



DEPARTMENT OF DEFENSE
DEFENSE MEDIA ACTIVITY
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PUBLIC AFFAIRS

DEFENSE MEDIA ACTIVITY

OPERATING INSTRUCTION

NUMBER: 20-02
August 28, 2015

SUBJECT: Alternative Dispute Resolution (ADR) Program

References: See Enclosure 1

1. **PURPOSE.** This Instruction establishes policy, provides guidance, assigns responsibilities, and outlines procedures for utilizing the program in accordance with "Title 5, USC, Part I, §§ 571-854" (Reference (a)).

1. APPLICABILITY

a. The provisions contained in this instruction apply to all DMA civilian and military personnel.

b. The ADR process covers most types of workplace disputes between individuals, as well as disputes between agencies or between DMA and non-federal entities.

2. **POLICY.** ADR techniques will be used as an alternative to litigation or formal administrative procedures to the maximum extent possible. The ADR process increases the opportunity to resolve a dispute prior to or during administrative procedures or litigation. The core principles of the ADR program are that it is voluntary, neutral, confidential, and enforceable. This process fosters teamwork and improves workplace relationships and communication. Managers must participate in ADR/mediation in good faith but are under no obligation to settle.

3. **RESPONSIBILITIES.** See Enclosure 2

4. **PROCEDURES.** See Enclosure 3

5. REPORTING REQUIREMENTS. None.

6. EFFECTIVE DATE. This instruction is effective immediately.


Ray B. Shepherd
Director

Enclosures:

1. References
2. Responsibilities
3. Procedures
4. Agreement to Mediate Form
5. Flowchart
6. Management Control Checklist

Glossary

ENCLOSURE 1

REFERENCES

- (a) Title 5, United States Code, Part I, §§571-584
- (b) Title 29, Code of Federal Regulations, Part 1614
- (c) DMA Operating Instruction 20-10, "Administrative Grievance System", May 21, 2012
- (d) DoD Directive 5145.5 Alternative Dispute Resolution, April 22, 1996 (current edition)

ENCLOSURE 2

RESPONSIBILITIES

1. Director, DMA. The Director, DMA:

a. Provides sufficient resources to ensure effective implementation and administration of the ADR Program.

b. Encourages increased use of ADR techniques throughout the agency.

2. ADR Program Manager. The ADR Program Manager:

a. Unless otherwise directed, will be the Director, Diversity Management and Equal Opportunity (DMEO) office. The Director, DMEO, may further delegate this function to a member of his or her staff, but if delegated, the Director will retain responsibility for oversight of the ADR Program Manager and any related programs or activities.

b. Serves as the DMA point of contact for all ADR matters, and receives all requests for mediation, fact-finding, or other methods of ADR.

c. Monitors and evaluates program execution.

d. Advises employees and management when ADR is appropriate to resolve disputes.

e. Ensures that all parties to the dispute receive information regarding their rights and responsibilities.

f. Obtains the services of a trained mediator/facilitator and/or fact-finder, as needed.

g. Contacts all parties involved in the ADR process.

h. Makes all administrative and logistical arrangements for ADR.

i. Ensures training and information is made available to all employees.

j. Maintains program data and provides statistical updates, as appropriate, to the Director, DMA, or designee, on the use of the ADR program.

k. Submits an annual ADR Report to the Equal Employment Opportunity Commission (EEOC) through DMA General Counsel (GC) to the Department of Defense Office of General Counsel (OGC).

3. GC. The General Counsel provides legal guidance and assistance to DMEO with respect to this program.

4. Director, Acquisition and Procurement. The Director, Acquisition and Procurement serves as the agency point of contact for all contractor and procurement-related disputes.

ENCLOSURE 3

PROCEDURES

1. Issues Covered

a. The ADR process can be used to resolve many matters of concern or dissatisfaction relating to employment as well as disputes between agencies or between DMA and non-federal entities.

b. Although ADR is beneficial in most instances, there are some situations where ADR is not appropriate. Parties will be counseled before the start of an ADR session on possible limitations. ADR will not be used for matters that affect important policy matters such as the health, safety, and/or security of employees. Other situations where ADR will not be used include when:

- (1) A definitive or authoritative resolution of the matter is required (e.g., a court decision);
- (2) The matter involves questions of significant government policy;
- (3) The matter significantly affects other parties not part of the same ADR proceeding;
- (4) A full public record of the proceeding is required;
- (5) There is a need for consistency in decisions and ADR would not likely reach consistent results; or

c. DMA requires continuing jurisdiction over the matter(s) in dispute.

2. How to Initiate ADR

a. An individual should contact the ADR Program Manager within 45 calendar days of the act, incident, or event that gave rise to the dispute or when the individual first became aware of the act, incident, or event.

b. During the initial interview, the ADR Program Manager will explain the purpose, scope, and applicability of DMA's program. The ADR Program Manager will (1) ascertain the issue(s) or matter(s) in dispute, (2) scope of the problem, (3) determine if the issue is appropriate for ADR, and (4) explain the various techniques available for use during ADR. Parties who agree to participate in the ADR program will be required to sign an Agreement to Mediate, Enclosure 4.

3. ADR and the Equal Employment Opportunity (EEO) Process

a. For matters involving allegations of discrimination, an individual must contact the

DMEQ office within 45 calendar days of the act, incident, or event that gave rise to the allegation or in the case of a personnel action within 45 calendar days of the effective date, in accordance with Title 29, Code of Federal Regulations, Part 1614 (Reference (b)).

b. When ADR is offered and the employee elects the ADR process in lieu of traditional EEO counseling, the ADR informal process shall not exceed 90 calendar days from the date of initial contact with the ADR Program Manager or an EEO Counselor. An election to proceed either through traditional EEO counseling or ADR is final and must be made in writing to the ADR Program Manager on the Agreement to Mediate form. If ADR is unsuccessful at the informal stage, the ADR Program Manager will ensure that the employee receives a Notice of Right to File a Formal Complaint and proceed through the traditional EEO complaint process.

4. ADR and the Administrative Grievance System (AGS) Process

a. For matters appropriate under the AGS, an individual may contact the ADR Program Manager or the Human Resources Employee Relations Specialist (ERS) within 15 calendar days of the act, incident, or event that gave rise to the issue. In accordance with DMA Operating Instruction 20-10, "Administrative Grievance System" (Reference (c)).

b. If the employee wishes to participate in ADR, he or she will be referred to the ADR Program Manager who will make all administrative and logistical arrangements for an ADR session.

c. If ADR is unsuccessful and the matter is not excluded under the AGS, the employee may file a formal grievance. A formal grievance must be in writing and filed with the ERS no later than 15 calendar days from the conclusion of the ADR process.

5. ADR and the Inspector General (IG) Process

If an employee contacts the ADR Program Manager concerning waste, fraud, abuse, whistle blowing, abuse of authority, or a substantial and specific danger to the public health and safety, the ADR Program Manager will refer the employee to the IG Office for assistance. Additionally, complaints of reprisal for making a complaint or disclosing information to an IG will be referred to the IG who will determine the appropriate procedures to resolve the dispute.

6. ADR and Procurement-Related Matters

If the ADR Program Manager is contacted concerning a procurement-related dispute, the ADR Program Manager will refer the individual to Director of Acquisition and Procurement for assistance.

7. Confidentiality

Parties to the ADR session must not voluntarily disclose or be required to disclose through discovery or compulsory process any dispute resolution communication or any communication provided in confidence, except if:

- a. All parties to the process, or a non-party who provided the communication, and the mediator, facilitator, or fact-finder consent in writing to the disclosure; or the communication has already been made public.
- b. The dispute resolution communication is required by statute to be made public, and no other person except the mediator, facilitator, or fact-finder is available to make the disclosure.
- c. A court determines that disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health and safety.
- d. The dispute resolution communication is relevant to determine 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.
- e. Either party communicates a threat of imminent physical harm.

8. General

- a. If a dispute is resolved during the ADR process, the resolution will be reduced to writing in a Resolution Agreement and signed by both parties. Each party to the Agreement will receive a copy once signed. The ADR Program Manager will maintain the original signed Agreement. The written Agreement will state clearly the terms of the resolution and identify the DMA official(s) responsible for its implementation.
- b. If the dispute is not resolved under the ADR program, the employee will be advised of further rights and avenues of redress, as appropriate.

9. Enforcement

a. Settlement Agreement Enforcement

(1) Agreements reached as the result of a mediation session are binding to the same extent as any settlement agreement is binding on the parties, as are the procedures to enforce such agreements. In EEO complaints, a complainant must contact the Director, DMEQ, within 30 calendar days of an alleged failure by DMA to comply with the terms of the settlement agreement. DMA's DMEQ then has 30 calendar days to issue a decision on whether DMA failed to implement the settlement. The complainant can then appeal DMA's decision on whether or not DMA failed to implement the settlement to the EEOC's Office of Federal Operation (OFO) within 30 calendar days, or if the agency failed to issue a decision, 35 calendar days after the complainant filed his/her allegation of noncompliance with the Director, DMEQ. If the EEOC finds failure, it may order compliance or it may order 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 chief mediator, ADR office conducting the mediation, or Chief Human Capital Office (CHCO), depending on the language for notification in the agreement.

(2) 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. Enforcement of terms of the agreement requires a delicate balance in order to not damage relations that 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 DMEO, CHCO and GC.

b. Breach of Settlement Agreement

(1) **Non-EEO Disputes** –If a party believes that the other party has breached the settlement agreement, he/she should report the breach to the ADR Program Manager within 30 calendar days of when the party knew or should have known of the alleged breach. The ADR Program Manager will investigate the allegations and, if appropriate, work with agency management to enforce the agreement.

(2) **EEO Disputes** –If a party believes that the other party has breached a settlement agreement that was reached during the EEO complaint process, the party should follow the procedures for breach of settlement agreements contained in Reference (b). These procedures require a complainant to notify the agency's Director, DMEO, in writing, of the alleged breach within 30 calendar days of when he/she knew or should have known of the breach. If the complainant is not satisfied with the agency's attempt to resolve the matter, he or she may file an appeal with the EEOC's OFO for a determination of whether the agency has complied with the terms of the settlement agreement.

ENCLOSURE 4

AGREEMENT TO MEDIATE

Defense Media Activity

Agreement to Mediate

Authority: 5 U.S.C. 301; 29 U.S.C. 209, 211, 217, 625; 44 U.S.C. 3101; 2 U.S.C. 1220 and EO 9397 (SSN)

Purpose: To investigate facts and circumstances surrounding reported situations involving issues associated with a dispute or an Equal Employment Opportunity claim.

Routine Use(s): To manage programs, produce reports, and control various aspects of program processes. Information may also be disclosed to the EEOC, or to another Federal Agency, including DoD, to carry out their legally authorized functions.

Disclosures: Voluntary, however, failure to furnish the information may delay the process.

This mediation is confidential. The parties, their representative(s), if any, and the mediator hereby agree to be bound by the contents of this agreement.

1. This is an Agreement by the parties and their representative(s), if any, to participate in good faith mediation efforts to resolve the issues in dispute.
2. By participating in this process, the parties admit neither guilt nor wrongdoing.
3. Mediation is a process that provides for a neutral third party, a mediator, to assist the parties in reaching a resolution to the issue in dispute. The mediator is active during the process but has no decision-making authority. The mediator does not represent either party. The mediator's role is to assist the parties in understanding their rights and the terms of any settlement agreement reached.
4. The mediator has the discretion to terminate the mediation at any time he or she believes the case is inappropriate for mediation or that an impasse has been reached.
5. Only those parties concerned with resolving the issue in dispute will be present. The employee must approve all attending participants.
6. Each party has the right to consult with an attorney or with a representative of their choosing before signing any resolution agreement.
7. By electing to pursue the issue in dispute through the Alternative Dispute Resolution Process, the parties do not waive their rights to pursue the issue through the Equal Employment Opportunity, the Administrative Grievance System, or the Inspector General process, or any other administrative or legal process if mediation is unsuccessful.
8. If mediation is successful, the employee agrees not to pursue the issue in dispute through any of the processes mentioned in the above paragraph.
9. The parties agree that any and all notes, records, documents, or recordings generated during mediation are confidential and shall not be disclosed in any pending or future action related to the subject matter of the mediation.
10. The parties agree not to attempt to compel the mediator's testimony against the other party.
11. The parties agree not to testify regarding any statements made in the mediation session.
12. The mediator may not testify or serve as a witness, consultant, expert, or provide any written documentation in any pending or future action related to the subject matter of the mediation, including those between persons not parties to the mediation.

13. Any concessions made by either party in an attempt to resolve the issue in dispute cannot be used against a party at a future time if resolution is unsuccessful.
14. Depending on the nature of the resolution agreement, it may be reviewed by representatives of the Office of Diversity Management and Equal Opportunity, Office of the Chief Human Capital Officer, Employee Relations, and/or the Office of General Counsel before being signed.

The parties agree and pledge to abide by the terms of this Agreement to Mediate.

Date

Participant's Signature

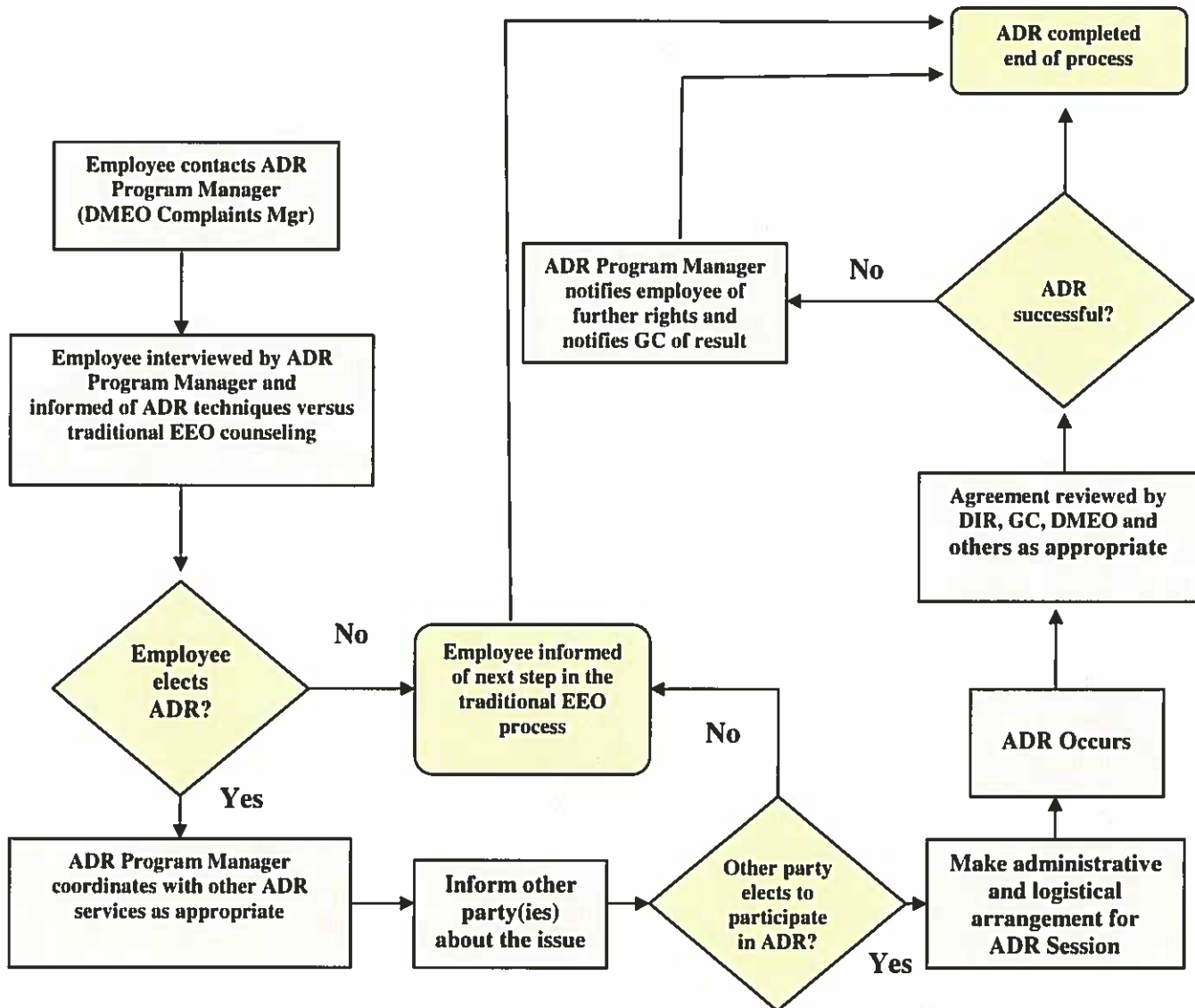
Date

Participant's Signature

**Agreement to Mediate
Personal Data Protected by the
Privacy Act of 1974 15 U.S.C.
552a DMA DME0**

ENCLOSURE 5

ADR PROCESS



ENCLOSURE 6

MANAGEMENT CONTROL CHECKLIST

1. Has the Director, DMEIO, made training and information on the ADR program available to all employees?
2. Is statistical and program data being maintained on the use of the ADR program?
3. Has the DMEIO submitted an annual report to the Equal Employment Opportunity Commission?
4. Has the DMEIO submitted an annual report to the Department of Defense Office of General Counsel in accordance with DoD Directive 5145.5 (Reference (d))?

GLOSSARY

PART I ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AGS	Administrative Grievance System
CHCO	Chief Human Capital Office
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
ERS	Employee Relations Specialist
GC	General Counsel
IG	Inspector General
OFO	Office of Federal Operation

PART II DEFINITIONS

These terms and their definitions are for the purpose of this operating instruction.

alternative dispute resolution. A spectrum of techniques used to resolve informal and/or formal issues in lieu of litigation in Federal court or through administrative proceedings. These techniques include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, or any combination thereof.

dispute. A controversy concerning a work place or employment problem, issue, or disagreement between two parties.

mediation. The intervention in a dispute or negotiation of an acceptable impartial and neutral third party who has no decision-making authority. The objective of this intervention is to assist the parties in reaching a mutually acceptable resolution of the issues in dispute.