

U.S. Department of Commerce
National Oceanic and Atmospheric
Administration

Alternative Dispute Resolution (ADR) Policy Guide

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I. PURPOSE

The purpose of this Guide is to provide guidance associated with the National Oceanic and Atmospheric Administration (NOAA) Order 202-715B, NOAA Alternative Dispute Resolution Program Policy. This Guide describes and implements NOAA's responsibilities and procedures for complying with the Administrative Dispute Resolution Act of 1996, Public Law 104-320. This Act encourages Federal agencies to use alternative dispute resolution (ADR) methods to avoid or resolve disputes. It also helps to support the NOAA's implementation of 29 CFR §1614, Federal Sector Equal Employment Opportunity, and 5 CFR §1201.22, which provides for ADR after an Agency issues an adverse action decision.

This Guide outlines methods by which disputes can be settled informally, within shorter time frames, and to the satisfaction of all parties. The primary method used by the NOAA is mediation. Mediation has proven to be a highly successful way of resolving workplace disputes. Most mediations lead to a durable settlement agreement, and most can be completed within a month of referral to the ADR Program. Other methods of conflict prevention and resolution, such as facilitated problem solving, conflict resolution, conflict coaching, and facilitated conversations are also available as needed.

When provisions of this Guide differ from changes in law, regulation, or Department of Commerce (DOC) Policy, the changes in law, regulation, or DOC Policy will apply.

II. APPLICABILITY

The purpose of the ADR Program is to help employees, supervisors, or managers at the NOAA reduce unproductive conflict as much as possible and resolve conflicts quickly so the mission of the agency can be accomplished as effectively and efficiently as possible.

The NOAA's ADR Program was developed by NOAA management and union representatives. The program uses mediation as an alternative to the NOAA's Equal Employment Opportunity (EEO) complaint process, negotiated grievance procedure, or the administrative grievance procedure, and as an addition to the Merit Systems Protection Board (MSPB) appeals process on adverse action decisions. It can also be used to resolve workplace disputes before they escalate to more formal processes.

The ADR methods are needed because use of the established appellate procedures often creates an adversarial posture that all parties find difficult to manage. In many disputes, regardless of the sources, poor communication contributes to polarization. Additionally, processing and investigating formal complaints is very expensive and time-consuming. Cost savings becomes increasingly important when budget and staff resources are limited.

Mediation is the NOAA's primary ADR method, offering all parties the opportunity to articulate their positions in a non-adversarial setting and to resolve their disputes with the help of a neutral third party. Mutually-agreed upon solutions increase the satisfaction and morale of all parties. Managers, supervisors, and employees enhance problem solving skills. Techniques learned can be used to prevent future conflict from disrupting the work environment. Early resolution of

grievances is cost effective and beneficial to both employees and management. Employees also retain their right to pursue the formal discrimination complaint process or grievance procedure if ADR is not achieved.

III. AUTHORITY

- A.** Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 34 Weekly Comp. Pres. Doc. 749 (May 1, 1998)
- B.** Administrative Dispute Resolution Act of 1996 (Public Law 104-320, amending Public Law 101-552 and Public Law 102-354)
- C.** 5 U.S.C. 571–584, Alternative Means of Dispute Resolution in the Administrative Process
- D.** 5 CFR § 1201.22, MSPB Filing an appeal and responses to appeals
- E.** 29 CFR § 1614, Federal Sector Equal Employment Opportunity

IV. COVERAGE

The provisions of this NOAA ADR Policy Guide apply to all NOAA Line and Staff Offices full-time and part-time employees nationwide who utilize ADR. Where provisions of this Guide differ from negotiated collective bargaining agreements, the provisions of the collective bargaining agreement apply.

V. DEFINITIONS

- A.** Action Plan – An action plan is a written document used in facilitated problem-solving. The parties involved will work with the facilitator to write an action plan agreeable to all parties involved. The action plan should include the main problem causing the workplace issue(s); identify the desired outcomes; specify the action(s) each individual will take to create a productive work environment. Anyone working for NOAA can request a facilitated problem-solving session.
- B.** ADR – The NOAA ADR Program uses two approaches for early intervention and dispute resolution:
 - 1. Mediation – A process in which a trained and neutral third party helps all parties in a dispute reach an informed and mutually acceptable settlement of the issues. Settlement agreements resulting from the mediation process are binding and enforceable. Mediation is the only ADR option for Equal Employment Opportunity (EEO)-related matters.
 - 2. Facilitated Problem Solving – A process using techniques to improve the flow of information in a meeting between parties in a dispute. Employees may participate voluntarily or may be directed to participate by a manager or supervisor. Unlike mediation, there is no legally binding written settlement agreement when a dispute has been resolved through facilitation. Once all or some of the issues addressed in a facilitated problem-solving session have been resolved, the parties write an action plan that is agreed to by all parties. Facilitation is never

appropriate for EEO-related matters.

- C. Facilitator – The facilitator focuses on procedural assistance and remains neutral to the topics under discussion and handles the structured process referred to as facilitated problem-solving. The facilitator does not make decisions for the parties or impose a resolution to the dispute. The facilitator does not serve as an arbitrator, judge, or advocate for any side in the dispute.
- D. Good Faith – An action (deed or word) with an honest and sincere intention. All mediation and facilitated problem solving participants are required to agree to participate in “good faith.” That is, they must agree to:
 - 1. Listen to all sides of a dispute;
 - 2. Explore their and the opposing sides’ interests;
 - 3. Not maintain a fixed negotiating position; and
 - 4. Help develop options that meet the interests of all parties.
- E. Initiator – The person who requests ADR services to help resolve a dispute.
- F. Mediator – A mediator serves as a trained neutral third party of the structured process referred to as mediation. The mediator helps the parties explore their interests and develop options towards a mutually satisfactory resolution of the issues. The mediator does not make decisions for the parties or impose a resolution to the dispute. The mediator does not serve as an arbitrator, judge, or advocate for any side in the dispute.
- G. Respondent – The person(s) with whom the Initiator seeks to negotiate with to resolve the issues in dispute.
- H. Settlement Agreement – When all or some of the issues in a dispute have been resolved to the mutual satisfaction of the parties, the agreements reached will be:
 - 1. Formally documented as a contract between the parties;
 - 2. Reviewed by the DOC Office of General Counsel’s (OGC) Employment and Labor Law Division (ELLD);
 - 3. Signed by the parties; and
 - 4. Reviewed and ratified by the OGC Employment and Labor Law Division, Office of Human Capital Services (OHCS), and the NOAA Office of Inclusion and Civil Rights (OICR), if the dispute is an EEO issue.

VI. POLICY

A. GENERAL

- 1. Mediation offers all parties the opportunity to articulate their positions in a non-adversarial setting and to resolve their disputes with a neutral third party.
- 2. The fundamental principle underlying the mediation process is self-determination. The parties must be free to craft a mutually acceptable resolution to their dispute. With the help of a structured process and the mediators, participants work through

- the solutions to their own problems and reach a conclusion or settlement which, by definition, must satisfy both sides.
3. Election of mediation as an alternative to more formal processes is voluntary for all parties to a dispute.
 4. Parties entering a mediation do so in good faith with the sincere expectation of resolving disputes. Settlement agreements resulting from the ADR process are binding and enforceable.
 5. The rights of all parties accorded by statutes will be fully protected. Employees retain their right to pursue the formal discrimination complaint process or grievance procedure if mediation is not successful.
 6. The ADR process is designed to assist parties in resolving disputes in the workplace. Any issue can be brought to mediation unless specifically excluded by law, rule, regulation, or collective bargaining agreement.
 7. Mediation is a confidential process, except when the mediator or NOAA personnel determines that there is a risk or threat of violence to self or others. All initial calls and consultations with the ADR Program are confidential. If mediation is elected the respondent will be informed about the request and both parties will be informed that the mediation is pending.
 8. When a settlement is reached, the agreement will be reviewed by the DOC OGC, the OHCS, and OICR (if the agreement involves EEO matters). The proceedings within the mediation sessions are confidential, and no notes or recordings may be taken from the session or used in further proceedings.
 9. Mediation is intended as an adjunct to formal grievance processes. When a person elects mediation, deadlines in the formal processes are either extended or suspended for the duration of the ADR process. For example, the pre-complaint processing period for EEO allegations is extended from 30 to 90 days. When a settlement is reached that resolves all or part of the issues in dispute, all or part of the more formal process is concluded. If no agreement is reached, then the formal process resumes from where it stopped to allow for the mediation.
 10. Facilitated problem-solving is a ADR approach used to resolve the underlying issues that prevent employees or teams from productive and attaining their goals.
Facilitated problem-solving:
 - a. Opens the lines of communications;
 - b. Helps to clarify misunderstandings;
 - c. Provides a safe setting to discuss sensitive issues;
 - d. Focus people on what is truly important to them; and
 - e. Encourage creative problem-solving.
 11. Proceedings before mediators are informal; therefore, rules of evidence shall not apply.
 12. Any materials presented to mediators will be returned to parties presenting the materials at the termination of the mediation. Mediators will destroy any notes they have made after the mediation is concluded.
 13. The parties in a dispute may consult and/or be represented by a representative of their choice.
 14. All parties, including representatives of NOAA employees, will be in a duty status during mediation.

15. There are many different mediation models in use. The primary model adopted for the NOAA ADR Program is an interest-based co-mediation model. However, flexibility is retained by the ADR Program Manager to authorize use of other mediation models on a case-by-case basis.
16. There are rare cases which NOAA considers inappropriate for mediation. Examples include cases involving sexual harassment or violence, and when:
 - a. Authoritative resolution of a matter is required in precedent-setting cases;
 - b. The matter in dispute has significant government policy implications; or
 - c. It is important to produce a full public record of the proceedings.
17. The ADR Program Manager will make determinations about whether or not a dispute is appropriate for mediation in consultation with the DOC OGC and the OICR.
18. The OHCS will answer all questions related to human resource matters and EEO concerns before and during mediations. The DOC OGC will be the final authority on matters obligating the agency.

B. RESPONSIBILITIES

1. Initiator shall:
 - a. Request mediation or facilitated problem-solving at the earliest possible time in the course of a dispute;
 - b. Report any allegations of discrimination to the NOAA's Office of Inclusion and Civil Rights Office or an EEO counselor within 45 calendar days of the alleged act(s) of discrimination, unless the issues are raised under the negotiated or administrative grievance process;
 - c. Raise issues under the negotiated or administrative grievance process within the time frames established in collective bargaining agreements or the administrative grievance procedure;
 - d. Upon receipt of an adverse action decision notice appealable to the MSPB, timely file with the MSPB any mutual election with the agency to resolve the dispute through ADR prior to timely filing an appeal (section 6.04 of the NAO 202-715B);
 - e. Cooperate in good faith with the terms set forth at the beginning of mediation or facilitated problem solving;
 - f. Agree, if the employee chooses mediation in lieu of EEO counseling or grievance processing, to comply with the terms of the ADR Program;
 - g. Inform the ADR Program Manager, or OICR (if EEO related), of any special accommodations (auxiliary aids, interpreters, etc.) are needed;
 - h. Maintain the confidentiality of the mediation process; and
 - i. Abide by the provisions of the settlement agreement after signatures and concurrences or action plan from the facilitated problem-solving.
2. Respondent shall:
 - a. Make an informed decision whether to participate in mediation or facilitated problem-solving after consultation with the ADR Program Manager or contact OICR (for EEO related issues), unless the Respondent's manager or supervisor requires participation

- in facilitated problem-solving. It is mandatory for managers and supervisors to participate in EEO-related mediations, if appropriate;
- b. Mediate in good faith, if mediation is elected;
 - c. Cooperate in good faith with the terms set forth at the beginning of mediation;
 - d. Maintain the confidentiality of the mediation process; and
 - e. Abide by the provisions of the settlement agreement after signatures and concurrences. A respondent making decisions on management's behalf must have the authority to speak for management or be able to contact an upper-level decision-maker, as necessary.
3. Manager or Supervisor shall:
- a. Encourage the use of ADR services to resolve workplace disputes;
 - b. Participate in ADR when requested by the Initiator;
 - c. Request mediation or other dispute prevention or resolution services at the earliest possible time in a conflict;
 - d. Authorize duty time for ADR participants;
 - e. Seek guidance from ADR Program Manager, OICR, OGC, and OHCS as needed;
 - f. Consult with the NOAA OICR for EEO-related issues if there are concerns with the mandatory participation of managers or supervisors;
 - g. Ensure, prior to all discussions involving bargaining unit employees, that the appropriate labor union representative(s) are provided with notice and the opportunity to attend and participate in mediation discussions;
 - h. Authorize funds for mediators, facilitators and any necessary accommodations for participants with disabilities;
 - i. Provide and arrange for administrative services for mediations, and facilitated problem-solving sessions, such as meeting space and access to equipment (virtual meeting); and
 - j. Maintain the confidentiality of the mediation process.
4. Mediator or Facilitator shall:
- a. Serve as a neutral third party trained in dispute resolution;
 - b. Assist parties in reaching mutually-agreed upon resolutions to disputes;
 - c. Terminate mediation when it becomes apparent that continued efforts to resolve the matter through the mediation process will be unsuccessful;
 - d. Advise all participants of the mediation and facilitated problem-solving regarding the process, rules of confidentiality, and terms;
 - e. Ensure disputing parties understand the mediator and facilitator has no authority to make decisions or is acting as an advocate for any party;
 - f. Maintain the confidentiality of the mediation and facilitated problem-solving process;
 - g. Consult with appropriate officials, as needed, for technical assistance to clarify issues or resolve concerns;
 - h. Assist disputants in drafting the mutually acceptable Settlement Agreement or action plan;
 - i. Use the EEO template developed by the NOAA OICR and the DOC OGC for

- all agreements involving EEO allegations;
 - j. Forward the draft Settlement Agreement to DOC OGC for preliminary clearance or clarification and revision, if necessary;
 - k. Obtain signatures from disputants to cleared and/or revised settlement agreements;
 - l. Forward the Settlement Agreement to the ADR Program Manager or the OICR (for EEO-related agreements), which will route the agreement through servicing OHCS office and DOC OGC for final clearance;
 - m. Inform parties the Settlement Agreement will be binding when all signatures are obtained;
 - n. Ask each participant to complete an evaluation form at the end of the mediation;
 - o. Issue Termination of Mediation notices to disputants if mediation concludes with a partial settlement or no settlement. (When applicable, also provide the union and the servicing OHCS office a copy of the notice. The notice will inform employees of their right to pursue a formal EEO complaint, negotiated/administrative grievance or MSPB appeal on unresolved issues.); and
 - p. Agree to adhere to the applicable provisions of the Model Standards of Conduct for Mediators issued jointly by the American Arbitration Association, the American Bar Association, and the Society for Professionals in Dispute Resolution.
5. The ADR Program Manager engages in all mediation and facilitated problem-solving sessions (except EEO-related mediations). The ADR Program Manager shall:
- a. Oversee policy and program development, direction, and evaluation, on behalf of the OHCS Director in collaboration with OGC, OHCS staff, and bargaining unions representing NOAA employees;
 - b. Explain the mediation or facilitated problem-solving process fully and what is meant by confidentiality and good faith;
 - c. Consult with parties to determine whether the dispute is appropriate for mediation or facilitated problem-solving session;
 - d. Assuring the appropriate decision makers can participate in either the mediation or facilitated problem-solving session;
 - e. Maintain the confidentiality of all information provided in initial contacts except when there is a risk or threat of violence;
 - f. Assist initiators and respondents in making decisions about using mediation or other ADR services;
 - g. Explain the process of mediation and what is meant by confidentiality and good faith; and
 - h. Process all requests for mediation or facilitated problem-solving (except for EEO cases), with the Initiator's permission, by:
 - (1) Contacting the Initiator and Respondent(s);
 - (2) Notifying the Respondent(s) of purpose of requested mediation or facilitated problem-solving session,
 - (3) Identifying the appropriate participants for mediation,
 - (4) Assuring the appropriate decision makers can participate in either the mediation or facilitated problem-solving session;
 - (5) Being available for consultation and ratification of decisions, and obtaining their

- voluntary agreements to mediation or action plan for facilitated problem-solving;
- (6) Informing the servicing OHCS office and the DOC OGC;
- (7) Scheduling the mediation;
- (8) Notifying the appropriate union if one of the mediation participants is a member of a bargaining unit;
- (9) Ensuring that administrative services, including place and time of mediation, adequate room set-up, virtual meeting set-up (e.g., Google Hangouts, Go to Meeting/Webinar), access to email, telephone, fax and any needed accommodations for participants with disabilities, are in place and communicated to mediators and participants;
- (10) Arranging for mediators from a pool of trained Federal Mediation and Conciliation Services mediators or supplemental community resources if needed, and ensuring they have all applicable NOAA forms and contact numbers prior to mediation;
- (11) Arranging for DOC OGC staff coverage for draft agreement review, and OHCS staff for telephone consultation.
- i. Ensure all mediators obtain DOC OGC review and clearance on draft settlement agreements and that all required revisions are made before parties agree to and sign the settlement agreement and mediators sign the settlement agreement (except for EEO cases);
- j. Ensure settlement agreements are reviewed and signed by the OHCS and the DOC OGC;
- k. Provide coaching and consultation on conflict management and prevention;
- l. Provide intervention and facilitation services as requested; and
- m. Maintain confidentiality of ADR files, contacts, and process.

6. The NOAA OICR shall:

- a. Engage with ADR only when they have a Counselee in the pre-complaint phase of the EEO process (when an allegation of discrimination in employment based on race, color, religion, sex, national origin, age, disability, retaliation, genetic information, or sexual orientation), the underlying issue is suitable for ADR, and they are offered and accept ADR.
- b. Oversee the program development and evaluation of all EEO-related mediation on behalf of the Office of the Deputy Under Secretary; and
- c. Conduct all actions outlined in section VI.B, item 5 b, c, g, and h above in accordance with internal OICR ADR procedures. Mediation is the only form of ADR used for EEO cases.

C. MEDIATION PROCEDURES

1. Employees may request mediation for:

- a. Administrative grievances;
- b. Negotiated grievances;
- c. EEO complaints;

- d. MSPB appeals; or
- e. Other workplace disputes.

Filing under formal appellate procedures is not a mandatory prerequisite before seeking mediation.

2. If mediation is requested, employees must follow the appropriate procedure from those listed below:
 - a. Administrative Grievances: Mediation is encouraged by the administrative grievance procedure (section 8 of DAO 202-771). Mediation may be requested at any point in either the informal or formal stages of the administrative grievance procedure but must be requested within the deadlines for filing an informal or formal grievance, whichever type of grievance and deadline is applicable.
 - b. Negotiated Grievances: Mediation may only be requested in accordance with the terms of the applicable collective bargaining agreement. If mediation is not addressed in the applicable collective bargaining agreement, the employee must proceed with the grievance procedure set forth in the collective bargaining agreement.
 - c. EEO Complaints: Employees may elect mediation at any time during the counseling or complaint processes. If an employee elects mediation during the informal counseling process, counseling will stop and the counselor will contact the OICR. If an employee elects mediation after a formal complaint is filed, the OICR will contact the DOC Civil Rights Office.
 - d. MSPB: Employees who wish to use mediation instead of filing an appeal with the MSPB should use the MSPB's Mediation Appeals Program. Information about the program may be found on the MSPB's website at: www.mspb.gov/appeals/mediationappeals.htm
 - e. Informal Workplace Disputes: Employees are encouraged to request mediation for workplace disputes for which there is no other forum, and/or where they feel mediation may be an effective approach for resolution by contacting the ADR Program Manager.
3. Expenses (e.g., travel and per diem) for mediators, conference room fees and expenses associated with accommodations for participants with disabilities will be paid by the Line or Staff Office where the request for ADR services originated.

VII. CONTACT INFORMATION

Employees who have comments, concerns, or questions regarding the NOAA Alternative Dispute Resolution Program should contact the ADR Program Manager at (816) 426-7819.

For additional policy information, contact the NOAA Office of Human Capital Services, Human Capital Policy Division, at (301) 628-1800.

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