

EEO MEDIATION



A Guide for Managers

U.S Department of Commerce
Office of Civil Rights



Employment discrimination disputes have traditionally been resolved through administrative complaint processes and law suits, but there are now new and different ways of resolving conflict -- ways that give more control over the outcome to the parties themselves. The term used to describe these new options is *alternative dispute resolution* (ADR).

At the Department of Commerce, EEO Mediation is the ADR process offered as an alternative to the EEO and Sexual Orientation Discrimination complaint processes. In this process, a neutral person, who is trained in mediation techniques, facilitates a meeting of the parties to help them reach a mutually acceptable solution to their dispute. Once the parties have worked out all the details, this solution is formalized in a settlement agreement and all necessary signatures are obtained. The dispute continues to be processed in the EEO or Sexual Orientation Discrimination complaint process until the agreement is finalized. Mediation is available in appropriate cases at all stages of the complaint processes -- from the informal pre-complaint process (EEO Counseling) up until the time a final decision is issued by the Department or the Equal Employment Opportunity Commission (EEOC).

You may be familiar with the use of mediation and other ADR techniques in many situations, such as family, school and consumer disputes. Mediation has been widely used because of its many benefits, including speed, cost savings, and the fact that it provides a forum that addresses both parties' interests.

This booklet describes the details of the Department of Commerce's EEO Mediation program and offers some tips on how best to prepare for mediation and use it effectively to resolve your disputes.

CONTENTS

Page 1



About EEO Mediation
Answers to Frequently Asked Questions

Page 4



What to Expect
Steps in the Mediation Process

Page 6



Getting Ready
How to Prepare for Mediation

Page 9



Getting to Agreement
Tips for Reaching Agreement

Page 11



Enforcing Agreements
The Employee's Rights if an Agreement is not Honored

ABOUT EEO MEDIATION

The Department of Commerce offers EEO Mediation -- a form of Alternative Dispute Resolution (ADR) - to employees as an alternative to the traditional EEO and Sexual Orientation Discrimination Processes. It is available throughout the complaint processes - from informal EEO Counseling up until the time that a final decision is rendered in the case by the EEOC or the Department. Employees who have raised allegations of employment discrimination based on race, color, sex, religion, national origin, disability, or sexual orientation; or related retaliation charges may elect to use EEO Mediation if their cases are appropriate.

EEO Mediation is an informal process in which a trained mediator -- a neutral third party -- meets with the employee and management representative, both as a group and on an individual basis, and assists them in reaching a voluntary, negotiated resolution of a charge of discrimination. Mediation gives the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement, and, ultimately, to incorporate those areas of agreements into a formal settlement agreement. A mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. Below are answers to some frequently asked questions about EEO Mediation:

Q. Who Can Use EEO Mediation?

Commerce employees who have raised a claim of discrimination or related retaliation may request EEO Mediation if their cases are appropriate for mediation. This request can be made at any time during the EEO process, whether in the informal pre-complaint process (EEO Counseling) or the formal complaint process.

Q. Is What I Say in Mediation Confidential?

Yes. The mediation process is strictly confidential. Information disclosed during mediation will not be revealed to anyone.

Q. How is a case settled in EEO Mediation?

The mediator has no authority to issue a decision. It is up to the parties themselves - with the assistance of the mediator - to work informally toward an agreement. Before an agreement is finalized, everyone whose authority is necessary in order to settle an agreement must sign off on the document. This includes officials from the Office of Human Resources and the Office of General Counsel.

Q. If the Parties are resolving the dispute themselves, why do they need a Mediator?

When people are emotionally involved in a situation, it can be difficult to remain calm and focus on reaching agreement. Mediators have training and experience in helping people to resolve their disputes by mutual agreement. The Mediator's job is to help the parties evaluate their goals and options and find a mutually satisfactory solution. Mediation is forward-looking; the goal is for all parties to work out a solution they can live with and trust. It focuses on solving problems, not uncovering the truth or imposing legal rules. This, of course, is a far different approach than the complaint process takes. In the formal complaint process, the decision maker looks back to

determine who was right and who was wrong, then imposes remedies if it determines that the complainant has proven discrimination.

Q. How can I get my claim into the EEO Mediation process?

In some cases, you may be offered an opportunity to mediate by your EEO Counselor, an EEO Officer or someone else in your Bureau EEO Office or the Office of Civil Rights. You may also ask to participate in mediation at any time during the process. To find out if your case is appropriate for mediation, contact Bonnie Worthy at 202/482-8121. TTY users may call via the Federal Relay Service at 1-800-877-8339.

Q. How quickly is the mediation scheduled?

Mediation is generally scheduled to take place within a few weeks of the employee's request for mediation. The Department makes every effort to schedule the mediation as soon as possible.

Q. How long does mediation take?

EEO Mediation cases are generally resolved with a half a day or, at most, a full day of mediation. More difficult or complex cases may take a few days.

Q. How can I be sure mediation will produce a fair result?

Because the mediator has no authority to impose a decision, nothing will be decided unless both parties agree to it. If you feel that a proposed resolution is not fair and you are unable to negotiate a resolution you feel comfortable with, you may continue to have your claim heard in the complaint process.

Q. Who are the mediators in the EEO Mediation program?

Most Department Mediators come from an interagency pool of volunteers who serve as mediators on a collateral duty basis. In some cases, the Department may also use mediators from other appropriate sources. All Mediators who handle cases in the Department's EEO Mediation program have completed training in mediation skills. You will be given an opportunity to review the name and background information about the mediator and may ask for another mediator if there is a compelling reason.

Q. If I choose mediation, am I still free to consult with a lawyer?

Yes, you may have a lawyer or other representative accompany you to the mediation to provide advice or be available to you for telephone consultation. If you choose to attend the mediation without a representative, you may also consult with your representative before finalizing any agreement and may have your representative review any agreement drawn up by the mediator.

Q. What happens if no settlement agreement is reached in my mediation?

If the parties cannot resolve their dispute through mediation, the claims will continue to be processed through the EEO or Sexual Orientation Discrimination Complaint process. Complaint processing is not suspended during mediation. If you and the employee are unable to resolve the case through mediation, it will continue to be processed like any other discrimination claim.

Q. What makes a case appropriate for mediation?

A case is usually appropriate for mediation when relationships are strained but the preservation of a working relationship is important. A skilled neutral third party can often facilitate communication in such cases and help the parties find common ground.

Q. When is a case inappropriate for mediation?

Some examples of situations in which mediation is inappropriate are:

- cases involving applicants for employment or former employees;
- cases in which violence or harassment have been alleged;
- adverse actions;
- class action cases involving multiple complainants; and
- cases in which the matter in dispute has significant government policy implications.

To find out if your case is appropriate for mediation, contact Bonnie Worthy at 202/482-8121. TTY users may call via the Federal Relay Service at 1-800-877-8339.

Q. How can I request a reasonable accommodations, such as sign language interpreting, during the mediation process?

When you request mediation, advise OCR of your need for an accommodation. You can also contact Bonnie Worthy at 202/482-8121 at any time during the process to ask for an accommodation. TTY users may call via the Federal Relay Service at 1-800-877-8339.

WHAT TO EXPECT

Steps in the EEO Mediation Process

There are no rigid rules governing EO Mediation, but there are some general steps in the process.

1		Introduction	Mediators describe the process and their role, introduce all participants, and discuss the ground rules of mediation, including confidentiality. Both sides are encouraged to work cooperatively towards a settlement.
2		Information Gathering	Each of the parties describes their view of the dispute and what they want out of any resolution. The parties are given a chance to vent emotions and express views in a safe environment. This is no discussion of the legal issues and no witnesses or evidence are presented.
3		Issue Identification	Mediators assist the parties in identifying the main issues in dispute. Mediators help the parties to understand each other's interest and needs with respect to each issue.
4		Generating Solutions	Mediators encourage the parties to become problem solvers, look objectively at the issues, identify and discuss possible solutions. At times, mediators may use a technique called "caucus" in which they meet with parties separately and in confidence. This can lead to fuller revelation of the parties' needs and development of options for a solution.

5



Agreement

Once the parties have reached an agreement the mediator or the parties' attorneys may record the terms of agreement. If the mediator drafts the agreement, the parties will be encouraged to have an attorney review the agreement prior to signing it. A signed agreement may be enforced as a contract.

GETTING READY

Preparing for Mediation

Taking some time to prepare for mediation will increase your chances of reaching a satisfactory resolution.



You will be better prepared if you understand the process, have a realistic sense of what you want to achieve, and are ready to work in good faith to reach a mutually acceptable resolution.

Understanding The Process.

1. **What Mediation Can Achieve.**

The goal of mediation is to reach an agreement about the future that both parties can live with. To come to an agreement, each party will have to make some compromises.

You should come to mediation with an open mind about possible solutions to the employee's issues. This enables you to focus on creative workable solutions, rather than hard line approaches.

2. **The Mediator's Role.**

The mediator is there to serve as an impartial facilitator of the process, and not to judge the facts or the law of the case or to advocate for either party. The mediator is there to guide you and the employee through a structured process, to reach an understanding of the underlying interests of all the participants, and to help both of you to develop creative options for resolution of the issues.

3. **Your Role as a Participant.**

As a participant in the process, your role is to mediate in good faith to achieve a resolution and to observe the ground rules of the mediation, including the principles of common courtesy. Mediating in good faith means that you are willing to hear the other party's perception of the dispute and to be open to possible resolutions. Ground rules include letting the other person speak without interruption and avoiding inflammatory language and name-calling.

Knowing What You Want.

1. **Take the Time to Identify your Interests and Needs.**

It is important to take the time to identify what you hope to achieve in the process. Ask yourself: What do I need to happen? What do I want? What is my bottom line?

2. **Prioritize Your Needs and Interests.**

Because you will be negotiating with the employee for a resolution that is acceptable to both of you, you will probably need to compromise on some areas of interest. Prioritize your needs and interests. It is important to be clear about your bottom line. Ask yourself which of your needs and interests must be satisfied for you to be happy with the resolution and what items are less important.

3. **Prepare for the Negotiation.**

Since mediation often takes place in one session, it is also helpful to anticipate the primary needs and interests of the employee and think about possible options that would satisfy both parties. However, be mindful to be open to needs and interests you may not have foreseen. This will get you used to seeing the conflict from the employee's perspective and will lead to a more productive discussion.

Preparing to Present Your Position.

1. **Prepare Your Opening Statement as the Management Representative.**

At the beginning of mediation, both the employee and the management representative will be given the opportunity to make an opening statement. The employee will probably have a very different perception of the facts than yours. Your opening statement should be concerned with presenting your perceptions, feelings, and interests regarding the issues. Remember, the process is not designed to judge the facts of the case, but to resolve the underlying issues between the employee and management in a way that is mutually satisfactory so that you can preserve your working relationship for the future.

Because this is an informal process, you do not need to prepare a written statement. Just think through the events, issues, and your feelings about them and prepared to present the issues as best you can. You may want to bring some notes to make sure that you touch on all the points you want to cover.

2. **Make Sure the Right People are Participating.**

Ask yourself “Of all the possible outcomes to this mediation, do I have both the necessary authority and knowledge to make informed decisions?” If not, ensure that those who can answer questions or authorize settlement actions are available to you during the mediation. All settlement agreements must also be reviewed by the Office of Human Resources and the Office of General Counsel before they are finalized to ensure that the terms agreed to do not conflict with laws or personnel regulations. You also can seek assistance in preparing for mediation from the Office of General Counsel.

3. **Get into the Right Frame of Mind for Negotiation.**

People who use listening and creative thinking skills are usually able to resolve their problems in a way that is agreeable to everyone. Before mediation, take some time to relax and make whatever mental preparation you need to arrive ready to work cooperatively towards a resolution. If you are not prepared to do this, the process will not be successful.

GETTING TO AGREEMENT

Tips for Successful Mediation

Successful mediation depends on both parties' willingness to negotiate in good faith and work out a solution.



Whether an agreement can be reached depends in large part on the attitude of the two parties. To be successful, the parties must focus on the future and on possible solutions to the problem. Parties who remain stuck on arguing about past behavior will not be able to agree on a solution.

Tips for Successful Mediation.

1 .

Keep Your Cool.

People who are involved in a conflict usually have very strong feelings about their positions. When people become emotionally involved, defenses go up. It is important to remain calm, refrain from responding negatively, and let the other person speak for him or herself.

A positive attitude and patience are essential to prevent the conflict from escalating.

Tips for Successful Mediation.

2. **Present your issues clearly and non-threateningly.**

The way that you communicate your issues sets the tone for the discussion.

- State your issues clearly and assertively.
- Avoid comments that refer to a person's attitude or behavior.
- Keep it non-threatening – state your issues and feelings in a way that doesn't threaten the other person's sense of self or dignity.
- Try to phrase the issues so they can be viewed as joint problems.
- State your issues in terms of future relationships and avoid placing blame for past behavior.

3. **Listen to what the other party is saying.**

It's very easy for people in conflict to misunderstand each other. Listen to the other person's viewpoint and concerns first and show that you understand what was said. Listening attentively and asking for clarification enhances the problem-solving process. The goal is to define a solution that is a win for each person involved. You are more likely to suggest solutions the other person would accept if you take the time to listen and understand their perspective.

4. **Present possible solutions that take both of your needs into account.**

Negotiation is a give and take process. Both sides need to be willing to make some concessions to reach an agreement.

- Be comfortable with the negotiating process. If you are uncomfortable, you are not likely to negotiate a settlement you are happy with.
- Avoid yes or no questions - instead use questions that encourage the other party to offer information.
- Present possible solutions that take both parties' needs into account.
- Do not approach every issue with the attitude that you have to win and the other party has to lose. Instead, determine what is important to you and what you can compromise on.

5. **Take the time to think before reacting.**

Be patient and give yourself time to think before responding. Take breaks if you need time to evaluate a situation or proposal.

ENFORCING AGREEMENTS

The Employee's Rights if the Settlement Agreement is Not Honored.

The Department expects its officials to mediate in good faith and comply with settlement agreements reached during mediation. However, employees who feel that an agreement has not been fully honored may raise a Claim of Breach of Settlement Agreement.

If an employee believes that the Department is not carrying out the terms of the settlement, the employee may file a Claim of Breach of Settlement Agreement within 30 calendar days of the date s/he first became aware of the alleged breach. A claim of breach of settlement agreement may be filed by sending written notice of the breach allegation to either: the bureau EEO Officer; or the Director, Office of Civil Rights (OCR), U.S. Department of Commerce Mail Stop 6012 Washington, D.C. 20230. If a claim is filed with the Director of OCR, s/he will forward it to the bureau EEO Officer. The employee may request that the complaint be reinstated at the point processing ceased or that the Department be ordered to comply with the terms of the settlement.

The Bureau EEO Officer will conduct an inquiry to determine whether there has been a breach of the settlement agreement, provide the Director of OCR with a recommendation as to whether there has been a material breach in the term(s) of the settlement agreement and suggest appropriate remedies. Upon receiving the EEO Officer's recommendations, the Director of OCR will issue a decision on the claim of breach of settlement agreement within thirty (30) days of receiving the allegation of noncompliance. If no breach is found, the employee will be notified of his/her right to appeal the decision to the EEOC. If a breach is found, the Director of the Department's Office of Civil Rights will either reinstate the complaint or order that the terms of the agreement be carried out.

The complainant may file an appeal on the alleged breach of settlement agreement directly to the EEOC: any time after 35 calendar days from filing a claim with the EEO Officer or Director of OCR if there has been no decision, or within 30 days of the complainant's receipt of the agency's decision on the breach of settlement agreement claim.

This process is established by Equal Employment Opportunity Commission (EEOC) regulations at 29 C.F.R. § 1614.504(a).

Allegations regarding subsequent acts of discrimination are processed as EEO complaints and *not* breach of settlement agreement claims. 29 C.F.R. § 1614.504(c).

