

CHAPTER 19

ALTERNATIVE

DISPUTE

RESOLUTION

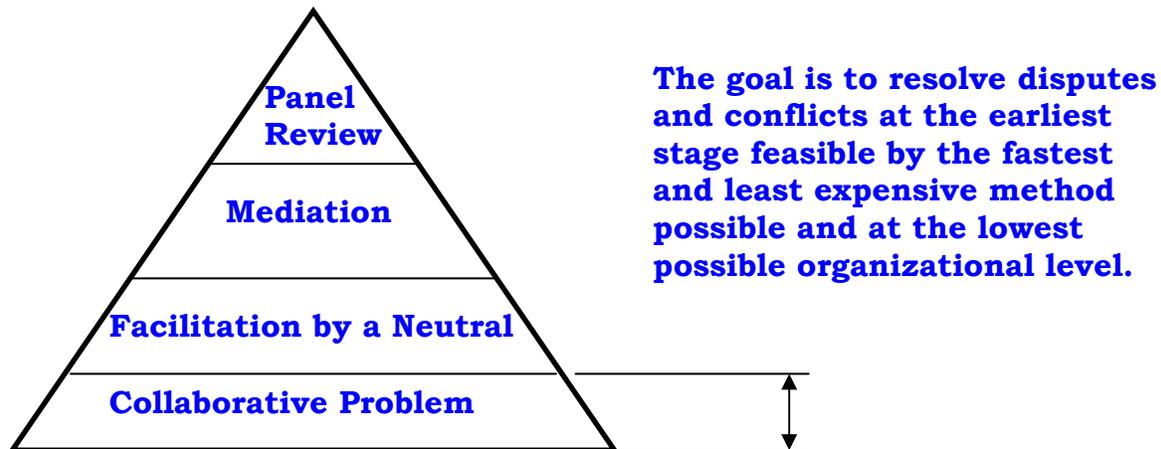
NOTE: This chapter should be read in conjunction with local activity instructions and with any negotiated agreements between your activity and an exclusively recognized labor organization. Contract language will take precedence over conflicting provisions in this manual. Areas of uncertainty should be discussed with the Human Resources Office.

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ALTERNATIVE DISPUTE RESOLUTION PROCESS

1. PURPOSE

This section explains how Alternative Dispute Resolution (ADR) can be used to resolve employment problems and/or workplace disputes which might otherwise be dealt with in grievance, EEO Complaint, or appeal procedures. Contact your HRO staff for details.



2. DEFINITIONS

ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR is a collection of collaborative methods for resolving disputes and problems outside the usual adversarial process of grievances and litigation.

ARBITRATION

The parties submit their difference to one or a panel of arbitrators who then make a decision in their dispute that may or may not be binding.

BINDING ARBITRATION

Involves the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision.

CONCILIATION

Attempt by a neutral party to reduce tensions and improve communications among the parties in an effort to get them to agree on a process for resolving their dispute.

COOPERATIVE PROBLEM SOLVING

One of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern.

DISPUTE PANELS

One or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information gaps, or resolve differences over data or facts.

EARLY NEUTRAL EVALUATION

Uses a neutral or impartial third party to provide a non-binding evaluation, in writing, which gives the parties involved an objective perspective on the strengths and weaknesses of their case.

FACILITATION

Involves the use of techniques to improve the flow of information in a meeting between parties to a dispute.

FACT FINDING

The use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a fact-finder in order to determine what the “facts” are in a dispute.

INTEREST-BASED PROBLEM SOLVING

A technique that creates effective solutions while improving the relationship between the parties.

MEDIATED ARBITRATION

A variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse.

MEDIATION

The intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority to help disputing parties reach an informed and mutually acceptable settlement of the issues.

NEGOTIATED RULEMAKING

Brings together representatives of various interest groups and a Federal agency to negotiate the text of a proposed rule.

NON-BINDING ARBITRATION

Involves presenting a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of an advisory or non-binding decision.

OMBUDSMEN

Individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and factfinding.

PARTNERING

Used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur.

PEER REVIEW

A problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision.

SETTLEMENT CONFERENCES

Involve a pre-trial conference conducted by a settlement judge or referee and attended by representatives for the opposing parties (and sometimes attended by the parties themselves) in order to reach a mutually acceptable settlement of the matter in dispute.

3. WHEN ADR SHOULD BE USED

ADR can be initiated any time during the dispute resolution process. All parties need to be in agreement on using the ADR process.

- Employee Grievances
- Employee to Employee Disputes
- Employee/Supervisor Disputes
- EEO Complaints
- Disciplinary Actions

4. PRINCIPLES OF CONFLICT RESOLUTION

See Appendix 19A Principles of Conflict Resolution for complete definitions.

- Think Before Reacting
- Listen Actively
- Assure Fair Process
- Attack the Problem
- Accept Responsibility
- Use Direct Communication
- Look for Interests
- Focus on the Future
- Options for Mutual Gain



5. ADR TECHNIQUES

a. ADR techniques can be used to settle settlements on a wide variety of issues, avoiding protracted adversarial proceedings. High settlement rates and timely workable resolutions have made use of ADR successful.

b. Commonly used ADR techniques

- Binding Arbitration
- Conciliation
- Cooperative Problem Solving
- Dispute Panels
- Early Neutral Evaluation
- Facilitation
- Factfinding

- Interest-based Problem Solving
 - Mediated Arbitration
 - Mediation (See Appendix 19B)
 - Mini-trials
 - Negotiated Rulemaking
 - Settlement Conferences
 - Non-binding Arbitration
 - Ombudsmen
 - Partnering
 - Peer Review
- c. Consult your HRO advisor to assist you in deciding the appropriate ADR technique(s) to use.

6. BENEFITS OF ADR

- Saves Time and Money
- Reduces Administrative Burdens
- Reduces Negative Impact on Morale and Productivity
- Improves Communications
- “Real-time” Response to the Issues
- Creative Solutions

APPENDIX 19A PRINCIPLES OF CONFLICT RESOLUTION

1. THINK BEFORE REACTING

The tendency in a conflict situation is to react immediately. After all, if we do not react we may lose our opportunity. In order to resolve conflict successfully it is important to think before we react—consider the options, weigh the possibilities. The same reaction is not appropriate for every conflict.

2. LISTEN ACTIVELY

Listening is the most important part of communication. If we do not hear what the other parties are communicating we cannot resolve a conflict. Active listening means not only listening to what another person is saying with words, but also to what is said by intonation and body language. The active-listening process also involves letting the speaker know that they have been heard. For example, “What I heard you say is....”.

3. ASSURE A FAIR PROCESS

The process for resolving a conflict is often as critical as the conflict itself. It is important to assure that the resolution method chosen as well as the process for affecting that method is fair to all parties to the conflict. Even the perception of unfairness can destroy a resolution.

4. ATTACK THE PROBLEM

Conflict is very emotional. When emotions are high, it is much easier to begin attacking the person on the other side than it is to solve the problem. The only way conflicts get resolved is when we attack the problem and not each other. What is the problem that lies behind the emotion? What are the causes instead of the symptoms?

5. ACCEPT RESPONSIBILITY

Every conflict has many sides and there is enough responsibility for everyone. Attempting to place blame only creates resentment and anger that heightens any existing conflict. In order to resolve a conflict we must accept our share of the responsibility and eliminate the concept of blame.

6. USE DIRECT COMMUNICATION

Say what we mean and mean what we say. Avoid hiding the ball by talking around a problem. The best way to accomplish this is to use “I-Messages”. With “I-Messages” we express our own wants, needs or concerns to the listener. “I-Messages” are a clear and non-threatening way of telling others what we want and how we feel. A “you-message” blames or criticizes the listener. It suggests that they are at fault.

7. LOOK FOR INTERESTS

Positions are usually easy to understand because we are taught to verbalize what we want. However if we are going to resolve conflict successfully we must uncover why we want something and what is really important about the issue in conflict. Remember to look for the true interests of all the parties to the conflict.

8. FOCUS ON THE FUTURE

In order to understand the conflict, it is important to understand the dynamics of the relationship, including the history of the relationship. However, in order to resolve the conflict, we must focus on the future. What do we want to do differently tomorrow?

9. OPTIONS FOR MUTUAL GAIN

Look for ways to assure that we all will be better off tomorrow than we are today. Our gain at the expense of someone else only prolongs conflict and prevents resolution

APPENDIX 19B MEDIATION OF WORKPLACE DISPUTES

1. BACKGROUND

Mediation is one of the most commonly used forms of alternate dispute resolution. This technique is used to reach settlements in a wide variety of issues, avoiding protracted adversarial proceedings. High settlement rates and timely workable solutions have made mediation an increasingly popular alternative. The distinguishing feature of mediation is that the mediator remains neutral while taking an active role in helping the parties to understand each other's positions and craft their own settlement. In employment situations, mediation has been used with success to resolve EEO complaints, co-worker disputes, supervisor/employee disputes, group disputes, grievances and appeals.

2. MEDIATION KEY FEATURES

- The mediator does not render any decision.
- Each disputing party may choose to reach a settlement or choose not to settle. If no settlement is reached, the issue may then be processed through the appropriate forum, e.g., grievance, EEO complaint, etc.
- The mediator guides the parties through a structured problem solving process designed to enhance communication and produce lasting settlements.
- The mediation process must be voluntary.
- The mediation session is confidential (unless the parties agree otherwise). No recording or stenographic record of the session is kept, and the mediator destroys any notes taken during the session. The mediator cannot be called to testify in any subsequent proceedings if the issues are not settled.
- Where adversarial forums tend to delay justice and deteriorate working relationships, mediation often results in quick resolutions with less workplace disruption and expense. This is especially useful where disputing parties must continue to work together, and a functioning working relationship is important.

3. SPECIFIC USES

By mutual consent of the parties, mediation may be utilized as an Alternative Dispute Resolution tool. Mediation may be offered by the employer or requested by an employee (or employee representative) at any stage of any dispute. By mutual agreement, timeframes for informal EEO complaint processing or grievance processing may be extended to give the parties time to attempt mediation while preserving an employee's right to complain or grieve should mediation fail. Mediation arrangements involving bargaining unit members should be cleared with their union representative in advance.

4. MEDIATOR SELECTION

- a. Qualified mediators are available from the following sources:

- 1) **The Human Resources Office.**

Trained, experienced mediators on the HRO staff are available on request, workload permitting. Use of an HRO mediator would not be suitable where one or both parties questions the mediator's ability to maintain neutrality.

2) Private Mediators.

Certified professional mediators are available for hire on an as-needed basis. The cost to an activity for mediation may be far less than the time, money, and disruption attendant to third party adjudicative processes.

3) Local Dispute Resolution Centers.

These state-chartered centers offer certified volunteer mediators for fees comparable to or less than professional mediators'.

4) The Federal Mediation and Conciliation Service.

Contact your HRO for information and assistance.

- b.** A team of two mediators often facilitates mediation sessions. A mixed gender team is advisable when gender issues are present in the conflict.
- c.** Activity managers should consult with their HRO field office when selecting a mediator (or mediation team). The HRO may be able to assist in locating area mediators with specific skills relating to the case at hand.

5. CONTRACTING FOR MEDIATION

- a.** A suggested source IDP contract (using DD Form 1149) should be initiated by the activity desiring the service. The paperwork can usually be hand carried through FISC for same day service when needed. A typical mediation may last 2–6 hours (sometimes conducted in more than one session) depending on the complexity of the issue(s) involved.
- b.** For purposes of making a cost estimate for the contract, the hourly rate for a mediation session should approximate the customary hourly billing rate for legal services in your area.

6. MEDIATION MODEL

Mediation's high success rate is due in equal part to the skill of the mediator(s) and the inherent structural efficacy of the mediation process itself. In order to assure maximum benefit from mediation, it is strongly suggested that the mediation model (format) set forth in Appendix 19C, or other tested model, be used by the mediator(s).

7. REPRESENTATION

As the presence of representatives may reduce the open exchange of thoughts, most mediators discourage their presence during the session. It is part of the mediator's job to assure a safe and balanced mediation environment free of coercion, intimidation, or domination.

8. SETTLEMENT AGREEMENTS

- a.** If the parties in mediation agree, a written, binding settlement agreement can be signed. Appendix 19D Mediation Agreement and Appendix 19E Settle Agreement may be reproduced and used to record settlement terms.
- b.** Agreements, or portions of agreements, which violate a government law, rule, or regulation, or a negotiated agreement, are not enforceable.
- c.** On occasion one or more parties to the dispute may desire to have their representative or subject matter expert review the settlement agreement prior to finalization.

**APPENDIX 19C
APPROVED MEDIATION MODEL**

1. Mediator's Opening Statement
 - Describe the mediation process
 - Describe roles of the participants
 - Set ground rules
 - Sign mediation agreement
 - Determine party to begin
2. Statements of the Disputants and Mediator Feedback
3. Disputants' Response to Each Other's Statement
4. Build Agenda
5. Negotiations
6. Caucus (if necessary)
7. Settlement Agreement

**APPENDIX 19D
MEDIATION AGREEMENT**

I understand that the mediation team assigned to this case is not serving as an advocate, attorney, or judge. Their only function is to act as neutral facilitators. Any agreements or decisions resulting from this mediation session are entered into voluntarily and by mutual acceptance of the disputing parties.

I agree to enter into this mediation in good faith. I will sincerely attempt to resolve the issues of this dispute, agree to cooperate with the mediation team assigned to this case, and give serious consideration to all suggestions made in regard to developing a realistic solution to the problem(s) at hand.

I understand and agree that mediation sessions are confidential settlement negotiations and that all offers, promises, conduct and statements, whether written or oral, made in the course of the proceedings are inadmissible in any investigation, litigation arbitration, or other dispute resolution process. No recording or stenographic record will be made of the mediation sessions(s). The parties agree not to subpoena or otherwise require any or all the mediation team to testify or produce records, notes, or work product in any future proceedings; however, information revealed in the mediation session is admissible in other proceedings (e.g., grievances, EEO complaints) if it is discoverable by some other means.

The following persons enter into this agreement:

_____	_____
Mediation Client	Date
_____	_____
Mediation Client	Date
_____	_____
Mediation Client	Date
_____	_____
Mediation Client	Date

**APPENDIX 19E
SETTLEMENT AGREEMENT**

WE _____

having participated in a mediation session(s) on _____
and being satisfied that we have reached a fair and reasonable settlement, hereby agree as follows:

WE intend the above agreement to be a legally binding and enforceable settlement contract.

DATED this ____ day of _____, 200__.
