriate. Neither party needs to know the caucus is for the mediator.

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[41] or in full.

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

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[40] *See* Appendix 26, 5 USC § 574(b)(1).

[41] 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 Champion) in the future because, while the mediation has ended, the mediation process is not necessarily over, and either one or both parties may reconsider their decision to stop. Many times the parties may be more willing to remain in the process or may be more amenable to settlement after a period of time has passed. Appropriate follow-up by the mediator or ADR Champion may result in the parties back at the table and an eventual settlement.

In most cases the mediation session will close with at least some of the 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, it should be reduced to writing by the mediator, reviewed, and then signed by the parties. A more complete discussion of settlements follows.

INTEREST-BASED NEGOTIATION

1. Overview.

Mediation is a form of negotiation between two parties where a third party neutral assists or facilitates a settlement, which is amenable to, and voluntarily accepted by, both parties. The style of negotiation best suited for mediations is called Interest-Based Negotiation, or "IBN." 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 be money, property, benefits, or obligations. The object of negotiation may be tangible (money, benefits) or intangible (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, characterized by the assertion of opposing positions by the parties, is referred to as Position-Based Negotiation, or "PBN." 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." IBN, by focusing 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." Though a cliché, "win-win" does describe what IBN and, by extension, mediation attempt to do. The mediator's challenge is to guide the parties from the natural inclination to engage in PBN to the IBN style.

IBN is a preferred negotiation style in the mediation context because, in most instances, there will be a continuing relationship between the parties; an agreement satisfactory to both parties is desirable; and, for mediation to survive as a litigation alternative in the workplace, the process must be satisfying to both parties. For these reasons, it is the style that has been adopted by the Air Force and is the style that Air Force mediators will use.

2. The Four Principles OF IBN.[42]

There are four principles of IBN that, if followed, usually produce a settlement that is mutually beneficial to the parties. See Figure 2. It is important that the mediator, in addition to assisting the parties in following these principles, also follow these principles.

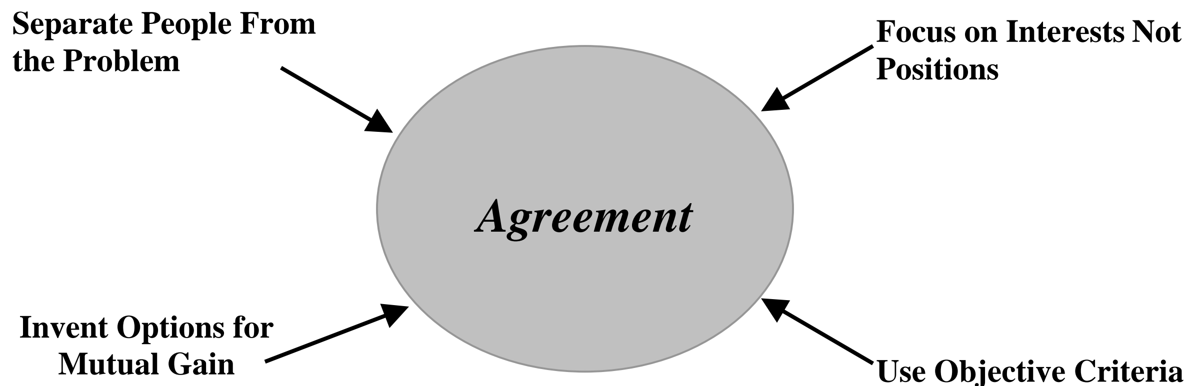

Figure 2. The Four Principles of IBN.

A. Separate the people from the problem.

Most civilian workplace disputes are emotional issues where personal animosity can run high. Misperceptions, emotions, and communication problems place themselves in the way of resolution.

1. Perceptions.

The mediator should assist the parties in "walking a mile in the other party's shoes." This will assist each party, as well as the mediator, in gaining a better understanding of the other's perception of the problem as well as assisting the parties in communicating the source of the problem. This helps the mediator uncover interests rather than positions.

The mediator should understand that each party 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. The mediator should never assume his/her own fears are the same as those of the parties, or, that the parties' motives and perceptions are the same as the mediator's. To do this, the mediator must get the parties to discuss their perceptions rather than drawing assumptions. This can be done either in caucus or in joint session, both of which are discussed in PART 2, Mediation Process.

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[42] *See* Roger Fisher and William Ury, Getting to Yes 97 (1991).

2. Emotions.

The mediator must understand that emotions play a primary role in workplace disputes and mediations. If the mediator does not recognize this going into the mediation, he/she will certainly learn this within a few minutes of the parties' opening statements. Emotions play an important role in IBN and should be embraced as another opportunity for getting to resolution. (See Venting below for additional comments)

3. Communication.

Communication problems are often, if not, always at the root of the dispute and good communication is a necessary element of the resolution. Here again, the mediator has a dual responsibility. The mediator should ensure through questioning that each party has a correct and clear understanding of the statements of the other party. To this end, the mediator must listen carefully so as to be sure of the meaning of each party. The mediator also has the responsibility of ensuring that he/she is speaking clearly and plainly and that his/her statements and questions are clearly understood by the parties.

B. Focus On Interests Not Positions.

Positions are pre-determined outcomes that may not be easily satisfied, and it is the extremely 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 interests versus positions can be found at Appendix 6. It is vital that the mediator guide the parties to express 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. See Appendix 5 for a discussion and examples of rephrasing and reframing.

C. Invent Options for Mutual Gain.

Once the interests of the parties are known, options for mutual gain can be brainstormed. 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 needs to be aware of the barriers that restrict option development. Such barriers may include making premature judgments, searching for a single solution and assuming 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 searching for mutual gain, and by keeping the parties from dismissing solutions as unworkable during the brainstorming phase. The mediator should never strong-arm nor pressure one party or both parties in this procedure. Further, the mediator must remember that his/her role is to keep as many options open and should not make judgments or comments regarding his/her opinion of the merits of a proposal.

D. Insist on Objective Criteria.

Once the mediator has helped the parties focus on their interests, the next step is to help the parties agree on the objective criteria that will be used to evaluate potential settlement options. These criteria should be developed by each party prior to identifying particular options, and should address the interests of each party. Many times a party will know how to describe the settlement they desire, but may not be able to articulate the details of such a settlement. There may be situations when a need to develop objective criteria is not necessary 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 effects of reactive devaluation.[43] 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 objective criteria can become the settlement. Both parties, for instance, might be willing to agree to follow industry standards or other independent criteria. Once this agreement has been reached, the only thing that remains is to research the details of the criteria.

DEALING WITH IMPASSE

1. Pressing Past Impasse.

Impasse, or the failure to make progress toward resolution, can be 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.[44]

A. Reality Checking.

Reality checking can be a critically important part of mediation and is most properly done in the caucus setting. Reality checking is the process by which the mediator gets the party to understand, through a series of questions, the weaknesses of their case, issue, or demand. If a party has no case, a very weak case, no claim for what they seek, no legal basis for the settlement they desire, or an unrealistic demand of the other party, reality checking may be necessary.

Reality checking is accomplished through questioning a party regarding their claim, defense, demand, etc. Use of questions regarding the elements of a prima facie case in an EEO dispute that the complainant would have to prove in court, or the elements of the employer's defense, and how the parties' facts may or may not satisfy those requirements is a good example of reality checking. Appendices 8 and 9 outline the elements required to prove various EEO claims that a

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[43] Reactive devaluation is the natural act of automatically diminishing an idea because it comes from the opposition.
[44] Additional tips for getting past impasse can be found in Appendices 8 and 9.

mediator might use in reality checking. Hard, tough hitting questions are not required for effective reality checking; however, their use may be the most effective method of getting the party to a reasonable understanding of his/her claim. Of course, the mediator should do nothing in this process that might compromise his/her impartiality. Nor should the mediator render an opinion. Rendering opinions moves away from a facilitative model of mediation to an evaluative model that has generally not been adopted by the Air Force ADR program. Facilitative mediation allows for proper reality checking without opinions being provided to the parties.

B. BATNA[45] 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 Best Alternative To Negotiated Agreement (BATNA) and their Worst Alternative To Negotiated Agreement (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.

Recognizing a party's 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 can often have the effect of compelling the party back to the table, or to be more amenable to considering options for settlement.

C. 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 one has to share, agree, or even sympathize 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.

2. The Value of Venting.

While emotions might make some parties or mediators uncomfortable, they are important to recognize. Often acknowledging emotions and allowing a party or parties to vent is the key to resolution. It is important for the parties to have the opportunity to be heard by each other and to be able to speak plainly and honestly about their feelings. 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, which makes settlement possible. The mediator should allow the parties to vent their emotions and frustrations to the greatest extent possible. The urge to move immediately to caucus when the mediation environment gets uncomfortable or heated should be avoided.

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[45] *See* Fisher & Ury, *supra* note 29 at 97. BATNA refers to a party's *Best Alternative to a Negotiated Agreement,* first coined by these authors.

For the mediator it is very important that no outward reaction is made to a party's emotional display. Such a reaction can jeopardize the mediator's all-important neutrality. Furthermore, the mediator retains the responsibility of maintaining the safety of the participants. While venting should be embraced and not feared, such a joint session should be ended 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.

SETTLEMENT

The goal of a mediation session is for the parties to agree on a resolution of their dispute. It is therefore up to the parties, not the mediator, to decide on a resolution. The settlement agreement should be memorialized in writing and reflect the terms and conditions agreed upon by the parties. Air Force mediators should draft a written settlement agreement to be signed by the parties, and 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. However, even where the parties have reached an agreement verbally but are not willing to sign the settlement agreement, it is important to have the document drafted to prevent confusion over what the terms of the agreement were. Therefore, verbal settlements, or settlements "in principle," should also be documented at the close of a session. If possible, obtaining the initials of the parties on a verbal agreement or an agreement in principle that has not been reduced to writing is desirable in order to track the point at which discussions ceased.

Assisting the parties in crafting a quality settlement agreement is one of the most important services an Air Force mediator can perform. The following guidance, based on the experience of Air Force mediators, is designed to assist in crafting a settlement agreement that will settle the current claim, without establishing the basis for additional claims in the future, and will survive the ratification process. A settlement cover sheet and sample settlement agreements can be found in Appendices 11, 12, 13, and 14.

1. Have the Approving Authorities Available.

First, prior to the mediation session, Air Force mediators/case intake officials should ensure that appropriate managers, supervisors, and base level attorneys 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 base level Air Force attorney for legal sufficiency; and (3) the local Civilian Personnel Flight (may involve multiple functions, e.g., Staffing, Classification, or Labor & Employee Relations) for implementation of the terms of the agreement.

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

2. 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, by either party, of a breach of the agreement. A "best practice" identified by an Air Force mediator is to review the settlement agreement at least once with just this point in mind -- who does what, when, and where? Avoid vague terms like "reasonable period" and "best effort" wherever possible. These terms invite misunderstandings and differences of interpretation. Another point to remember is that the settlement agreement may take a couple of days to be reviewed and approved by appropriate Air Force officials. It is important to be sure that the "when" and "how" contained in the agreement take this into consideration and provide for sufficient timeframes 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. This can be handled by indicating in the agreement that the agreement does not become final until coordination and approval of the agreement by appropriate officials.

3. 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 mediator/case intake official ensure such experts are available by phone during the mediation session.

After coordinating with the Office of Personnel Management, 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 5 of the United States Code or processing guidance of the Office of Personnel Management. Such situations could arise where Office of Personnel Management 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 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 Code of Federal Regulations indicates that the personnel action is processed under an appropriate legal authority.

See MD 110, Chapter 12, Section VII at http://www.eeoc.gov/federal/md110/chapter12.html. While this guidance is helpful, there are nevertheless a number of areas where the Air Force personnel need to use special caution.

A. Settlement Agreements Providing for Payment of Funds from the Government.

Payment of funds by the Government must be based upon statutory authority. For example:

1. 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.[46]
2. The Civil Service Reform Act, 5 U.S.C. § 7701, allows for the payment of attorney's fees and interim relief payments.
3. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, allows for the payment of back pay as equitable relief.
4. 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, there are other statutes that authorize the payment of funds. Individuals must be clear as to which authorize the payment of funds in their particular matter. Once authority to make a payment has been identified, the tax consequences must be determined. For payments of back pay, the appropriate tax withholdings must be deducted prior to payment to the employee.[47] Also, note that damages paid for emotional distress, such as pain and suffering, loss of enjoyment, anxiety, etc., are taxable after 1995.[48] Refer the parties for appropriate financial management advice on the tax implications. For EEO complaints, use MD-110, Chapter 12, to examine available flexibilities and options for resolution.

B. Settlement Agreements that Discuss Modification of Employee Benefits.

The Office of Personnel Management's (OPM) fundamental principle is that the Retirement Fund is not a litigation settlement fund. Rather, its purpose is to provide annuities to federal

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[46] 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.

[47] *See* 26 U.S.C. § 3402(a).

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

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 Employee's 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.

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

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

If the settlement involves an allegation of age discrimination, specific language must be added to the settlement agreement citing to additional rights that complainants of age discrimination enjoy. Federal law requires the complainant be advised to consult with an attorney before signing the agreement; however, whether the complainant follows the advice is up to him or her. See Appendix 13 for sample settlement agreement for use in these cases. Contact your local Air Force attorney or the Air Force Central Labor Law Office (AFLSA/CLLO) at DSN 426-9158 or (703) 696-9158 for more information.

4. Standards Indicating Compliance with the Agreement.

The agreement should contain objective standards so that each party can be sure that its stipulations are being followed. The use of terms such as "good faith," "best efforts," or "reasonable" are often necessary and desirable, but, such terms alone can be ambiguous and can lead to future problems. If possible, urge the parties to include specific time frames within which to fulfill clear obligations. In guiding the discussion on clarifying the terms and standards, the mediator may ask how the parties and others, who may have to review the agreement but not present during the mediation, will know that the agreement has been satisfied.

5. 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 should include a clause in the agreement addressing confidentiality. Sample agreements with confidentiality clauses can be found in Appendices 12-14. 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 you are unsure of the limits of confidentiality protections, consult an Air Force labor attorney or the ADR Champion.[49]

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[49] 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.

6. 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, there may be bargaining obligations that must be satisfied prior to implementing a settlement agreement. Parties should consult an Air Force Labor Relations Specialist in the local Civilian Personnel Flight or the base labor attorney for additional guidance. Mediators should contact their ADR Champion in the event they need guidance on this issue.

7. Settlement Agreement Enforcement.

Agreements reached as the result of a mediation session are binding to the same extent any settlement agreement is binding on the parties, as are the procedures to enforce such agreements. In EEO complaints, a complainant must contact the "EEO Director" within 30 days of an alleged failure by the Air Force to comply with the terms of the settlement agreement. The base then has 30 days to issue a decision on whether it failed to implement the settlement. The complainant can then appeal the base's decision to the EEOC's Office of Federal Operations (OFO) within 30 days, or, if the agency fails to issue a decision, 35 days after the complainant filed his/her allegation of noncompliance with the base's EEO Director.[50] 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 mediator, ADR office, or Civilian Personnel Flight, depending on the language for notification in the agreement.

If an EEO complainant alleges retaliation after the settlement agreement, he/she must contact an EEO Counselor to initiate a new complaint. Generally, the complainant cannot have a settled complaint reinstated, even if the settlement includes a non-retaliation clause.[51]

Enforcement of terms of the agreement requires a delicate balance in order not to damage relationships which may have been repaired as a result of ADR. Care must be taken to investigate allegations fully. Breaches in any form, whether breach of confidentiality or breach of contractual terms, should be coordinated with the base labor attorney.

PART THREE

RESOURCES

1. Mediation and ADR Reference Materials.

[50] 29 C.F.R. § 1614.504.
[51] *Martinez v. Department of the Navy*, EEOC Appeal No. 01934493 (1993); see also 29 C.F.R. § 1614.504(c).

The Air Force ADR Program has an extensive collection of mediation and ADR reference materials. Below are just some of the types of information available on or by request from the Air Force ADR Program Website at http://www.adr.af.mil:

- A web version of this Compendium;
- An annotated bibliography[52] of ADR materials;
- Air Force and DoD ADR policies and regulations;
- Mediation and ADR training videos (by request);
- Links to other mediation and ADR web sites (government and non-government);
- Various commercial ADR and mediation handbooks;
- Various books and other materials on negotiation skills;
- Quarterly ADR Newsletter; and
- Web-based videos and other distance-learning tools (under construction).

2. Other Mediation Resources.

The Secretary of the Air Force tasked the Air Force General Counsel's Office to work with AF/DP and AF/JA to promote the use of ADR to resolve civilian 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 Air Force mediation and ADR needs with the appropriate and available resource(s). Listed below are some of the information, services, and funding available through the Air Force ADR Program.

A. Mediation/Mentor Services.

The Air Force has trained more than 1,400 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, the Air Force decided to establish a Mediation-Mentor Program. This program pairs experienced Air Force or private-sector mediators ("mentors") with trained, but inexperienced, Air Force mediators ("mentees") to give these individuals hands-on apprenticeship training. Even if the mediation is unsuccessful, the inexperienced Air Force 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 straight mediation and mediation-mentoring is usually negligible, SAF/GCD prefers mentoring whenever possible.

Mediation-mentor services can be arranged by contacting the Air Force ADR Program Office in SAF/GCD at http://www.adr.af.mil/feedback/request.htm, or by telephone at DSN 227-3407 or (703) 697-0407, or via e-mail at gcqadr@pentagon.af.mil.

B. Gaining Experience Mediating Federal Agency Disputes.

[52] A list of award winning ADR articles is maintained by the Center for Public Resources and can be found at http://www.cpradr.org/biblio.htm.

If an organization is located near another federal agency, they may be in a position to work together to develop a local, shared-mediator program. The Administrative Dispute Resolution Act of 1996 makes the job of locating those who are similarly interested in mediation much easier. Specifically, the ADRA of 1996 requires that each Federal agency 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 on the web at http://www.adr.gov/agenda/contacts.pdf.

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 third-party neutrals employed by member agencies and makes them available to other agencies on a reciprocal basis. Many Air Force bases have made use of FEB shared neutrals programs to obtain mediation services as well as to provide additional experience for their own mediators. If your base has access to an FEB, it may be worthwhile looking into its shared neutrals program. The U.S. Department of Health and Human Services maintains a large shared neutrals program, accessible on the web at http://www.hhs.gov/dab/sn/.

C. 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 Alternative Dispute Resolution Act of 1998. 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 Air Force ADR Program Office can provide additional information.

3. Mediation Training -- Basic and Advanced Courses.

The Air Force ADR Program provides central funding for a number of ADR-related training classes every year. The Air Force ADR Program normally offers several basic mediation training courses each year. The basic course is a mediation skills training course that lasts four days. At the end of the basic course, participants receive a certificate of completion. The advanced course, offered once every other year, 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 process. Interested parties can contact the Air Force ADR Program Office or the Air Force Civilian Personnel School at Maxwell AFB, Alabama.

A. Basic Mediation Course.

The Basic Mediation Course gives Air Force personnel an introduction to the Air Force Mediation Model. This course is intended for those civilian or military individuals who will mediate civilian 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 to ensure 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 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;
- Be familiar with interest-based negotiations; several strategies for re-framing questions and statements made by participants; using "active listening" skills; "best practices" in preparing for mediation; and the Air Force ethical guidelines for mediators;
- Understand the scope and limits of confidentiality in mediation;
- Be able to draft a settlement agreement and be familiar with settlement drafting guidelines;
- Be familiar with mediator standards of conduct and how they apply in several situations commonly encountered in a mediation session; and
- Be familiar with several mediation case studies as well as strategies for successful resolution of ADR cases.

B. Advanced Mediation Course.

In 2004, Air University approved an Advanced Mediation Course as a resident course to be held at the Civilian Personnel School every other year. This course focuses on refining the skills taught to Air Force 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 bases. As an advanced course, it is intended for mediators who have considerable mediation experience.

Additional information about Air Force basic and advanced mediation training can be provided by the Air Force Civilian Personnel School, or SAF/GCD.

APPENDICES

The following Appendices are divided into two major sections, with the second section further subdivided into two sections. They are attached for the convenience and assistance of the mediator as well as the ADR program manager. Section 1 contains helpful forms for use in administering the ADR program as well as accomplishing the mediation. Section 2 is the mediator's toolbox. It contains helpful tips for the mediator. The first section of the toolbox is for the mediator only. The materials in this section should not be shown or given to either or both parties. The second section of the toolbox contains helpful tools that are appropriate for release to either party.

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SECTION 1

APPENDIX OF FORMS

Confidential
Information not releasable under the Freedom of Information Act pursuant to 5 U.S.C. 574(j) and not releasable pursuant to a discovery request under a number of circumstances pursuant to 5 U.S.C. 574

AIR FORCE MEDIATOR CASE MANAGEMENT WORKSHEET

I. INFORMATION ABOUT THE PARTIES

Name of 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 Complainant/Grievant Available:______________________________________
____

Dates Management Official(s) Available:____________________________________
____

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

____

____

____

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

Complainant/Grievant's Information

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

2. What management official(s) is/are involved in the controversies? How are they involved?

Respondent's Information

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

2. Who has settlement authority in this matter?

3. Who will need to be consulted if an acceptable settlement agreement is crafted? (It is recommended that you obtain the name, office and phone number of these individuals to ensure they are available by phone during the mediation session to ensure any proposed terms in the settlement agreement will be supported by these officials. The legal and personnel offices are a good start.)

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

1. Does either party have a disability that may require special considerations such as an access ramp for the disabled?

2. Does either party currently plan to bring a representative (legal or non-legal) to this session? If so, who are they? What is their expected role?

3. **Name of Representative for Complainant/Grievant**:______________________
____

4. Representative's address:____
____
____

5. Phone number:__________________ Home Phone (optional):___________
Fax number:____________________ Duty hours:_____________________
Email:__________________

6. **Air Force Attorney or other management official attending**:_______________
____

Office address:____
____
____

Phone number:__________________ Home Phone (optional):___________
Fax number:____________________ Duty hours:_____________________
Email:

7. Who is the Air Force point of contact for reservation of the mediation conference room?

Phone number:__________________ Home Phone (optional):___________
Fax number:____________________ Duty Hours:_____________________
Email:__________________

IV. RECOMMENDED POINTS TO COVER WHEN EXPLAINING WHAT MEDIATION IS AND YOUR ROLE 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, the Complainant/Grievant may resume the formal process ***as long as applicable time limits are met***.

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

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

______Explain why confidentiality and impartiality are keys to the success of mediation.

______Explain 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: AIR FORCE MEDIATOR/CASE INTAKE OFFICIAL SHOULD ARRANGE FOR SUCH 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 may 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 and using the same processes as any other administrative settlement 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 THE CASE INTAKE OFFICIAL

	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. Confirmed availability of the mediation conference room prior to the mediation session. ____________

11. 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. ____________

12. Made arrangements with relevant management officials and Air Force attorneys for an ***expedited review*** of the settlement agreement after mediation. ____________

13. Ensured appropriate accommodation if a disability or special need is identified by any of the parties. ____________

THE FOLLOWING ARE TO BE COMPLETED BY THE MEDIATOR ONLY

14. Conducted the mediation. ____________

15. Completed settlement agreement coordination process. ____________

16. Prepared the mediation result and lessons-learned report. ____________

17. Submitted mediation results and lessons learned to the Base ADR Program office. ____________

MEDIATION MEMORANDUM

[**Date**]

TRANSMITTED VIA FACSIMILE

COMPLAINANT/GRIEVANT
[**Address**]

MANAGEMENT OFFICIAL
[**Address**]

Re: Mediation Conference Between __________________ [**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

I will conduct the mediation at the location and time shown on the last page of this letter. 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.

B. What is Mediation and How Does it Work?

This is not a legal proceeding. Equally important, as a mediator I do 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.

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 me regarding my role as a neutral. I am not an advocate or legal representative for or against either party. After the opening statement, I will ask the Complainant/Grievant, to tell me in his/her own words about the complaint and what type of remedy he/she is seeking. I will then give the management representative an opportunity to describe the dispute from their 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, I may ask to meet privately (caucus) at least once with each participant. Information discussed in your caucus that is given to me in confidence will not be shared with anyone else, subject to the limitations discussed below. Following the caucuses, I 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 me until it is clear that a settlement is or is not going to emerge at 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 a settlement is reached, I will draft the terms of a settlement agreement that is acceptable to all parties and, if present, their representatives. Appropriate management or legal personnel also will need to review and authorize a commitment to the settlement terms before they are 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 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 obvious exceptions*** to this rule, but I do not expect them to arise during our mediation. For example, if you tell me you plan to commit 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. 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, we may be required by a court to disclose our private discussions.

Having said that, I want you to please remember that facts that were discoverable before the mediation session do not become confidential merely because they were presented during a mediation conference. It is only those things you say or write in confidence ***to me during the mediation*** that I will not disclose, unless one of the unusual exceptions I discussed above applies. This means that neither the mediation agreement nor the resulting settlement agreement, if any, are 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 me in any future legal proceeding -- unless of course you have a dispute with me 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 Champion or Staff Judge Advocate. The ADR Champion or SJA will provide guidance about how to respond. As a matter of policy, the Air Force will defend you and me 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 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. I look forward to working with you in an effort to resolve the dispute to everyone's satisfaction.

AGREEMENT TO MEDIATE

1. I have received the mediation memorandum from _________________________ [name of mediator] 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 received from the mediator. 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. The parties agree that the entire mediation session is a compromise 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. The Complainant/Grievant also agrees he/she will not disclose or discuss this settlement with other agency employees (except his or her representative and responsible management personnel). The Complainant/Grievant recognizes and authorizes 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.

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

5. I agree to conduct the mediation according to the terms of the mediator's memorandum.

____
Name

____
Title

____
Date

Please sign and fax to your mediator as soon as possible!

APPENDIX 3

SAMPLE MEDIATOR'S OPENING STATEMENT

Good afternoon, my name is _______________. I am a certified mediator and have been trained to hear disputes such as the one before us today. My purpose here today is to act as the mediator in this case and to assist you in the resolution of the dispute that brings us to this table.

Let me begin by stating that I am not acquainted with the parties involved in this dispute. I am not here to represent either side, any particular position. I will not express partiality or take sides during this process. My goal is to assist each of you in reaching an acceptable settlement of this matter. 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 still empowered with the ability to design a settlement that meets your needs, and addresses your interests.

I sent each of you a letter outlining what you should expect in a mediation session and asking you to verify that you willingly accept the opportunity to participate. So that you are both comfortable with each other's good intentions, I want to assure each of you, I have signed agreements to participate in this process from each of you. I want to remind you that this is not a court of law or a legal proceeding. Therefore, we are not bound by the formal rules of evidence. Should you desire at a later time, to pursue this matter in a court of law or an administrative system, this proceeding will in no way delay or interfere with your right to do so. I will not willingly testify for or against either of you in an administrative or court proceeding regarding the information unique to this conference.

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 obvious exceptions to this rule, but I do not expect them to arise during our mediation. For example, if you confess 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, I may be required to share this information with appropriate authorities. 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, we may be required by a court to disclose our private discussions.

Having said that, I want you to please remember that facts that were discoverable before the mediation session do not become confidential merely because they were presented during a mediation conference. It is only those things you say or write in confidence to me during the mediation that I will not disclose, unless one of the unusual exceptions I discussed above applies. This means that both the mediation agreement and the resulting settlement agreement, if any, are not 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.

Before we begin, let me explain the procedure we will use. When I complete these preliminary statements each of you will have the opportunity to make an uninterrupted opening statement 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, Mr./Ms. ___________ I will ask you to begin. When you have completed your opening remarks, I will ask Mr./Ms.___________ to make an uninterrupted opening statement.

After that, we will transition into a joint discussion centering on possible solutions, I ask that each of you be thinking of how you might like to resolve this matter. At some point, I will meet with each of you separately. This is called a caucus. I will use the caucus to help me clarify in my mind some concerns I may have as we talk, and to be of more assistance in helping you resolve your dispute. I may use the caucus any number of times, and the length of each caucus should not be of concern to either of you. The information you share during the caucus is also confidential and will not be shared during open discussion unless you specifically give consent to such disclosure.

When you reach agreement, it will be written, and each of you will be asked to verify and sign it. I will also sign it as a witness. Each of you will be provided with a copy of the

agreement today. Appropriate authorization may be required for the agreement to become binding and if so, we will note that in the agreement.

At this time please turn off all cell phones, pagers and electronic devices. Let me once again congratulate you for being here today to try to work this out. Your presence here today demonstrates your willingness to attempt cooperative problem-solving.

Are there any questions at this point? If not, let's proceed with Mr./Ms._________'s opening statement.

SECTION 2

MEDIATOR'S TOOLBOX

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..."

APPENDIX 5

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 the Parties

The Air Force has identified the six most common areas that generate discrimination complaints; they include Disciplinary Actions, Appraisal/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.

The charts in this appendix can assist you in identifying the potential interests of the parties in an EEO complaint. These charts are not meant to provide an exhaustive listing of all potential interests that the parties may have. However, they can assist you in identifying the underlying interests and help the parties identify possible areas that may help them resolve their dispute.

Identifying the interests of the parties is a key factor in 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.

A. Disciplinary Actions

<table>
<tr><th>Possible Interests of the Complainant</th><th>Possible Interests of Management</th></tr>
<tr><td>

Pride/Shame/Embarrassment
Loss of Money
Future Adverse Career Impact
Perception of Fairness/Equality
Reputation
Fear of Losing Job
Future Relationship
Vindication
Benefits (Health, Life, Retirement)
Saving Face
Desire not to appear Weak
Time
Hidden Personal Agenda
Dignity/Self Esteem
Trust
Monetary Enrichment

</td><td>

Need to Control Work Environment
Need to Correct Behavior
Impact on Morale
Equality
Reputation
Future Relationship
Retribution
Saving Face
Setting a Precedent
Need to Minimize Workplace Disruption
Desire not to appear Weak
Time
Desire to Minimize Hassle
Desire to Comply with all Relevant Laws & Regulations
Desire to be a Model Employer
Hidden Personal Agenda
Desire to Contain Costs

</td></tr>
</table>

B. Appraisal/Evaluations

Possible Interests of the Complainant	Possible Interests of Management
♦ Pride/Shame/Embarrassment ♦ Loss of Award Money ♦ Future Adverse Career Impact (Promotions/RIF) ♦ Perception of Fairness/Equality ♦ Inaccurate Ratings ♦ Inaccurate Workplan ♦ Lack of Training ♦ Reputation ♦ Desire for Praise/Approval/ Acknowledgment ♦ Saving Face ♦ Desire Not to Look Weak/ or Back Down ♦ Time ♦ Hidden Personal Agenda ♦ Respect ♦ Vindication ♦ Recognition for Performance of Related Duty ♦ Future Relationship	♦ Motivation of Employees ♦ Desire to be Fair ♦ Setting a Precedent ♦ Not Appearing Weak to Subordinates and/or Supervisor ♦ Retribution ♦ Saving Face ♦ Time ♦ Desire to Minimize Hassle ♦ Hidden Personal Agenda ♦ Desire to Comply with all Relevant Laws & Regulations ♦ Desire to be a Model Employer ♦ Save the Government Money ♦ Desire to Reward Only the Most Deserving Employees ♦ Desire to Build an Adverse Action Case ♦ Future Relationship

C. Promotion/Selection Actions

Possible Interests of the Complainant	Possible Interests of Management
♦ Pride/Shame/Embarrassment ♦ Loss of Future Earnings ♦ Future Adverse Career Impact ♦ Perception of Fairness/Equality ♦ Loss of Potential Career Experience ♦ Loss of Potential Training ♦ Reputation ♦ Saving Face ♦ Desire Not to Look Weak/ or Back Down ♦ Time ♦ Hidden personal agenda ♦ Needs Money ♦ Self-Worth ♦ Desire to Stay Even Or Surpass Peer Group ♦ Future Relationship	♦ Getting the Best Person for the Job ♦ Meeting Mission Requirements ♦ Rewarding Good Performance ♦ Building Career Ladder ♦ Desire to be Fair ♦ Adequate Representation in the Workplace ♦ Personality issues ♦ Saving Face ♦ Desire Not to Look Weak/ or Back Down ♦ Setting a Precedent ♦ Time ♦ Desire to Minimize Hassle ♦ Hidden Personal Agenda ♦ Desire to Comply with all Relevant Laws & Regulations ♦ Desire to be a Model Employer ♦ Future Relationship

D. Harassment Complaints

Possible Interests of the Complainant	Possible Interests of Management
♦ Perception of Equality/Fairness ♦ Fear/Embarrassment ♦ Desire to Have Harassment Stop ♦ Adverse Career Impact ♦ Reputation ♦ Health Issues (Physical, Mental, Emotional) ♦ Personal Like or Dislike for Supervisor ♦ Saving Face ♦ Desire Not to Appear Weak/ or Back Down ♦ Time ♦ Hidden Personal Agenda ♦ Revenge ♦ Future Relationship	♦ Harassment Free Workplace ♦ Improved Morale ♦ Control Over Work Environment ♦ Reputation ♦ Adverse Career Impact ♦ Impact on the Mission ♦ Pride ♦ Setting a Precedent ♦ Saving Face ♦ Desire Not to Appear Weak/ or Back Down ♦ Time ♦ Desire to Minimize Hassle ♦ Personal Like or Dislike for Subordinate ♦ Hidden Personal Agenda ♦ Desire to Comply with all Relevant Laws & Regulations ♦ Desire to be a Model Employer ♦ Future Relationship

E. **Performance-Based Actions**

Possible Interests of the Complainant	Possible Interests of Management
♦ Perception of Equality/Fairness ♦ Pride/Shame/Embarrassment ♦ Fear of Losing Job ♦ Loss of Money (Change to Lower Grade) ♦ Future Adverse Career Impact ♦ Reputation ♦ Benefits (Health, Life, Retirement) ♦ Saving Face ♦ Desire Not to Appear Weak/ or Back Down ♦ Time ♦ Hidden Personal Agenda ♦ Future Relationship	♦ Need to Control Work Environment ♦ Need to Improve Performance ♦ Obligation to Ensure Employee is Meeting Job Requirements ♦ Impact on Morale ♦ Equality ♦ Reputation ♦ Desire to Minimize Disruption in the Workplace ♦ Not Appearing Weak to Subordinates and/or Supervisor ♦ Saving Face ♦ Setting a Precedent ♦ Time ♦ Desire to Minimize Hassle ♦ Hidden Personal Agenda ♦ Desire to Comply with all Relevant Laws & Regulations ♦ Desire to be a model employer ♦ Future Relationship

F. Reasonable Accommodation

Possible Interests of the Complainant	Possible Interests of Management
♦ Perception of Equality/Fairness ♦ Pride/Shame/Embarrassment ♦ Fear of Losing Job ♦ Future Adverse Career Impact ♦ Reputation ♦ Benefits (Health, Life, Retirement) ♦ Desire to Work ♦ Desire to Minimize Discomfort (Physical and/or Mental) ♦ Saving Face ♦ Hidden Personal Agenda ♦ Future Relationship ♦ Equal Access and Participation ♦ Career Development and Advancement	♦ Need to control Work Environment ♦ Obligation to Ensure Employee is Meeting Job Requirements ♦ Impact on Morale ♦ Genuine Misunderstanding ♦ Equality ♦ Reputation ♦ Desire to Minimize Disruption in the Workplace ♦ Saving Face ♦ Setting a Precedent ♦ Time ♦ Desire to Minimize Hassle ♦ Hidden Personal Agenda ♦ Desire to Comply with all Relevant Laws & Regulations ♦ Desire to be a Model Employer ♦ Future Relationship ♦ Verification of Disability

POINTS ON CAUCUS

Purpose--The caucus 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. Parties are often so suspicious of each other that they will not talk openly in front of each other. The caucus is the parties' opportunity to share information freely.

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

What To Do During Caucus:

- Reemphasize confidentiality and ensure you have a clear understanding as to what the party wants to remain confidential
- 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

Things To Look For: Recognize potential areas of agreement and encourage parties to concentrate on the possible agreements(s). Look into possible solutions that perhaps neither party has considered. Try to find the positive aspects of the situation concentrating on the feasibility of an agreement. Guide the discussion toward a future based, forward-looking view of the solution set to the issue(s).

Ending The Caucus: The mediator should be sure to summarize the information conveyed by the party during caucus. This step is important for two 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 you 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 it take to make that proposal into something you could accept?"*

10. Use the opposite of 9 above to help a party reality-check his/her own idea: *"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 so overuse “what ifs" 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, you 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: 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.

POTENTIAL SOLUTIONS TO IMPASSE

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.

Disciplinary Actions

In accordance with AFI 51-1201, paragraph 21.2.4, disciplinary actions are generally not appropriate for ADR at the *proposal* stage. Therefore, 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 (e.g., removals, suspensions greater than 14 days), MSPB rules allow an additional 30 days for the employee to file the appeal if the parties attempt ADR. 5 C.F.R. 1201(b)(1).

1. 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 Complainant 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.

2. 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.

3. 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.

4. 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. Conversely, the parties may also agree that the complainant will not seek a recommendation.

5. Rescind the action

Rescinding the action is to terminate the process and expunge the record. This can be done at after a decision has been made.

Points on Closure

Mediations of performance-based actions will most likely be at the stage between placement on a performance improvement plan 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.*

1. Reassignment

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.

2. Voluntary Change to Lower Grade

An employee-requested action to be reduced in grade.

3. Voluntary Resignation

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

4. Extend Performance Improvement Period

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

5. Training

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

6. Retroactive Step Increase

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

Evaluations/Appraisals

1. Change the Overall Appraisal rating, Performance Elements or Appraisal Factors

Change an appraisal rating, PE, and/or appraisal factors i.e. replace the current rating with an amended overall rating, an amended PE rating and/or changed appraisal factors.

2. Grant Award

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

3. 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.

4. Develop a New Performance Plan

Rewrite the performance 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.

5. Performance Counseling Schedule

Planned systematic discussion between the rating official and employee during the rating period regarding employee 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.

6. Performance-Related Training

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

7. 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 rise to greater performance levels.

Promotion/Selection

1. Placement in Next Vacancy

Mandatory selection for the next occurring vacancy for which the complainant 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 course of action.

2. Priority Consideration for Next Vacancy

For the next position vacancy for which the complainant qualifies, the complainant's name will be forward to the selecting official for selection consideration before other names of eligible candidates. **[Note: Be certain of the intentions of the parties. Use of the term Priority Consideration in an EEO settlement means selection for that position unless unusual qualifications are required. If the parties mean Priority Referral, make sure the agreement states it that way.]**

3. 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.

4. 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.

5. Desk Audit

An interview for fact-gathering purposes conducted by a person competent in the classification process 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.

6. 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. **[Note: See # 1 above for additional guidance regarding non-competitive actions.]**

7. 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 rise to greater performance levels.

Harassment

1. 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.

2. 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.

3. 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.

Reasonable Accommodation

1. 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.

2. 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.

3. Voluntary Change to Lower Grade

An employee requested action to be reduced in grade.

Confidential
Information not releasable under the Freedom of Information Act pursuant to 5 U.S.C. 574(j) and not releasable pursuant to a discovery request under a number of circumstances pursuant to 5 U.S.C. 574

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 allegations that triggered this complaint/grievance***.____
____
____
____
____
____

6. Does the proposed settlement affect the Complainant/Grievant's benefits?
______Yes ______No

7. Does this settlement agreement propose the Government make a payment to the Complainant/Grievant? ______Yes ______No

MEDIATION SETTLEMENT AGREEMENT
(ALL EEO COMPLAINTS, EXCEPT THOSE ALLEGING AGE DISCRIMINATION)

The Complainant, *[INSERT NAME]*, and the Department of the Air Force (the Agency) enter into this negotiated settlement agreement to completely resolve the disputed issues raised in the *[INSERT complainant's informal complaint, Base Docket No.; AFCARO Docket No.; and/or complainant's EEO complaint, EEOC Case No.]* *(Note: for each subsequent level of complaint, insert the prior identification, i.e., for cases at the EEO administrative hearing stage include the AFCARO/OCI OCI and Base Docket No.)* This Agreement is entered into based on the authority provided by Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16) [29 C.F.R. Section 1614.603].

1. The parties mutually agree:

   a. This agreement constitutes the complete understanding between the Complainant and the Agency and is binding upon the parties, their successors, and their representatives. 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. All promises, conduct, and statements made in the course of reaching this Settlement Agreement, including the fact of settlement, are confidential and will not be disclosed voluntarily to the extent permitted by law. See, e.g., 5 U.S.C. 574 and Federal Rule of Evidence 408. The Complainant agrees that *he/she* will not disclose or discuss this settlement with other agency employees (except his or her representative and responsible management personnel.) The Agency agrees it will not disclose or discuss this settlement except as necessary for implementation. The Complainant authorizes the Agency to disclose the terms of this Agreement to Agency officials who may need to review and approve the terms of the Agreement;

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

   d. 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, or any other federal or state statute or regulation.

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

f. The Mediator, Agency, and Complainant/Grievant will ***immediately notify*** the servicing ADR Champion and/or the servicing Staff Judge Advocate, IAW AFI 51-1201, paragraph 34, if anyone seeks information about confidential discussions that took place during this mediation session. The ADR Champion and/or SJA will provide guidance about how to respond.

2. In exchange for the promises made by the Agency in paragraph 3 of this Agreement, the Complainant freely and voluntarily agrees:

a. That execution of this agreement operates as a withdrawal of the complaints identified in the Preamble above.

b. 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 Agency by either Complainant or the Equal Employment Opportunity Commission, or other type of EEO complaint 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 complaint(s) as listed in the preamble 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. Complainant specifically and voluntarily affirms that he/she has no other claims made under the Age Discrimination in Employment Act, as amended.

c. That in the event the Complainant believes that the Agency has violated a term or condition of this Agreement, to notify in writing the Chief EEO Counselor within 30 calendar days of the asserted violation and request that the terms of the Agreement be specifically implemented. If the Agency determines no violation occurred or refuses or fails to correct any violation identified by Complainant within 30 calendar days, Complainant may appeal to the Equal Employment Opportunity Commission and request specific enforcement of the Agreement or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

d. *[INSERT additional terms placed on the Complainant that are case specific.]*

3. In exchange for the promises made by the Complainant in paragraph 2 of this agreement, the Agency agrees:

a. *[INSERT the terms the Agency agrees to implement to resolve the complaint(s).]*

4. This agreement is binding upon the signatories upon their signature. Both parties understand and agree that, as a provision of this settlement, the agreement must be coordinated through the Legal Office and the Personnel Office for legal and technical sufficiency and will become fully binding upon the Agency only upon completion of that coordination.

5. By signing below, the Complainant acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement without coercion or duress.

_______________________________________ _______________________________________

Complainant Signature Date Respondent Signature Date

____

Mediator Signature Date

[INSERT signature and date blocks for the Complainant’s or Respondent’s representative if applicable, and Agency settlement authority.]

MEDIATION SETTLEMENT AGREEMENT
(EEO COMPLAINT ALLEGING AGE DISCRIMINATION)

The Complainant *[INSERT NAME]* and the Agency enter into this negotiated settlement agreement to completely resolve the disputed issues raised in the *[INSERT complainant's informal complaint, Base Docket No.; AFCARO Docket No.; and/or complainant's EEO complaint, EEOC Case No.]* *(Note: for each subsequent level of complaint, insert the prior identification, i.e., for cases at the EEO administrative hearing stage include the AFCARO/OCI OCI and Base Docket No.)* This Agreement is entered into based on the authority provided by Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16) [29 C.F.R. Section 1614.603].

1. The parties mutually agree:

a. This agreement constitutes the complete understanding between the Complainant and the Agency and is binding upon the parties, their successors, and their representatives. 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. Seven days is a reasonable time for 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.

c. All promises, conduct, and statements made in the course of reaching this Settlement Agreement, including the fact of settlement, are confidential and will not be disclosed voluntarily to the extent permitted by law. See, e.g., 5 U.S.C. 574 and Federal Rule of Evidence 408. The Complainant agrees that *he/she* will not disclose or discuss this settlement with other agency employees (except his or her representative and responsible management personnel.) The Agency agrees it will not disclose or discuss this settlement except as necessary for implementation. The Complainant authorizes the Agency to disclose the terms of this Agreement to Agency officials who may need to review and approve the terms of the Agreement;

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

e. 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, or any other federal or state statute or regulation.

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

g. The Mediator, Agency, and Complainant/Grievant will ***immediately notify*** the servicing ADR Champion and/or the servicing Staff Judge Advocate, IAW AFI 51-1201, paragraph 34, if anyone seeks information about confidential discussions that took place during this mediation session. The ADR Champion and/or SJA will provide guidance about how to respond.

2. In exchange for the promises made by the Agency in paragraph 3 of this Agreement, the Complainant freely and voluntarily agrees:

a. That execution of this agreement operates as a withdrawal of and all of the complaint(s) identified in the Preamble above.

b. 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 Agency by either Complainant or the Equal Employment Opportunity Commission, or other type of EEO complaint 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 each complaint as listed in the preamble is 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 Complainant specifically and voluntarily affirms that he/she has made no other claims under the Age Discrimination in Employment Act, as amended.

c. That in the event the Complainant believes that the Agency has violated a term or condition of this Agreement, to notify in writing the Chief EEO Counselor within 30 calendar days of the asserted violation and request that the terms of the Agreement be specifically implemented. If the Agency determines no violation occurred or refuses or fails to correct any violation identified by Complainant within 30 calendar days, Complainant may appeal to the Equal Employment Opportunity Commission and request specific enforcement of the Agreement or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

d. [INSERT additional terms placed on the Complainant that are case specific.]

3. In exchange for the promises made by the Complainant in paragraph 2 of this agreement, the Agency agrees:

a. *[INSERT the terms the Agency agrees to implement to resolve the complaint(s).]*

4. The Complainant is advised that the Complaint may have specific rights or claims under the Age Discrimination in Employment Act, 29 U.S.C. 633a, as amended. The Complainant is advised of the right to consult with an attorney prior to executing this agreement. The Complainant shall have a reasonable period of time, 7 calendar days, to consult with an attorney and consider this Agreement. 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 understands the execution of this settlement agreement will waive all consultation rights under the Age Discrimination in Employment Act.

______________________________	______________________________
[*INSERT Complainant's Name]*	*DATE*

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

5. This agreement is binding upon the signatories upon their signature. Both parties understand and agree that, as a provision of this settlement, the agreement must be coordinated through the Legal Office and the Personnel Office for legal and technical sufficiency and will become fully binding upon the Agency only upon completion of that coordination.

6. By signing below, the Complainant acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement without coercion or duress.

______________________________		______________________________	
Complainant Signature	Date	Respondent Signature	Date

____

Mediator Signature Date

[INSERT signature and date blocks for the Complainant's or Respondent's representative if applicable, and Agency settlement authority.] (Note: The Appellant may voluntarily sign the agreement sooner than 7 calendar days after having signed paragraph 6 above. The day after the Complainant signs paragraph 6 shall serve as the first day for counting purposes.)

APPENDIX 13

MEDIATION SETTLEMENT AGREEMENT

(USE IN NON-EEO COMPLAINTS)

The Complainant, ___________________, and the Respondent, _________________, enter into this settlement agreement as a result of mediation. The reason for the mediation was to completely resolve the issues in dispute between the parties. The mediation number assigned to this ADR case is ___________________.

1. The parties mutually agree:

a. This agreement constitutes the complete understanding between the Complainant and the Respondent and is binding upon the parties, their successors, and their representatives. 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. All promises, conduct, and statements made in the course of reaching this Settlement Agreement, including the fact of settlement, are confidential and will not be disclosed voluntarily to the extent permitted by law. See, e.g., 5 U.S.C. 574 and Federal Rule of Evidence 408. The Complainant agrees that *he/she* will not disclose or discuss this settlement with other agency employees (except his or her representative and responsible management personnel.) The Agency agrees it will not disclose or discuss this settlement except as necessary for implementation. The Complainant authorizes the Agency to disclose the terms of this Agreement to Agency officials who may need to review and approve the terms of the Agreement;;

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

d. This agreement does not constitute an admission of liability, fault or error by the Respondent, 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.

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

f. This agreement is binding upon the signatories upon their signature. Both parties understand and agree that, as a provision of this settlement, the agreement must be coordinated through the Legal Office and the Personnel Office for legal and technical sufficiency and will become fully binding upon the parties only upon completion of that coordination.

g. The Mediator, Agency, and Complainant/Grievant will ***immediately notify*** the servicing ADR Champion and/or servicing Staff Judge Advocate, IAW AFI 51-1201, paragraph 34, if anyone seeks information about confidential discussions that took place during this mediation session. The ADR Champion and/or SJA will provide guidance about how to respond.

2. In exchange for the promises made by the Respondent in paragraph 3 of this Agreement, the Complainant freely and voluntarily agrees:

a. That execution of this agreement operates as a withdrawal of the complaints identified by the mediation case number found in the Preamble above.

__________b. 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 Respondent or the Agency by either Complainant or the Equal Employment Opportunity Commission, or other type of EEO complaint 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 complaint(s) as listed in the preamble 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 Complainant specifically and voluntarily affirms that he/she has no other claims made under the Age Discrimination in Employment Act, as amended.

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

d. *[INSERT additional terms placed on the Complainant that are case specific.]*

3. In exchange for the promises made by the Complainant in paragraph 2 of this agreement, the Respondent agrees:

a. *[INSERT the terms the Agency agrees to implement to resolve the complaint(s).]*

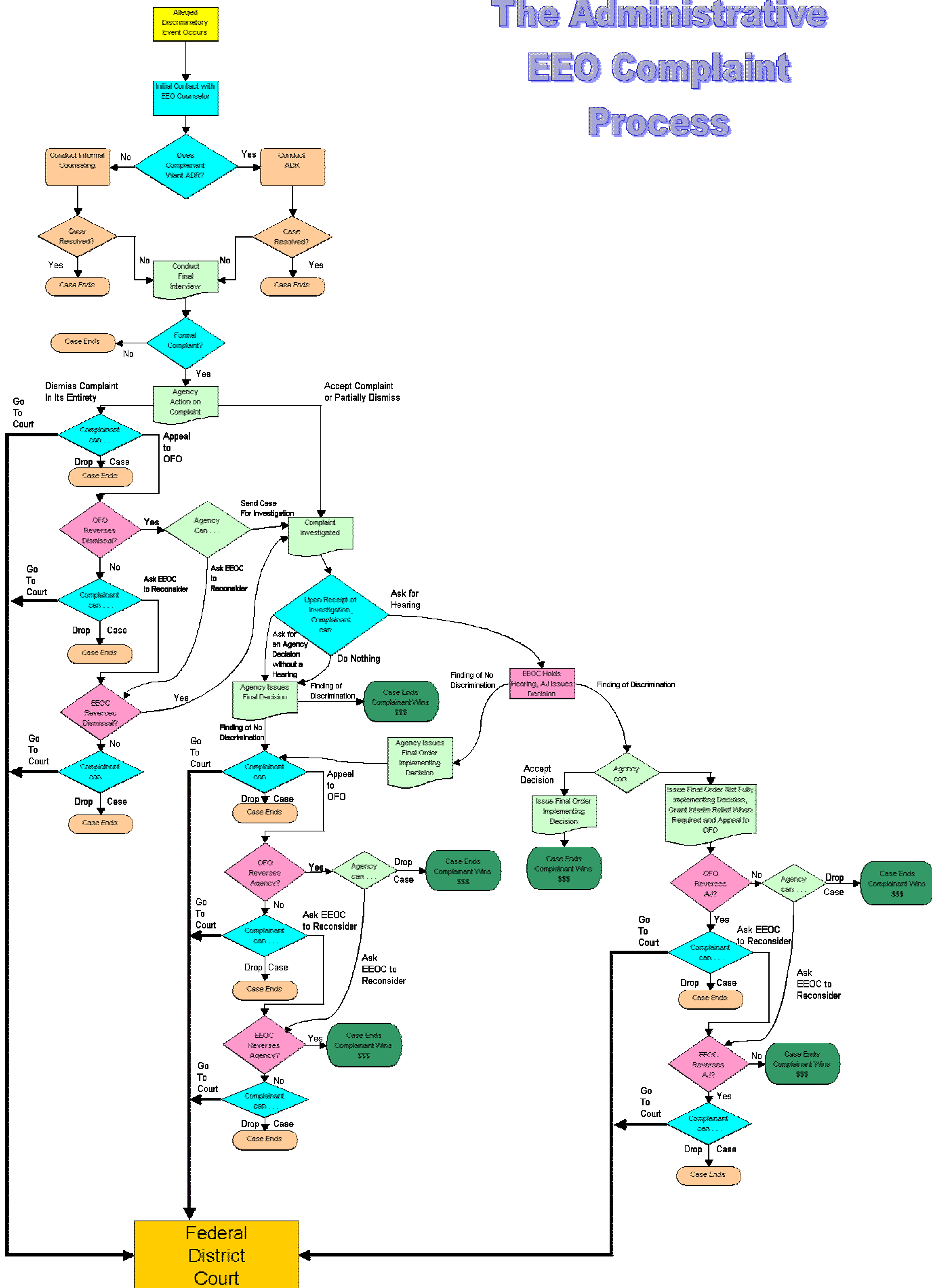
4. By signing below, the Complainant and Respondent acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement without coercion or duress.

Complainant Signature	Date	Respondent Signature	Date

Mediator Signature Date

MEDIATOR'S TOOLBOX

(FOR MEDIATOR AND PARTIES)



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

Case Elements for Use in Reality Checking

I. 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 three categories of discrimination with which you may be involved: (1) disparate treatment, (2) disparate impact, and (3) failure to make reasonable accommodation in religious discrimination or disability claims.

Disparate treatment is probably the most common form of discrimination--that is, different treatment because of 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.

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 thus 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, Age Discrimination, and Rehabilitation Act.

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 question of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). Section II and III below explain the specific elements required in particular types of cases.

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. 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. If management meets this burden of production, the presumption of discrimination raised by the prima facie case is rebutted and drops from the case altogether. Examples of this second step include lesser comparative qualifications, inability to get along with supervisors or co-workers, or poor performance.

Third, in order to prevail, the complainant must show by a preponderance of the evidence [53] that management's stated reason is pretext for discrimination. The complainant may show pretext by 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*).

Finally, two terms need to be explained. First, a "protected class" or "protected group" represents a group that is recognized *by the law* to have protection against discrimination. Second, "similarly situated employees" has been defined to mean a person or group of persons who are of the same GS rating, occupation, or office for the purposes of comparing the treatment received. These terms of art should be discussed with your labor counsel when reviewing a case for possible settlement or litigation.

The elements that make up the ***prima facie*** **case** address the first prong of the *McDonnell Douglas* test.

II. PROTECTED CLASSES

A. Race, Color, and National Origin

Regardless of whether the claim is discrimination by race, color, or national origin, the elements are the same. The Complainant must prove that:

1. He/she is a member of a protected class,
2. The complainant experienced an adverse action, and
3. The complainant was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.

[53] 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.

B. Sex Discrimination

You may find that sex discrimination complaints may be filed on one or more of the three types of discrimination claims: (1) disparate treatment, (2) disparate impact, and (3) sexual harassment.

The *prima facie* elements for **disparate treatment** (treating someone differently based on gender) are the same as for race, color, or national origin discrimination. To make a *prima facie* case of **disparate impact discrimination**, the complainant must show that a challenged practice or policy disproportionately impacted members of his/her protected class. Specifically, the complainant must:

1. Identify the specific practice or policy challenged;

2. Show a statistical disparity; and

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

Sexual harassment may be seen as either ***quid pro quo*** harassment **or hostile environment**. ***Quid pro quo*** harassment is a case where favorable treatment or punishment is promised for, or conditioned upon, the complainant providing sexual favors. A complainant makes a *prima facie* case of *quid pro quo* harassment by proving:

1. The harassment occurred in an employment context;

2. The promised or threatened action was work related; and

3. The harasser was in a position, or was reasonably perceived as being in a position, to carry out the promised or threatened action.

The second type of sexual harassment is known as the **hostile environment**. A complainant makes a *prima facie* case in this area by proving:

1. He or she is a member of a protected class;

2. The Complainant was subjected to unwelcome sexual advances, requests for favors, or other verbal or physical contact of a sexual nature;

3. “But for” complainant’s gender, he/she would not be subject to the harassment;

4. The harassment affected a term or condition of employment, and/or had the purpose or effect of unreasonably interfering with the work environment, and/or created an intimidating, hostile, or offensive work environment; **and**

5. The employer knew or should have known about the harassment, and failed to take prompt remedial action.

D. Religious Discrimination

The elements of a *prima facie* case of discrimination based upon religion are the same as those for race, color, or national origin.

E. Age Discrimination

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

F. Disability Discrimination

A complainant must prove:

1. He or she has a permanent disability.[54] There are detailed requirements and recently developed modifications of those requirements from the United States Supreme Court on this point, so check with an attorney on this element. A physician's statement as to the disability should suffice in matters where the disability is not obvious (e.g. amputee, blindness, or deafness).

2. The Agency knew of the disability or request for accommodation;

3. The Complainant was qualified to fill the position with or without reasonable accommodation of the disability; and

4. The Complainant was treated differently because of the disability, or because the Agency failed to accommodate the disability (depending on what is alleged.)

G. Reprisal

Reprisal cases may be the one type of complaint in which you are more likely to see direct evidence. To make a *prima facie* case of reprisal:

1. Proof by **direct evidence** of the intent to punish the complainant for engaging in some protected activity (such as involvement in the EEO process or whistleblowing).

2. Proof by **indirect evidence**, which requires the complainant to show:

[54] Even if the complainant does not have an *actual* disability, if he or she is *perceived* by the employer as having a disability, or has a *record* of a disability, it is tantamount to having the disability.

a. The Complainant engaged in a protected activity;

b. The responsible management officials knew about the activity;

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.

III. PRIMA FACIE ELEMENTS FOR COMMON TYPES OF UNLAWFUL DISCRIMINATION COMPLAINTS

A. Not Selected For Promotion

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; and

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

B. Disciplinary Actions

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.

C. Appraisals

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

b. He/she is similarly situated to employees outside his protected class; and

c. The Complainant got a lower performance rating.

D. Harassment

Harassment may be based on any of the protected bases--race, color, national, origin, religion, sex, age, or disability. Most frequently, complainants allege harassment based on race or sex.

A complainant must show:

1. The existence of a pattern of harassment or intimidation. The harassment must be more than a few isolated incidents. It must be “sufficiently pervasive” so as to alter a condition of the victim’s employment and create an abusive working environment;

2. That the employer or agency knew or should have known of the illegal conduct; and

3. That the employer or agency failed to take reasonable steps to cure the harassment.

E. Failure to Provide a Reasonable Accommodation to a Qualified Disabled Person

In order to establish a prima facie case of disability discrimination under a reasonable accommodation theory, complainant must show:

1. That he/she is an "individual with a disability";

2. That he/she is a "qualified individual with a disability"; and

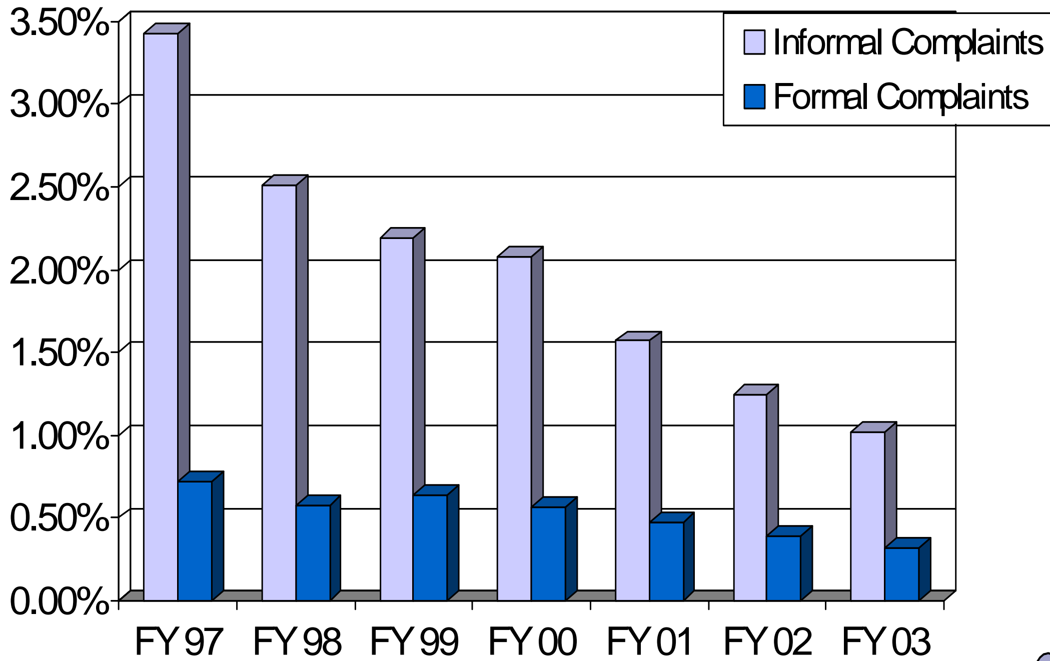
3. That the agency failed to reasonably accommodate his/her disability

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).

U.S. AIR FORCE

Percent of Civilian Workforce Filing EEO Complaints FY97-03



Informal Complaints ↓ 70%

Formal Complaints ↓ 56%

Source: EEOC Form 462

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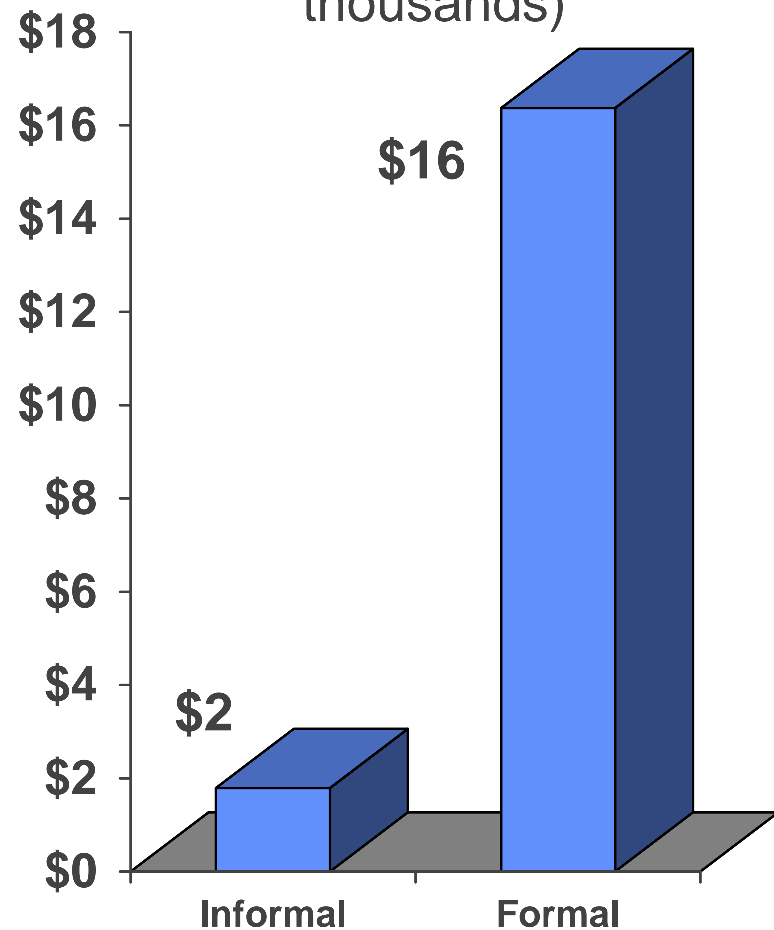
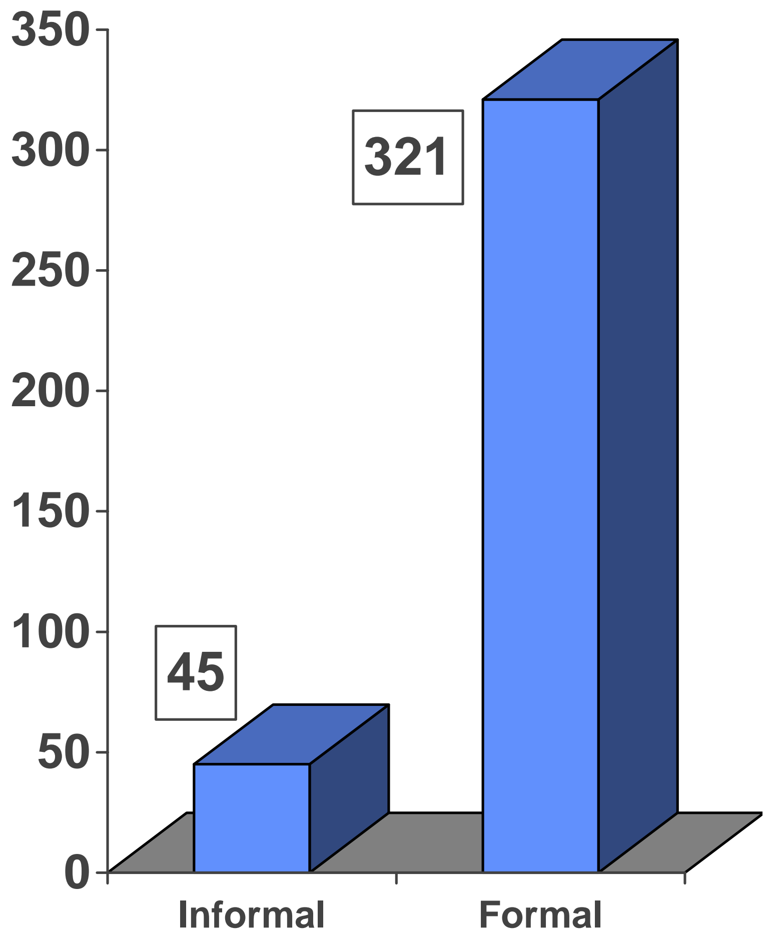
The Time and Cost To the Air Force of Informal and Formal EEO Complaints

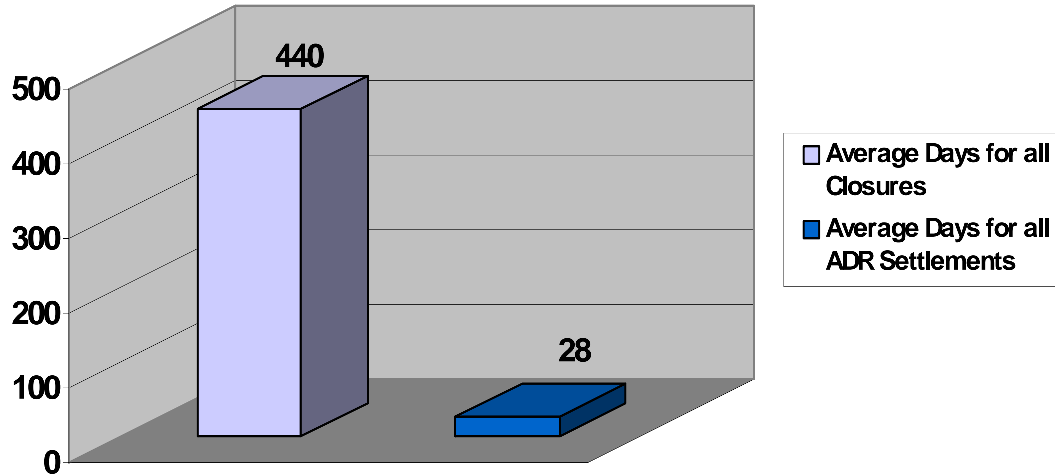




Source: Air Force Audit Agency, Project 98051018

APPENDIX 18

Average Number of Days for Closure of EEO Complaints in FY 03



ADR resolves complaints in an average of just under one month as compared to an average of 15 months in the formal process.

Source: EEOC Form 462

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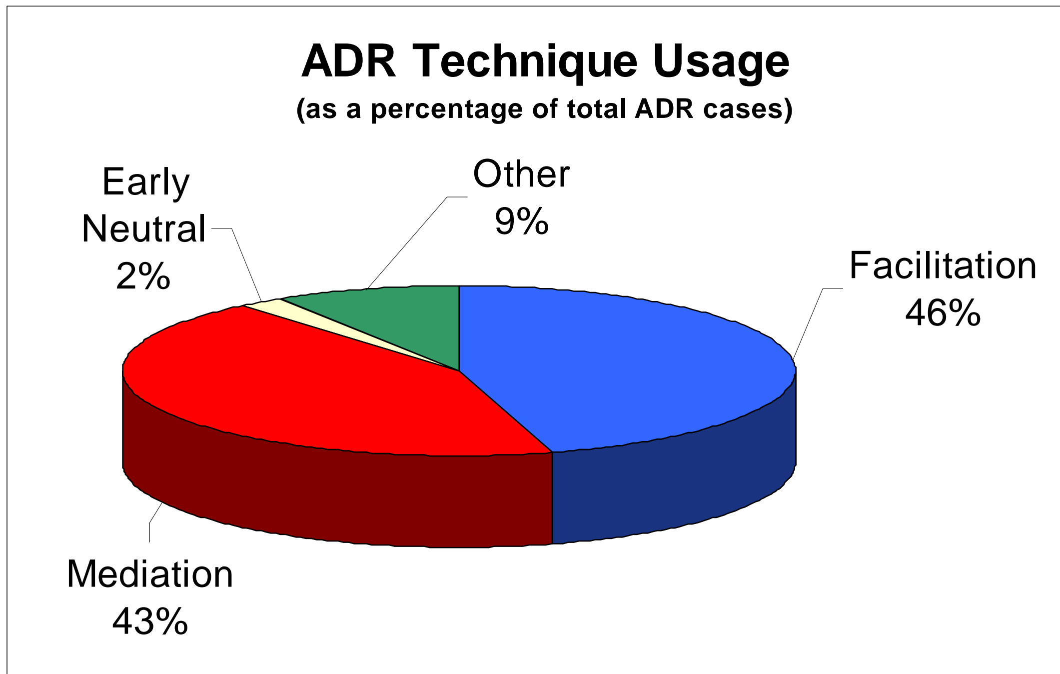
Use of Specific ADR Techniques



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TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USCS § 1981a (2000)

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery.

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 *(42 U.S.C. § 2000e-5* [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act *(42 U.S.C. § 2000e-2* or 2000e-3 [or 2000e-16), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes *(42 U.S.C. § 1981),* the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)], from the respondent.

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 *(42 U.S.C. § 12117*(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 *(29 U.S.C. § 794a*(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 *(29 U.S.C. § 791)* and the regulations implementing section 501 [*29 USCS § 791],* or who violated the requirements of section 501 of the Act [*29 USCS § 791]* or the regulations implementing section 501 [*29 USCS § 791]* concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 *(42 U.S.C. § 12112),* or committed a violation of section 102(b)(5) of the Act [*42 USCS § 12112*(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)], from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [*42 USCS § 12112*(b)(5)] or regulations implementing section 501 of the Rehabilitation Act of 1973 [*29 USCS § 791],* damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to

identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages.

(1) Determination of punitive damages. **A complaining party may recover punitive damages under this section against a respondent <u>(other than a government, government agency or political subdivision)</u> if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.**

(2) Exclusions from compensatory damages. Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)].

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction. Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes *(42 U.S.C. § 1981).*

(c) Jury trial. If a complaining party seeks compensatory or punitive damages under this section-

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

Arizona, Petitioner-Cross Respondent,
vs.
FEDERAL LABOR RELATIONS AUTHORITY,
Respondent-Cross Petitioner,
AMERICAN FEDERAL OF GOVERNMENT EMPLOYEES, AFL-CIO (AFGE), Local 1547,
Respondent-Intervenor.

Nos. 98-71173, 98-71347
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1999 U.S. App. LEXIS 34569

December 8, 1999, Argued and Submitted, San Francisco, California
December 30, 1999, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Petitions for Review of a Decision of the Federal Labor Relations Authority.

DISPOSITION: REVERSED.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner-cross respondent air force base sought review of the decision of respondent-cross petitioner Federal Labor Relations Authority finding it had violated 5 U.S.C.S. § 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 Federal Labor Relations Authority found that petitioner-cross respondent air force base violated 5 U.S.C.S. § 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.

CORE TERMS: grievance, grievance procedure, notice, collective bargaining agreement, exclusive representative, bargaining unit, scheduled

In order for an union to possess a right to representation at a meeting, the following elements of 5 U.S.C.S. 7114(a)(2)(A) must exist: There must be (1) a discussion, (2) which is formal, (3) between the representatives of the government employer and the unit employee or her representatives (4) concerning a grievance.

COUNSEL: For LUKE AIR FORCE BASE, Petitioner (98-71173): Sandra Wien Simon, Esq., William - Kanter, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For FEDERAL LABOR RELATIONS AUTHORITY, Petitioner (98-71347): Solicitor, James F. Blandford, Attorney, FEDERAL LABOR RELATIONS AUTHORITY, Washington, DC.

For FEDERAL LABOR RELATIONS AUTHORITY, Respondent (98-71173): Solicitor, William R. Tobey, Esq., James F. Blandford, Attorney, FEDERAL LABOR RELATIONS AUTHORITY, Sandra Wien Simon, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For LUKE AIR FORCE BASE, Respondent (98-71347): Sandra Wien Simon, Esq., William - Kanter, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO (AFGE), Local 1547, Respondent - Intervenor (98-71173): Kevin M. Grile, Esq., American Federation of Government Employees, AFL-CIO, Chicago, IL.

JUDGES: Before: WIGGINS, O'SCANNLAIN, and HAWKINS, [*2] Circuit Judges.

OPINION: MEMORANDUM [55]

American Federation of Government Employees, Local 1547, is the exclusive representative of a bargaining unit at Luke Air Force Base ("Luke"). The collective bargaining agreement between the union and Luke excludes discrimination claims from the grievance procedure provided in the agreement. Tillie Cano, a member of the union's bargaining unit, filed her claims pursuant to Equal Employment Opportunity Commission ("EEOC") regulations rather than the grievance procedure. For the mediation and the investigation scheduled in connection with these complaints, Cano designated Paul King, president of the union, as her personal representative. On January 18, 1995, Cano, King, and representatives from Luke and the Office of Complaint Investigation met for the first time. King left the meeting early. At the end of the first [*3] meeting, a second meeting was scheduled for the next day; however, no one from Luke's management attempted to contact King or the rest of the union regarding the second meeting. At the January 19 meeting, Cano signed a

[55] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

settlement agreement without King's presence.

In May and October of 1995, the union filed unfair labor practice charges against Luke before the Office of Administrative Law Judges, part of the Federal Labor Relations Authority ("FLRA"). The Chief Administrative Law Judge found that Luke failed to comply with Section 7114 of the Federal Service Labor-Management Relations Statute ("Labor Statute") because Luke did not give the union notice and an opportunity to be represented at the January 19 meeting. [56]In August 1998, the FLRA adopted the ALJ's conclusion in a decision and order. We have jurisdiction under 5 U.S.C. § 7123. We may set aside a decision issued by the FLRA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Department of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994). Because we conclude that the FLRA acted arbitrarily and capriciously in [*4] deciding that Luke violated Section 7114 of the Labor Statute, we REVERSE.

In order for the union to possess a right to representation at a meeting, the following elements of Section 7114(a)(2)(A) must exist: There must be (1) a discussion, (2) which is formal, (3) between the representatives of the government employer and the unit employee or her representatives (4) concerning a grievance. See General Serv. Admin. v. American Fed'n of Gov't Employees, 48 F.L.R.A. 1348, 1354 (1994). Under IRS, Fresno Serv. Ctr. v. FLRA, 706 F.2d 1019, 1024 (9th Cir. 1983), [*5] "grievances" within the meaning of Section 7114(a)(2)(A) do not include Cano's complaints because they were brought pursuant to EEOC procedures, which are "discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7114 [is] directed." The fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure also suggests that these claims are not "grievances." See id. Because the January 19 meeting did not concern "grievances" within the meaning of Section 7114, the meeting did not satisfy the fourth element of Section 7114. The union therefore had no right of representation at the meeting. As such, Luke did not violate Section 7114 when it failed to give the union notice of the January 19 meeting.

REVERSED.

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[56] Section 7114(a) of the Labor Statute provides in relevant part:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -- (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance . . . .
> 5 U.S.C. § 7114 (1998).

DEPARTMENT OF THE AIR FORCE, 436TH AIRLIFT WING, DOVER AIR FORCE BASE, PETITIONER v. FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1709, INTERVENOR FOR RESPONDENT

No. 01-1373

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

354 U.S. App. D.C. 315; 316 F.3d 280; 2003 U.S. App. LEXIS 644; 171 L.R.R.M. 2774; 90 Fair Empl. Prac. Cas. (BNA) 1253

October 10, 2002, Argued
January 17, 2003, Decided

DISPOSITION: Air Force's petition for review denied and FLRA's cross-application for enforcement granted.

CASE SUMMARY:

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.S. § 7114*(a)(2)(A). The FLRA sought enforcement of its order. The Air Force petitioned for review.

OVERVIEW: The Air Force argued an EEO complaint was not a "grievance" under Federal Service Labor-Management Relations Act, *5 U.S.C.S. § 7103*(a)(9) and, thus, it did not trigger the union's formal discussion rights under *5 U.S.C.S. § 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.

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Title VIILabor & Employment Law > Discrimination > Federal Employees

[HN1] The 1972 amendments to Title VII of the Civil Rights Act extend coverage of the Act to include the employment practices of the federal government. *42 U.S.C.S. § 2000e-16* (2000). The authority for enforcing the Civil Rights Act resides with the Equal Employment Opportunity Commission (EEOC). *42 U.S.C.S. § 2000e-4* (2000).

Civil Procedure > Alternative Dispute Resolution > Judicial ReviewLabor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies

[HN2] Under Equal Employment Opportunity Commission (EEOC) regulations, an employee is required to attempt to resolve his complaint on an informal basis (e.g., precomplaint counseling) before filing a formal complaint. Pursuant to the federal sector EEO program, agencies are responsible for investigating complaints filed against them by their employees. *29 C.F.R. § 1614.108(a)* (2002). Mediation is often available in appropriate cases to assist the parties in resolving their disputes. The Alternative Dispute Resolution Act is found at *5 U.S.C.S. § 571* et seq. (2000) (ADR Act). EEOC regulations encourage agencies to settle EEO cases. They are encouraged to incorporate alternative dispute resolution ADR

techniques into their investigative efforts in order to promote early resolution of disputes. *29 C.F.R. § 1614.108(b)*. They are instructed to make reasonable efforts to voluntarily settle disputes as early as possible. *29 C.F.R. § 1614.603*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution
[HN3] A grievance is defined as any complaint by any employee concerning any matter relating to the employment of the employee. *5 U.S.C.S. § 7103*(a)(9). A grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures.

Administrative Law > Judicial Review > Standards of Review > Standards GenerallyGovernments > Legislation > Interpretation
[HN4] In interpreting an agency's enabling or organic statute, courts employ traditional tools of statutory construction to determine whether Congress has directly spoken to the precise question at issue. Courts must give effect to the unambiguously expressed intent of Congress; if the statute is unambiguous on the question at issue, the inquiry ends there. (Chevron step one). Where the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (Chevron step two). The United States Supreme Court has stated that the Federal Labor Relations Authority (FLRA) is entitled to considerable deference when it exercises its special function of applying the general provisions of the Federal Service Labor-Management Relations Act, *5 U.S.C.S. § 7101* et seq. to the complexities of federal labor relations.

Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN5] A union has a right to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN6] *5 U.S.C.S. § 7114*(a)(2)(A) provides that an exclusive representative has the right to be present at any formal discussion of a grievance between management and a bargaining unit employee.

Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN7] A direct conflict between the rights of an exclusive representative under *5 U.S.C.S. § 7114*(a)(2)(A) and the rights of an employee victim of discrimination should presumably be resolved in favor of the latter.

Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN8] Neither the Alternative Dispute Resolution Act, *5 U.S.C.S. § 574*(a) & (b) nor the Privacy Act, *5 U.S.C.S. § 552a,* creates a conflict (much less a direct conflict) with *5 U.S.C.S. § 7114*(a)(2)(A).

COUNSEL: [1]** Sandra Wien Simon, Attorney, U.S. Department of Justice, argued the cause for petitioner. With her on the briefs was William Kanter, Deputy Director.

David M. Smith, Solicitor, Federal Labor Relations Authority, argued the cause for respondent. With him on the brief were William R. Tobey, Deputy Solicitor, and James F. Blandford, Attorney.

Kevin M. Grile argued the cause for intervenor. With him on the brief were Mark D. Roth and Charles A. Hobbie.

JUDGES: Before: SENTELLE, ROGERS and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge SENTELLE.

OPINIONBY: SENTELLE

OPINION:

[*281] On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

SENTELLE, *Circuit Judge*: The Department of the Air Force, 436th Airlift Wing, Dover Air Force Base ("Air Force") petitions for review of an order from the Federal Labor Relations Authority ("FLRA") concluding that the Air Force 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 the labor union of which the employee is a member notice **[**2]** and an opportunity to be present pursuant to *5 U.S.C. § 7114*(a)(2)(A) (2000). The FLRA seeks enforcement of its order. The Air Force argues that an EEO complaint is not a "grievance" under section 7103(a)(9) and, thus, that it does not trigger the Union's formal discussion rights under section 7114(a)(2)(A). The Air Force also argues that the FLRA's interpretation of section 7114(a)(2)(A) is impermissible, urging us to

adopt the reasoning of the Ninth Circuit in *IRS, Fresno Service Center, Fresno, Calif. v. FLRA, 706 F.2d 1019 (9th Cir. 1983).* Because we agree with the FLRA that its interpretation is permissible, we deny the Air Force's petition for review and grant the FLRA's cross-application for enforcement of its order.

I

[HN1] The 1972 amendments to Title VII of the Civil Rights Act extend coverage of the Act to include the employment practices of the federal government. Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972) (codified as amended at *42 U.S.C. § 2000e-16* (2000)). The authority for enforcing the Civil Rights Act resides with the Equal Employment Opportunity Commission ("EEOC"). *42 U.S.C. § 2000e-4* (2000). **[**3]**

[HN2] Under EEOC regulations, an employee is required to attempt to resolve his complaint on an informal basis (e.g., precomplaint counseling) before filing a formal complaint. Pursuant to the federal sector EEO program, agencies are responsible for investigating complaints filed against them by their employees. *29 C.F.R. § 1614.108(a)* (2002). Mediation is often available in appropriate cases to assist the parties in resolving their disputes. In this case, the Air Force had a contract with Resolution Group to provide mediation services. The contract provides that Resolution Group will provide its services pursuant to the Alternative Dispute Resolution Act, *5 U.S.C. § 571 et seq*. (2000) ("ADR Act").

EEOC regulations encourage agencies to settle EEO cases. They are encouraged to "incorporate alternative dispute resolution [ADR] techniques into their investigative efforts" in order to promote early resolution of disputes. *29 C.F.R. § 1614.108(b)*. They are instructed to make "reasonable efforts" to voluntarily settle disputes as early as possible. *29 C.F.R. § 1614.603*. **[**4]**

EEOC regulations provide that when a complaint of discrimination is covered by a collective-bargaining agreement ("CBA") that permits such complaints to be raised in a negotiated grievance procedure, the person filing the complaint "must elect to raise the matter under either part 1614 or **[*282]** the negotiated grievance procedure, but not both." *29 C.F.R. § 1614.301(a)*. On the other hand, "when a person is not covered by a [CBA] that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under [EEOC regulations part 1614]." *29 C.F.R. § 1614.301(b)*.

Section 1614.109(e) provides that attendance at hearings is limited to those with direct knowledge relating to the complaint. Furthermore, "hearings are part of the investigative process and are thus closed to the public." *29 C.F.R. § 1614.109(e)*.

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 **[**5]** by part 1614 of EEOC regulations. EEOC regulations and MD 110 require that all agencies establish an ADR program to be utilized during the pre-complaint process as well as during the formal complaint process. *29 C.F.R. § 1614.102(b)(2)*; MD 110, Ch. 3, § I.

MD 110 also provides that agencies must be mindful of the information disclosure prohibitions imposed by the Privacy Act, *5 U.S.C. § 552a* (2000). Pre- and post-complaint information is contained in a system of records that are subject to the Privacy Act. This information "cannot be disclosed to a union unless the complaining party elects union representation or gives his/her written consent." MD 110, Ch. 3, § II(A)(6).

Confidentiality is an essential component to the success of agency ADR proceedings. MD 110, Ch. 3, § VII(A)(3).

> Parties who know that their 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 ADR information.

[6]** *Id.* Agencies are encouraged to issue their own written policies to protect the confidentiality of ADR proceedings. *Id.*

The Federal Service Labor-Management Relations Act, *5 U.S.C. § 7101 et seq*. (the "Act"), provides a general framework for regulating labor-management relations for the federal government. The Act provides that CBAs shall contain procedures for the settlement of grievances. *5 U.S.C. § 7121*(a)(1). However, the parties to a CBA can exclude any subject from the coverage of the CBA and its grievance procedures. *Id.*

The Act regulates the manner in which CBAs are negotiated as well as the manner in which a bargaining unit employee may challenge adverse personnel actions. Section 7114 of the Act defines the right of representation of the employees in the grievance process. It provides that

an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -

> any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices **[**7]** or other general condition of employment.

5 U.S.C. § 7114(a)(2). Section 7103(a)(9) defines what constitutes a "grievance."

"Grievance" means any complaint -

> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> **[*283]** (C) by an employee, labor organization, or agency concerning -
>
> (i) the effect or interpretation, or a claim of breach, of a [CBA]; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

5 U.S.C. § 7103(a)(9).

The matters to be processed under the CBA's grievance procedures are expressly limited by section 7121(d) of the Act, which preserves the employee's right to proceed with a discrimination claim through existing statutory schemes. Section 7121(d), similarly to part 1614 of EEOC regulations, provides for the aggrieved employee to elect his means of seeking relief. If an "aggrieved employee" is affected by a prohibited personnel practice under *5 U.S.C. § 2302* (b)(1) (2000) **[**8]** (incorporating the Civil Rights Act) that also falls within the coverage of the negotiated grievance procedure, the employee "may raise the matter under a statutory procedure or the negotiated procedure, but not both." *5 U.S.C. § 7121*(d). Section 7121(d) notes that selection of the negotiated grievance procedure does not preclude the aggrieved employee from requesting EEOC review of a final decision in a matter "involving a complaint of discrimination of the type prohibited by any law administered by the [EEOC]." *5 U.S.C. § 7121*(d). Thus, section 7121(d) provides for alternative avenues of relief, and the EEOC has final review authority over any decision resulting from the grievance procedure involving discrimination within the EEOC's jurisdiction.

Elizey Jones, Jr., a member of the bargaining unit of employees at Dover AFB, filed a formal EEO complaint of discrimination pursuant to part 1614 of the EEOC regulations in November of 1999 in connection with a suspension that had been imposed upon him. Jones did not file a complaint pursuant to the CBA grievance procedure because the CBA explicitly excludes claims of discrimination **[**9]** from the grievance procedure. Labor-Management Contract between Dover Air Force Base, Delaware and Local 1709, AFGE at Art. 22, § 3 ("The negotiated Grievance procedures will not cover/pertain to grievances or appeals concerning ... EEO complaints.").

Jones requested that the Air Force initiate mediation of his complaint pursuant to EEOC regulations. The Air Force referred this request to the Resolution Group. Kathy Fragnoli, owner of the Resolution Group, was assigned to mediate the dispute.

Prior to the mediation, Jones and the agency representative, Captain Rockenbach, signed a confidentiality agreement in order to preserve the confidentiality of the mediation. On January 18, 2000, mediator Fragnoli, Jones, and Rockenbach participated in a mediation proceeding for approximately six hours. About 20% of the time was spent in joint sessions, the rest in individual caucuses. The parties failed to reach a settlement. Jones' union, Local 1709 of the American Federation of Government Employees, was neither notified of, nor given the opportunity to attend, the mediation.

Local 1709 filed an unfair labor practice complaint with the FLRA, and a hearing was held before Administrative Law **[**10]** Judge Garvin Lee Oliver (the "ALJ"). The ALJ concluded that the mediation proceedings constituted a formal discussion within the meaning of section 7114(a)(2)(A) of the Act and that the Air Force violated that section by failing to provide Local 1709 notice and an opportunity to be represented at the mediation. The ALJ found that the mediation concerned a grievance within the meaning of section 7114(a)(2)(A), relying on an FLRA decision that formal EEO **[*284]** complaints are grievances within section 7114(a)(2)(A) notwithstanding a negotiated grievance procedure that excludes discrimination complaints. *See Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev'd, 208 F.3d 221 (9th Cir. 1999)* (Table). The ALJ also concluded that the presence of a union representative at the mediation of an EEO complaint

would not conflict with EEOC regulations or the ADR Act.

The Air Force filed exceptions to the decision of the ALJ. The FLRA agreed with the ALJ that the Air Force violated the Act by failing to provide Local 1709 with notice and an opportunity to be heard. The FLRA found that the mediation concerned a grievance. In doing so, the FLRA focused on the language **[**11]** of section 7103(a)(9) which states that a grievance is "any complaint ... by any employee concerning *any* matter relating to the employment of the employee." *5 U.S.C. § 7103*(a)(9) (emphasis added). The FLRA found that this broad definition included *any* employment-related complaint, regardless of the forum chosen.

The FLRA rejected the Ninth Circuit's determination that the formal discussion right does not apply during EEOC proceedings because those complaints are "discrete and separate from the grievance process to which *5 U.S.C. § § 7103* and 7114 are directed." *IRS Fresno, 706 F.2d at 1024.* The FLRA also rejected the Air Force's argument that section 7121 provides a basis for limiting the definition of grievance. The FLRA relied on this Court's decision in *National Treasury Employees Union v. FLRA, 249 U.S. App. D.C. 212, 774 F.2d 1181 (D.C. Cir. 1985)* ("*NTEU*"), in which this Court held that section 7121 provides that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures. *Id.* at 1187. The **[**12]** FLRA, after reviewing the legislative history of the Act, concluded that the term grievance should not be limited to matters covered by a negotiated grievance procedure. Moreover, the FLRA held that to the extent the legislative history supports a narrower definition of grievance, it does so only with respect to section 7121, not the formal discussion right provisions of section 7114.

The FLRA rejected the Air Force's arguments that unions have no institutional interest in the processing of EEO complaints. The FLRA stated that unions have an interest in how such complaints are resolved and that their interest does not depend on the forum in which the employee files his complaint. The FLRA, citing *Department of Veterans Affairs v. FLRA, 3 F.3d 1386, 1390 (10th Cir. 1993),* noted that the resolution of one individual complaint may bear on the rights of other bargaining unit employees.

The FLRA also rejected the Air Force's argument that the exclusion of EEO disputes from the negotiated grievance procedure amounts to a waiver of any rights Local 1709 has with respect to such matters. The FLRA remarked that Local 1709 may have excluded these matters simply to avoid some **[**13]** of the expenses related to processing EEO grievances.

The FLRA found no conflict between Local 1709's formal discussion right and EEOC regulations or the ADR Act. The FLRA found no EEOC regulation precluding union attendance. With respect to the ADR Act, the FLRA found that Local 1709 was a party under the ADR Act because it was "entitled as of right to be admitted," *5 U.S.C. § 551*(3), pursuant to its formal discussion rights under section 7114(a)(2)(A) of the Act. In the alternative, the FLRA ruled that the ADR Act contemplates the attendance and participation of "nonparty participants." *5 U.S.C. § 574*(a)(1), (e). Lastly, the FLRA **[*285]** dismissed the Air Force's remaining arguments as conjectural. The Air Force had cited potential problems with the FLRA's rule that the FLRA thought purely hypothetical in the present case.

The Air Force petitioned for review here.

II

Section 7103(a)(9) [HN3] defines "grievance" as "any complaint ... by any employee concerning any matter relating to the employment of the employee." *5 U.S.C. § 7103*(a)(9). Although the Air Force contends that the EEO proceeding initiated by Jones is not a grievance **[**14]** within the meaning of section 7103(a)(9), our decision in *NTEU* demonstrates otherwise. *See 774 F.2d at 1186-87* (holding that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures). The Air Force suggests that *NTEU* is distinguishable because it involved a Merit Systems Protection Board ("MSPB") proceeding rather than an EEO proceeding; however, our analysis in *NTEU* relied upon the text, structure, and legislative history of the Act and did not rest on the type of grievance in question. *See 774 F.2d at 1185-88.* We find no reason to distinguish *NTEU*; accordingly, we will read the term "grievance" as we did in that case.

Because the present case involves a "grievance" as defined in section 7103, Local 1709's section 7114 formal discussion rights are triggered, and we turn to the issue of whether the FLRA's construction of section 7114(a)(2)(A) passes *Chevron* muster. [HN4] In interpreting an agency's enabling or organic statute, we "employ[ ] traditional tools of statutory construction" to determine "whether Congress has directly spoken **[**15]** to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* We "must give effect to the unambiguously expressed intent of Congress;" if the statute is unambiguous on the question at issue, our inquiry ends there. *Id. at 842-43* (*Chevron* step one). Where "the statute is silent or ambiguous with

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id. at 843* (*Chevron* step two). The Supreme Court has stated that the FLRA is entitled to "considerable deference when it exercises its special function of applying the general provisions of the [Act] to the complexities of federal labor relations." *National Fed'n of Fed. Employees, Local 1309 v. Dep't of the Interior, 526 U.S. 86, 99, 143 L. Ed. 2d 171, 119 S. Ct. 1003 (1999)* (quotation omitted).

Section 7114(a)(2)(A) provides that [HN5] a union has a right to be represented at "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning **[**16]** any grievance or any personnel policy or practices or other general condition of employment." *5 U.S.C. § 7114*(a)(2)(A). The FLRA has construed this language as providing Local 1709 the right to have a union representative present at the mediation of a formal EEO complaint filed by Jones, one of Local 1709's members.

The language of section 7114(a)(2)(A) is quite broad. Because it does not yield a clear and unambiguous interpretation, we move past step one to step two of the *Chevron* inquiry. The FLRA's construction is a natural reading of the broad statutory language. In addition, the FLRA's construction is supported by our decision in *NTEU. 774 F.2d at 1189* [HN6] (holding that section 7114(a)(2)(A) provides **[*286]** "that an exclusive representative has the right to be present at *any* formal discussion of a grievance between management and a bargaining unit employee"). Nevertheless, the Air Force argues that the FLRA's construction is impermissible, urging the Court to follow the Ninth Circuit's reading of section 7114(a)(2)(A) in *IRS Fresno, 706 F.2d 1019.* In that case, the Ninth Circuit held that a pre-complaint conciliation conference **[**17]** was not a grievance, explaining that EEOC procedures "are not controlled by [section] 7114(a)(2)(A) because they are discrete and separate from the grievance process to which [sections] 7103 and 7114 are directed." *IRS Fresno, 706 F.2d at 1024.* The problem with this argument is that we previously disagreed with the Ninth Circuit's narrow reading of section 7114(a)(2)(A). *NTEU, 774 F.2d at 1188.* Furthermore, as we pointed out in *NTEU*, *IRS Fresno* appears "to be based primarily on its conclusion that the precomplaint conference did not constitute a 'formal' discussion" rather than on its brief analysis of the grievance issue. *Id.*

As it did with the grievance issue, the Air Force attempts to distinguish *NTEU* on the grounds that EEO proceedings utilized by Jones here are a different vehicle than MSPB proceedings utilized in *NTEU*. The Air Force notes that the Ninth Circuit has treated EEO proceedings and MSPB proceedings differently. *Compare IRS Fresno, 706 F.2d 1019* (finding no formal discussion right in EEO proceeding) *with Dep't of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526 (9th Cir. 1994)* **[**18]** (finding a formal discussion right in MSPB proceeding). However, the Ninth Circuit itself has noted that our reasoning in *NTEU*, rejecting the *IRS Fresno* analysis, is more persuasive than that court's own reasoning in *IRS Fresno*. *Veterans Affairs Med. Ctr., 16 F.3d at 1534 n.4.*

The Air Force also attempts to evade *NTEU* by emphasizing the primacy of an aggrieved employee's rights in the context of a discrimination claim. The Air Force notes that in *NTEU* we acknowledged in a footnote that "in the case of grievances arising out of alleged discrimination ..., Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former." *774 F.2d at 1189 n.12.* However, the point we made in footnote 12 of *NTEU* is that [HN7] "a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should ... presumably be resolved in favor of the latter." *Id.* Such a direct conflict is not present here.

The Air Force argues that there is a conflict **[**19]** between the FLRA's construction of section 7114(a)(2)(A) and the confidentiality protections of both sections of the ADR Act *(5 U.S.C. § 574*(a) & (b)) and the Privacy Act, *5 U.S.C. § 552a.* This argument fails because neither of the statutes cited by the Air Force prohibits union attendance at ADR proceedings. The provisions of the ADR Act cited by the Air Force concern only the confidentiality of communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding. *5 U.S.C. § 574.* n1 Similarly, the Privacy Act concerns the confidentiality of records rather than what parties may attend an ADR proceeding, *5 U.S.C. § 552a,* and this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation **[*287]** of confidential information in violation of the Privacy Act. In other words, [HN8] neither the ADR Act nor the Privacy Act creates a conflict (much less a direct conflict) with section 7114(a)(2)(A).

n1 It is not entirely clear whether the ADR Act is applicable in this case. The ADR Act by its terms is voluntary and merely supplements, rather than limits, other available ADR techniques. *5 U.S.C. § 572*(c).

[20]**

The Air Force also argues that the FLRA's construction of section 7114(a)(2)(A) is impermissible because of EEOC regulation *29 C.F.R. § 1614.109(e)*, which provides that attendance at agency hearings is "limited to persons determined by the administrative judge to have direct knowledge relating to the complaint." However, as the Air Force acknowledged at oral argument, this regulation says nothing about what happens at ADR proceedings.

Left without a statute or regulation as a hook, the Air Force attempts to hang its hat on an agency manual, MD 110. Section VII of Chapter 3 of MD 110 addresses what it refers to as ADR "core principles." It states: "Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution...." MD 110, Ch. 3, § VII(A)(3). The Air Force contends that union presence at ADR proceedings would undermine the confidentiality of the process. This argument amounts to nothing more than the Air Force's doubt that union representatives can keep confidential matters confidential. Union representatives are often in the position of having to maintain confidentiality. **[**21]** More importantly, even assuming that an inconsistency between an agency manual and a statute constitutes a conflict, the Air Force again fails to show a conflict with the FLRA's construction of section 7114(a)(2)(A).

It is important to note one other reason why there is no direct conflict in this case. As the Air Force conceded, there is no evidence that Jones (the employee) objected to union presence at the mediation proceeding. We do not foreclose the possibility that an employee's objection to union presence could create a "direct" conflict that should be resolved in favor of the employee as described in footnote 12 of *NTEU. 774 F.2d at 1189 n.12.* As there is no conflict present in the case before us, the FLRA's construction is permissible. Accordingly, the Air Force committed an unfair labor practice in failing to give Local 1709 notice of and the opportunity to be present at the mediation.

III

With support from our precedent in *NTEU, 774 F.2d at 1186-87,* we read section 7103(a)(9)'s broad definition of "grievance" as encompassing both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative **[**22]** statutory procedures. In addition, we find permissible the FLRA's construction of section 7114(a)(2)(A) that provides Local 1709 the right to have a union representative present at the mediation of a formal EEO complaint filed by a bargaining unit employee. For these reasons, we deny the Air Force's petition for review and grant the FLRA's cross-application for enforcement of its order.

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the General Counsel

5 Mar 03

MEMORANDUM FOR SAF/MRE
AF/DPPF

FROM: SAF/GCD

SUBJECT: Guidance for ADR Practitioners on Impact of *Dept. of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA* (D.C. Circuit, 17 Jan 03) on EEO Mediations

On 17 Jan 03, the D.C. Circuit Court of Appeals handed down its decision in *Dept. of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA*. The court ruled that the Air Force had committed an unfair labor practice when it conducted an EEO mediation session with a complainant, who was also a bargaining unit employee, without notifying the union or giving it an opportunity to attend the mediation. The court agreed with the FLRA that an EEO complaint is a "grievance" under the Federal Service Labor Management Relations Statute, and a mediation of that complaint is a "formal discussion" at which the union has a right to be present. The court's holding conflicts with an earlier decision by the Ninth Circuit Court of Appeals in a case arising out of Luke AFB, thus leaving the question unsettled for now. The Air Force has long maintained that EEO complaints are not "grievances" for purposes of the FSLMRS.

Relevance of this Decision to Air Force ADR Practitioners

In its decision the D.C. Circuit court rejected government arguments that allowing the union to attend EEO mediations would be inconsistent with the federal Administrative Dispute Resolution Act and would undermine confidentiality of ADR proceedings, saying that the ADR Act does not address union presence at ADR proceedings, nor is there any basis for assuming that the union cannot keep confidential matters confidential. The court speculated that its decision might have been different had the complainant objected to the union's presence, noting that such an objection could create a conflict that "should be resolved in favor of the employee." However, since there was no evidence the employee did object, that question went unanswered.

Impact of this Case on the Conduct of Air Force ADR Proceedings

ADR practitioners have asked about the impact of the *Dover* decision on ADR proceedings in EEO complaints or other workplace disputes that are outside the negotiated grievance procedure. The direct impact of *Dover* is relatively limited, but the indirect impact is unclear. The decision is binding only in the District of Columbia, where the D.C. Circuit court sits, thus affecting only Bolling AFB. Unions elsewhere may use the *Dover* decision to argue for similar participation in EEO mediations whenever the complainant is a member of the

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bargaining unit. Unless the request is made in the District of Columbia, however, the Air Force position continues to be that the union has no statutory right to attend an EEO mediation session.

Guidance to Air Force ADR Program Administrators and Third-Party Neutrals

Two fundamental principles underlying Air Force ADR policy and practice are *neutrality* and *impartiality*. Air Force personnel who administer ADR programs and serve as third party neutrals are bound to these principles. Union attendance at a mediation, or any other meeting of employee and management, is therefore an issue best left to the expertise of union officials and labor relations professionals. Accordingly, ADR program managers, intake personnel, and neutrals, are advised to refer all matters pertaining to union attendance at an ADR proceeding (other than as the employee's designated representative) to the servicing Labor Relations Officer and Staff Judge Advocate for resolution. If a union observer attempts to attend or indicates an intention to attend an ADR proceeding, the LRO, SJA, and ADR program manager shall coordinate with SAF/GCD the procedures for adequately safeguarding confidentiality of ADR communications before commencing the ADR proceeding.

Please disseminate this guidance to field units through appropriate functional channels. Questions regarding this guidance, or Air Force ADR practice in general, should be directed to SAF/GCD at DSN 227-0379, commercial (703) 697-0379. General questions regarding the *Dover* decision should be directed to the Air Force General Litigation Division, Employment Law Branch, or the Central Labor Law Office.

Joseph M. McDade, Jr.
Deputy General Counsel
(Dispute Resolution)

cc:
AFLSA/JACL (CLLO)
HQ AFMC/JAG

APPENDIX 24

Selected ADR Statute Provisions

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER IV. ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE
PROCESS

5 USC § 571 (1999)

§ 571. Definitions

For the purposes of this subchapter [*5 USCS §§ 571* et seq.], the term--
(1) "agency" has the same meaning as in section 551(1) of this title;
(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter [*5 USCS §§ 551* et seq.];
(3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;
(4) "award" means any decision by an arbitrator resolving the issues in controversy;
(5) "dispute resolution communication" means 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; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
(6) "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;
(7) "in confidence" means, with respect to information, that the information is provided--
(A) with the expressed intent of the source that it not be disclosed; or
(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
(A) between an agency and persons who would be substantially affected by the decision; or
(B) between persons who would be substantially affected by the decision;
(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
(10) "party" means--
(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

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5 USC § 572 (1999)

§ 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 USCS §§ 571* et seq.] are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

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5 USC § 573 (1999)

§ 573. Neutrals

(a) A neutral may be 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.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter [*5 USCS §§ 571* et seq.]. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall--

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

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5 USC § 574 (1999)

§ 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 Terms

ADR Attempt: An ADR Attempt occurs when an ADR technique is offered and the parties and management voluntarily agree to its use. 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.

Agency: Each authority 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; (D) the government of the District of Columbia.

Alternative Dispute Resolution (ADR): The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) defines ADR as any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, factfinding, minitrials, arbitration, and the use of ombuds, or any combination thereof. Sec. 4(b), 571(3). An ADR procedure is defined as one in which a neutral is appointed and specified parties participate. *Id*. 571(6). The Air Force ADR Program Office defines these terms as follows:

1. Facilitation: This is an unstructured and flexible process in which the parties are assisted by a third party neutral (not necessarily a certified mediator) in interest-based negotiations toward a resolution. The primary attribute of facilitation is that the neutral engages the parties in settlement negotiations, focusing on the use of interest-based negotiation techniques to resolve their dispute. Stated differently, the facilitator assists the parties in looking behind their legal positions to reveal their underlying needs, desires, and concerns in order to allow those considerations to be addressed in resolving an issue in controversy. The three essential elements of facilitation are:

a) A third-party neutral offers to facilitate a resolution to the dispute and neither party objects;

b) The neutral assists the parties in using interest-based negotiations to resolve their dispute; and

c) An informal oral agreement that resolves the matter is often all that is necessary for a successful facilitation. Some disputes, however, such as EEO complaints, require a written settlement.

Notwithstanding its informal nature, for facilitation to qualify as an "ADR procedure," the facilitator must be designated or selected as a "neutral," and accept the obligations of serving as a neutral, including adherence to the standards of conduct for neutrals in AFI 51-1201, ¶ 23.

2. Fact-finding/Early Neutral Evaluation: This is a structured process in which the parties seek the assistance of a subject matter expert to review the dispute and to provide an assessment of the likely outcome of the dispute. The primary attribute of these procedures is that the parties have selected an expert to provide them with a non-binding opinion regarding how an adjudicative body would likely resolve their dispute. The three essential elements of these procedures are:

a) The parties agree to use a subject matter expert to review their dispute;

b) The subject matter expert provides a written or oral report as to his/her findings, and the parties use this report to assist them in resolving their dispute; and

c) A formal written settlement agreement is not necessary for a successful resolution when using these procedures, but the matter must be resolved to be considered successful.

3. Mediation: This is a structured process in which the parties seek the assistance of a certified mediator to help them in resolving their issue in controversy. The primary attribute of mediation is a structured process in which the mediator assists the parties in using interest-based negotiation techniques to resolve their dispute, and the parties contemplate having separate and confidential caucuses with the certified mediator. The essential elements of mediation are:

a) The parties agree to use a certified mediator to resolve their dispute;
b) Certified mediator assists the parties in using interest-based negotiation techniques to resolve their dispute, and the parties contemplate meeting with the mediator in separate confidential caucuses; and
c) A formal written settlement agreement is required for Air Force mediations.

4. Mini-Trial: This process is not used to resolve civilian personnel disputes. Mini-trials are used extensively to resolve complex large-dollar acquisition contract disputes.

5. Ombuds: This process is similar to that of either conciliation or facilitation with one important difference: the third-party must be officially appointed ombudsperson in writing by the base, Field Operating Agency, or Direct Reporting Unit.

6. Other ADR*:* For example, if an organization employs Peer Review Panels in which a panel of several employees (or employees and managers) review facts, listen to arguments, and provide a non-binding decision on an issue in dispute, this process is considered other ADR. Alternatively, an organization may be employing a technique that is considered part of another agency's ADR program, such as the Federal Labor Relations Authority. In addition, a dispute may be resolved by the use of a Federal Court's ADR program. Some defining characteristics of "Other ADR" are as follows:

a) The technique employed involves the assistance of at least one third party and does not fit any of the categories defined in 1-5 above;

b) The technique employed is considered an ADR technique by the Equal Employment Opportunity Commission, Federal Labor Relations Authority, or the Merit System Protection Board; or

c) The technique employed is considered an ADR technique by a Federal Court.

Dispute: See *workplace dispute.*

Dispute resolution communication: 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 or arbitration award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

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.

***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.

In confidence: Information provided -- (A) with the expressed intent of the source that it not be disclosed; or (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.

Issue in controversy: An issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement -- (A) between an agency and persons who would be substantially affected by the decision; or (B) between persons who would be substantially affected by the decision.

Neutral: An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

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.

Qualified Mediator: An individual who has completed basic mediation training sanctioned by the Air Force ADR program or a contractor provided by SAF/GC.

Relief: The whole or a part of an agency -- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (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.

Workplace Dispute: A formal or informal claim or issue in controversy, arising out of an existing or prospective employment relationship between the Air Force and its civilian employees, applicants for employment, or military members, for which a remedial process is authorized by law, regulation or policy. A workplace dispute may be written or oral, and includes EEO complaints (formal and informal), employee grievances under a negotiated and agency grievance procedure, MSPB appeals, ULPs, and other undefined disputes arising out of the Air Force employment relationship.