

U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C. 20250

DEPARTMENTAL REGULATION		Number: 4710-001
SUBJECT: Alternative Dispute Resolution	DATE: July 20, 2001	
	OPI: Conflict Prevention and Resolution Center	

1 PURPOSE

This regulation establishes the Department of Agriculture's (USDA) policy on the use of Alternative Dispute Resolution (ADR) and related techniques to prevent and resolve workplace and program conflicts within USDA.

2 REFERENCES

The following authorities, among others, authorize this Regulation: Administrative Dispute Resolution Act of 1996 (ADR Act); Agricultural Credit Act of 1987, as amended by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 and the Grain Standards and Warehouse Improvement Act of 2000 (Public Law No. 106-472); Equal Employment Opportunity Commission (EEOC) regulations on Federal sector equal employment opportunity (EEO) complaint processing, 29 CFR 1614; Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613); and administrative grievance system regulations, 5 CFR 771.

3 SPECIAL INSTRUCTIONS/CANCELLATIONS

This regulation supersedes and modifies the USDA Alternative Dispute Resolution Policy, Secretary's Memorandum 4710-1.

4 DEFINITIONS

- a Alternative Dispute Resolution (ADR) - Any of a number of conflict resolution techniques which use a neutral third party to assist employees, managers, agencies, and USDA customers in resolving disputes. (See examples of ADR techniques in Appendix A)
- b Conflict - Any disagreement, discord, argument, complaint, or legal action, as well as the circumstances leading up to it.
- c Customer - Individuals, organizations, or businesses external to USDA that provide services to or receive services from USDA or that have contact with any USDA office or employees.
- d Good faith - An effort to honestly, sincerely, and fully discuss problems and matters in conflict, and to explore solutions to those problems or conflicts.

- e Mediation - An ADR technique that involves a confidential discussion among two or more parties in conflict, with one or more mediators present to facilitate the discussion in an attempt to reach a resolution that is acceptable to all parties.
- f Neutral - The person who conducts, leads or facilitates an ADR session. The neutral has no personal interest in the outcome of the conflict, and performs the neutral duties impartially and without bias. Neutrals include mediators, facilitators, and arbitrators.
- g Parties - The agencies, employees, managers, or customers who are in conflict.
- h Resolution - The terms to which parties in conflict agree that result in the total or partial end or closure of a conflict, complaint, grievance, appeal, or litigation.

5 POLICY

The benefits of using ADR include achieving effective and mutually satisfactory resolutions of conflicts, decreasing time, cost, and other resources expended in resolving conflicts, fostering a culture of respect and trust between USDA and its customers and employees, and increasing customer satisfaction and employee morale. USDA will attempt to prevent conflicts whenever possible and, when conflicts do occur, make every effort to reach early, consensual resolution of conflicts and issues, using ADR as an essential tool toward achieving that goal.

a General Provisions

- (1) USDA should utilize ADR as a standard tool for resolving workplace conflicts and conflicts between USDA and its customers.
- (2) USDA should seek to resolve conflicts at the earliest stage possible.
- (3) In any ADR proceeding involving a conflict with a USDA agency or other organizational entity, an individual with authority to fully resolve the matter on behalf of the entity should be in attendance whenever possible. If that is not possible, an individual with authority to negotiate on behalf of the entity should attend the ADR proceeding, and should have access to an individual with authority to fully resolve the matter on behalf of the entity.
- (4) All parties participating in ADR are expected to participate in good faith. Except in those instances specified in this regulation, participation in ADR is voluntary for all.
- (5) Agreement to resolve a conflict shall be voluntary for all parties participating in ADR.
- (6) Parties are entitled to be accompanied, represented, and advised by a personally chosen representative in ADR proceedings.

- (7) The use of ADR shall not adversely affect the rights of individuals to seek resolution of their issues through the established complaint, grievance, and appeal systems, provided established time frames in each system are otherwise met.
- (8) No employee shall commit, authorize, or condone any retaliation against any employee or customer because of the pursuit of, or participation in, ADR.
- (9) Agencies shall make available training and educational services designed to promote effective conflict management. These shall include explanations of available ADR services and employees' responsibilities relating to ADR participation.

b ADR in Workplace Disputes

- (1) ADR, including, at a minimum, mediation, shall be available for the early resolution of workplace conflicts, during the period before the initiation of a grievance or a complaint.
- (2) Employees are strongly encouraged to use mediation or other ADR processes to resolve workplace conflicts at the earliest stage possible.
- (3) In a workplace conflict that is not an EEO complaint, managers and supervisors are expected to participate in ADR when requested to do so, absent compelling reasons.
- (4) In the EEO complaint process, ADR services will be available in both the informal and the formal stages. ADR is voluntary for the aggrieved party or complainant. Once an agency offers ADR to a complainant and the complainant elects ADR, management is required to participate in ADR. A complainant in the informal stage shall have the option of choosing any available ADR program in USDA that uses neutrals qualified to provide ADR services in EEO complaints. However, if the complainant chooses an ADR program other than the one that normally services employees in the complainant's Agency, the selected program is not required to provide the ADR service. This regulation shall be read in conjunction with Departmental Regulation 4300-7 (Processing EEO Complaints of Discrimination) and Departmental Manual 4300-1 (EEO Complaint Processing Procedures).
- (5) Agencies and labor organizations are encouraged to work cooperatively to include or enhance ADR provisions in future negotiated agreements, partnership agreements, separate addenda, or memoranda of understanding. Management and bargaining units are encouraged to consider suspending time frames for a mutually agreed upon period in order to use ADR before and during the grievance process.

- (6) Within the administrative grievance system, either the grievant or management may request or propose the use of ADR to facilitate the informal and voluntary resolution of workplace disputes. The parties may mutually agree to suspend the timeframes for completing the grievance process for the purpose of participating in ADR.
- (7) Management must fulfill its notice and any bargaining obligations under the Federal Labor Management Relations Statute and applicable collective bargaining agreements prior to implementation of any new ADR procedures or programs affecting bargaining unit employees.
- (8) ADR may not be appropriate for, and need not be offered by an agency, in every workplace dispute. Examples of instances in which ADR may not be appropriate include: if adjudication may be needed for precedential value; if the ADR process might not be safe for the parties (as when the complainant alleges conduct that is violent in nature); or if the issues are subject to an ongoing criminal or similar investigation. However, an agency decision that ADR is not appropriate should be the exception, not the rule, and should be based on a significant reason, such as in the examples above.

c ADR in Program Disputes

- (1) USDA encourages the use of ADR as a tool to prevent or minimize escalation of conflicts with its customers and to resolve such conflicts at the earliest possible stage.
- (2) In States that have a USDA-certified State Agricultural Mediation Program, USDA agencies shall offer mediation to customers to whom they issue an adverse decision relating to agricultural loans, wetlands determinations, compliance with farm programs, including conservation programs, agricultural credit, rural water loans, grazing on National Forest System lands, pesticides, rural housing loans, rural business loans, crop insurance, and other issues the Secretary may subsequently consider appropriate. If a customer chooses mediation under this subsection, USDA agencies shall participate.
- (3) In States in which there is no USDA-certified State Agricultural Mediation Program, USDA agencies shall advise all customers to whom they issue an adverse decision relating to the program issues identified in c(2) of this Section that mediation may be an option and offer it to the customers as appropriate. If the customer expresses interest in mediation once mediation has been offered, the agency shall use its best efforts to participate in good faith mediation. In States in which there is a State Agricultural Mediation Program but the Program is not certified to mediate each and every program issue, as to the non-certified issues, mediation shall be governed by the procedures for non-certified states.

d Neutrals

- (1) Any individual who mediates USDA workplace disputes must have at least 24 classroom hours of mediation skills training, except that the minimum training standards for mediators of Shared Neutrals Programs operated by Federal Executive Boards or the Department of Health and Human Services (Washington, D.C.) are deemed to meet USDA's minimum training requirements.
- (2) To serve as a lead or solo mediator of a USDA workplace dispute, an individual must have mediated or co-mediated at least three workplace disputes.
- (3) Mediators must be familiar with and follow the Model Standards of Conduct for Mediators promulgated by the Society of Professionals in Dispute Resolution, the American Arbitration Association, and the American Bar Association.

e Evaluation

All ADR programs are to engage in evaluation of ADR's use and benefits to ensure quality ADR services. At a minimum, evaluators should attempt to capture and analyze ADR usage, time savings, cost avoidance, customer satisfaction, improved relationships, and other indicators in line with the agency's strategic goals and objectives.

f Confidentiality

- (1) Confidentiality in ADR sessions is intended to allow parties to candidly discuss their interests in order to reach the best possible resolution, without fear that statements made during ADR will later be used against them. Confidentiality provides protection from disclosure by an ADR neutral to individuals outside of an ADR session of information discussed or presented during an ADR session. Confidentiality also provides the assurance that an ADR neutral will not disclose to one party of an ADR session information shared with the neutral in confidence by another party.
- (2) Information, including resolution options, discussed during or specifically prepared for ADR proceedings may not be introduced as evidence in subsequent hearings or other legal proceedings, except as permitted under the ADR Act.

6 RESPONSIBILITIES

a Sub-cabinet officials and Agency Administrators are responsible for:

- (1) Ensuring that all employees are aware of, have access to, and are encouraged to use ADR programs.

- (2) Reporting to the Department at least annually on agency ADR programs and usage.
- b The Assistant Secretary for Administration is responsible for issuing Department-wide policy, regulations, and guidance on the use of ADR and the evaluation of programs.
- c The Director, Conflict Prevention and Resolution Center (CPRC) is responsible for:
 - (1) Developing and issuing standards for qualifications and evaluation of mediators and other neutrals.
 - (2) Coordinating ADR activities throughout USDA.
 - (3) Assisting and supporting agency ADR programs.
 - (4) Promoting and encouraging the use of ADR.
 - (5) Monitoring agencies' programs, tracking usage, determining compliance with Departmental standards, and reporting at least annually to the Secretary on ADR activities.
 - (6) Maintaining information on available neutrals and providing a variety of additional ADR services.
 - (7) Providing ADR services to the Office of the Secretary, the Departmental Staff Offices, the offices reporting to the Assistant Secretary for Administration (Departmental Administration) and to any other officer or agency of the Department as may be agreed.
- c The General Counsel is responsible for:

Working with the client agency, the Department of Justice, and CPRC, as appropriate, in recommending and using ADR in appropriate administrative and litigation matters.

END

Appendix A

EXAMPLES OF ADR TECHNIQUES

1 Mediation

Mediation is currently the most popular form of ADR used in employment-related conflicts. It is a form of ADR that is often used as an alternative to traditional EEO counseling. Mediation is an informal process in which a neutral third party assists the parties in conflict in reaching a voluntary, mutually agreeable settlement. It gives the parties the opportunity to discuss the issues, clear up misunderstandings, determine the parties' underlying interests or concerns, find areas of agreement, and, ultimately, to incorporate those areas of agreement into resolutions. The mediator does not impose a decision on the parties, but rather, helps the parties to agree to their own mutually acceptable resolution.

2 Fact Finding

Fact Finding is the use of an impartial expert (or group) with the authority to determine what the "facts" are in a conflict. The Fact Finder is authorized only to investigate or evaluate the matter presented and to file a report establishing the facts in the matter. The Fact Finder may also issue either a situation assessment or a specific procedural or a substantive recommendation as to how a conflict might be resolved. The findings of fact must remain confidential in order to comply with the core principles of ADR.

3 Facilitation

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a conflict. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). A facilitator does not typically become as involved in the substantive issues, as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator works with all of the participants at once and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed-upon goal. The facilitator focuses on procedural assistance and remains impartial with regard to the topics under discussion.

4 Early Neutral Evaluation

Early Neutral Evaluation is a process whereby a Neutral, usually with substantive expertise, evaluates the relative merits of the parties' cases. This process usually involves an informal presentation to the Neutral of the highlights of the parties' positions. The Neutral provides a non-binding evaluation that can give the parties a more objective assessment of their positions, thereby increasing the chances that further negotiations will be productive. Following the evaluation, the Neutral may assume the role of a mediator and assist the parties in reaching a mutually acceptable resolution.

5 Non-binding Arbitration

Arbitration involves presenting a conflict to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of an advisory opinion. Under the process, the parties have input into the selection process, giving them the ability to select an individual or panel with some expertise and knowledge of the disputed issues. Generally, persons chosen are those known to be impartial, objective, and fair, and who have the ability to evaluate and make judgments about data or facts. The opinions issued by the third party in such cases must be non-binding.

6 Settlement Conferences

Settlement conferences may be conducted by a settlement judge or referee, and attended by representatives of the opposing parties and/or the parties themselves, in order to reach a mutually acceptable settlement of the disputed matter. Agencies are not precluded from having their own settlement conferences without a settlement judge, provided the parties agree.

The role of a settlement judge is similar to that of a mediator in that he/she assists the parties procedurally in negotiating an agreement. Such judges may have much stronger authoritative roles than mediators, since they may provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court or hearing. They also provide the parties with possible settlement ranges for their consideration. In the event a settlement is not reached, the case is then processed by an administrative judge other than the settlement judge. Because these conferences are not conducted by the administrative judge hearing the case on the merits, traditional ex parte communication constraints are not applicable.

7 Ombuds

Ombuds are individuals who rely on a number of techniques to resolve conflicts. These techniques include counseling, mediating, conciliating, and fact-finding. When an ombud receives a complaint, he/she interviews parties, reviews files, and makes recommendations to the disputants. Ombuds typically do not impose solutions. The power of the ombud lies in his/her ability to persuade the parties to accept his/her recommendations. Generally, an individual not accepting the proposed solution of the ombud is free to pursue a remedy in other forums for conflict resolution.

8 Med-Arb

Med-Arb (mediation-arbitration) is a process whereby a third party Neutral begins by facilitating discussions between parties in conflict (mediation), which may enable the parties to reach a mutually acceptable resolution of the issues and concerns in the conflict. If the parties fail to reach a mutually acceptable resolution, the Neutral is empowered to issue a non-binding decision after hearing evidence and arguments from both parties (arbitration).