



U. S. Department of Energy
National Nuclear Security Administration
Office of Civil Rights, NA-1.2

NNSA Alternative Dispute Resolution Program

Alternative Dispute Resolution Guide

PREFACE

The Equal Employment Opportunity Commission (EEOC) requires all Federal agencies to establish and to make available an Alternative Dispute Resolution (ADR) program for all employees, and the EEOC encourages agencies to use ADR as a valuable tool in resolving Equal Employment Opportunity (EEO) disputes throughout the EEO Complaint Process.

The NNSA complies with the EEOC on this requirement and has long supported ADR, through mediation, as an option for employees for resolving EEO-relevant disputes. The NNSA ADR Program ensures that ADR is made available during both the pre-complaint (Informal EEO Counseling) stage, and the Formal EEO Complaint stage; the NNSA ADR Program also ensures that non-EEO related matters are eligible to be addressed via ADR.

This Guide presents an overview of the NNSA's ADR process. This guide was developed with several audiences in mind: 1) EEO staff and EEO Counselors whose role is to provide information on the mediation process to individuals seeking advice; 2) employees considering mediation for resolving a dispute; and 3) management officials who wish to learn more about mediation, and their respective responsibilities in this process.

Employees and managers are encouraged to refer to the Guide as needed, as a supplement to consulting with the NNSA's ADR Program.

The NNSA has chosen Mediation as the primary ADR method in resolving EEO disputes because it empowers the parties themselves to reach an acceptable resolution of the conflict.

TABLE OF CONTENTS

	Page
What is Alternative Dispute Resolution?	4
What Is Mediation?	5
What Are Typical Organizational Experiences with Mediation?	6
What Are the Goals of Mediation?	8
When Is Mediation Appropriate?	9
When Is Mediation Inappropriate?	10
What Are Some Concerns Expressed About Mediation?	10
How Is Mediation Elected?	12
Who Participates in Mediation?	13
What Happens in a Mediation Session?	14
How Will Mediators Be Selected?	15
How Can a Party Prepare for Mediation?	16
How Does Mediation End?	17
Are Settlement Agreements Binding?	17
What Can You Do If You Believe the Department Is Not Adhering to the Terms of the Settlement Agreement?	17
How Does Participation in Mediation Affect An Employee’s Rights?	18
Appendix A: Time Frames in the Complaint Process	19

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?



Alternative Dispute Resolution, referred to as ADR, is a term which covers many alternatives to traditional methods for resolving conflicts or disputes. ADR has been used as a tool in resolving workplace disputes arising from poor communication, personality conflicts, or alleged discrimination. Within the NNSA, ADR is offered as

an alternative method for resolving workplace disputes in tandem with the EEO Complaint Process.

There is a spectrum of dispute resolution techniques, covering such processes as fact-finding, early neutral evaluation, negotiation, mediation, settlement conferences, arbitration, and adjudication. All ADR processes aim to achieve the following desirable results:

- to motivate parties to focus their attention on the issues;
- to give parties the opportunity to present their perspectives on the situation;
- to provide parties the opportunity, often for the first time, to hear a clear explanation of each other's view point; and
- to provide parties with a window of opportunity to identify common interests and points of agreement, and to fashion mutually acceptable settlement options to resolve disputed issues.

Dispute resolution techniques differ in their formality and placement of decision-making power. If the process is adjudication or arbitration, the decision-making power lies with a third-party neutral, however, when the process involves mediation, the decision-making power will reside at all times with the parties in conflict. **The NNSA has selected mediation as its primary ADR method for EEO disputes, because it empowers the parties themselves to reach an acceptable resolution of the conflict, through the intervention of a third party.**

WHAT IS MEDIATION?

Mediation is familiar to most people as a means of resolving labor management and international disputes, but it also has been used to settle contract, interpersonal, human resource, and EEO conflicts. Mediation involves the intervention of a third person (the mediator) into a dispute to assist the parties in negotiating jointly acceptable resolution of issues in conflict. The mediator meets with the parties at a neutral location where the parties can discuss the dispute and explore a variety of solutions. Each party is encouraged to be open and candid about his/her point of view. The mediator, as a neutral third party, can view the dispute objectively and assist the parties in considering alternatives and options that they might not have considered. The mediator is neutral, as he or she does not stand to personally benefit from the terms of the settlement, and is impartial, as he or she does not have a preconceived bias about how the conflict should be resolved.

“The courts of this country should not be the place where resolution of disputes begins. They should be the place where disputes end after alternative methods of resolving disputes have been considered and tried.”

Justice Sandra Day O’Conner



The mediation session is private and confidential. Matters unique to the mediation discussion have been held by Federal courts to be privileged and inadmissible in any adversarial administrative or court proceeding with the exception of certain issues such as fraud, waste and abuse, or criminal activity. If a settlement was not achieved during a mediation session, and the dispute was litigated in any administrative or judicial proceeding, neither the mediator nor his/her notes can be subpoenaed by either party.

WHAT ARE TYPICAL ORGANIZATIONAL EXPERIENCES WITH MEDIATION?

Early Use of Mediation Enhanced the Potential for Resolving the Dispute

As time drags on without a resolution, people tend to “dig in their heels” and fight for their position rather than work to achieve mutual agreement.

Accordingly, most advise that mediation should be attempted as soon after the dispute arises as practicable. The following comments were typical of expressing the relationship between the timing of mediation attempts and the success of the mediation in resolving the dispute:



- “The parties should mediate as soon as possible. Do not wait to see if a formal complaint will be filed.”
- “Both parties agree face-to-face discussion is very effective and it should have happened in the beginning.”
- “Should have attempted mediation sooner — both sides became more determined to win with each passing day.”
- “This case had progressed too far before it came to mediation (in time and substance). The parties had become so polarized in their positions and distrust had grown to the extent that mediation was not a viable method.”

ADR Procedures Help Overcome Disputes Arising from Poor Communication

Often, one or both of the parties need a flexible process and skillful neutral to bring out what's bothering him/her. Other times, people just need to take time out of their busy schedules to sit down and talk with one another away from the distractions and stresses of the workplace. As the following indicates, poor communication skills are often the root of many disputes:

- “Mediation opened lines of communication between employee and supervisor.”
- “Good case for mediation. Supervisor explained selection criteria which was all the non-selectee needed.”
- “Both parties felt process enabled them to discuss concerns and both would consider this route again.”
- “Issue could have been resolved outside of the EEO process.”
- “Most conflict was the result of miscommunication or lack of communication.”

Mediation keeps the solutions with the people who best know the problem and allows the disputants to resolve the problem themselves, rather than having other offices or a judge decide it for them.

Not All Cases Result in Successful Settlements

Even the strongest advocates for mediation acknowledge that mediation will not be able to resolve all disputes:

- “Settlement reached but didn't get to the heart of the problem — personality conflict. They're back in EEO.”
- “Parties did not come to the table with a “good faith” effort to negotiate. Urge that parties be briefed on the nature of negotiations and the need to be willing to adjust positions.”
- “Mediation does not work if the dialogue with management is not there.”
- “Not all individuals are willing to resolve an issue even though the opportunity is given to them. Sometimes people are not rational in their own beliefs about the merits of their perspective.”

WHAT ARE THE GOALS OF MEDIATION?

The goals of mediation are for the disputing parties to:

1. share feelings and reduce hostilities;
2. clear up misunderstandings;
3. determine underlying interests and concerns;
4. find areas of agreement; and
5. incorporate those areas into solutions devised by the parties themselves.



Even if disputants do not resolve the dispute, mediation frequently will “bring out” the real issues and enhance communications between the parties, fostering an improved working relationship.

The advantage of mediation over more traditional complaint procedures is that it provides an environment for creative problem-solving between the parties. Through the skilled assistance of the mediator, disputants are encouraged to listen, keep confidences, be empathetic, suspend preconceived judgements, respect each other’s values, and focus on resolving the underlying conflict.

WHEN IS MEDIATION APPROPRIATE?

A matter is usually deemed appropriate for mediation when relationships are strained but must continue. Poor communication is often apparent and a skilled neutral third party is needed to facilitate communication. The intervention of a third party is likely to change the dynamics of the interaction of the disputants. And, the parties are often interested in retaining control of the outcome. Mediation may be appropriate when:

- Parties are having difficulties resolving the dispute because of lack of conflict resolution skills or because of resistance to confronting, or
- Being confronted by, the other party. The mediation can help by clarifying productive steps for problem solving and by providing a non-threatening environment for discussion.
- There are strong psychological or relationship barriers to negotiating a resolution. Mediators can play an intermediary and conciliatory role between the parties. Mediators are trained to handle emotional barriers to settlement, problems of misperception, or poor communication.
- Parties would be otherwise unwilling to meet face-to-face to discuss the dispute.
- The preservation of a working relationship is important. Many conflicts develop in the context of an ongoing relationship. A mutual agreement to a dispute, in which the parties maintain control of the outcome and “own” the decision, is always preferable to a decision imposed by a third party. The mediation process frequently repairs or builds new working relationships that are critical to the success of ongoing work.

In order for the mediation process to function effectively, the parties must communicate openly and honestly.

WHEN IS MEDIATION INAPPROPRIATE?

While mediation is an effective technique in many situations, the Administrative Dispute Resolution Act and the EEOC recognize that there are instances in which mediation may not be appropriate or feasible.

Examples of when mediation would be **inappropriate** are in cases involving applicants for employment, former employees, alleged violence, egregious harassment, adverse actions, class actions, when authoritative resolution of a matter is required in precedent-setting cases, when the matter in dispute has significant government policy implications, or when it is important to produce a full public record of the proceedings.

During the Informal EEO Counseling stage, the EEO Counselor will notify the EEO Manager of a request for mediation, and the EEO Manager will then make the determination regarding the inappropriateness of a dispute for mediation, based upon the standardized criteria. When ADR is deemed appropriate, mediation will be offered/provided as an alternative to “traditional” Informal EEO Counseling. Should mediation be determined to be inappropriate in a particular case, the matter will continue to be processed through the traditional Informal EEO Counseling process.

WHAT ARE SOME CONCERNS EXPRESSED ABOUT MEDIATION?

People often have concerns about the mediation process. Listed below are some of the most frequently raised questions and some responses.

Doesn't a Participant Lose Control and Have His/Her Rights Weakened by Using Mediation?

On the contrary, mediation keeps decision making authority in the hands of the key parties. In mediation, the parties evaluate whether settlement options developed through negotiations meet their needs, and can reject them if they are unacceptable. Agreement to participate is voluntary, and authority is preserved. Management is highly encouraged to participate (absent exigent circumstances).

Doesn't Mediation Just Result in a Compromise?

Occasionally settlements arrived at through mediation are compromises, but often they are more creative and customized agreements which meet the specific needs of the involved parties. Mediation helps parties to “expand their thinking,” to consider broader alternatives meaningful to each party, to exchange interests not known before, to become aware of issues valued by each other, and to develop “win/win” solutions.

How Can a Party Be Assured That a Mediator Will Remain Impartial and Not Take Sides?

Professional mediators are trained not to take sides. Standard practice and the *Code of Ethics for Mediators* guides mediators to ensure impartial behavior. Should either party become dissatisfied with the mediator’s behavior, or believe the mediator is acting in a partial manner, they are free to end the session and to report the incident to the EEO Manager. Moreover, all participants in a mediation session will be given a Mediation Evaluation Form which solicits their feedback on the quality, integrity, and value of the mediation experience.

HOW IS MEDIATION ELECTED?

Participation in mediation is voluntary for both the employee and management. Once the determination has been made by the EEO Manager ***that the dispute is appropriate for mediation***, the EEO Counselor will explain mediation to the employee as an alternative to pursuing traditional Informal EEO Counseling or, later on, when/if pursuing a formal EEO complaint. EEOC regulations require the employee to seek resolution through the mediation process ***or*** through the traditional Informal EEO Counseling process prior to being provided the right to file a formal EEO complaint. The EEO Counselor will provide the requesting employee with the Mediation Request Form. The employee must return the completed and signed Mediation Request Form to the EEO Manager ***within 5 working days***.

When an employee elects mediation, the EEO Counselor will notify the EEO Manager, who will contact the management official with whom the employee is requesting to mediate. Should management agree to participate in mediation, the EEO Manager will arrange for a mediator and the mediation session. Should management not agree to participate in mediation, the EEO Counselor will be notified to advise the employee accordingly and to proceed with traditional Informal EEO Counseling.

When an employee files a formal EEO complaint and if it is accepted for investigation, the employee will be informed (through issuance of a Notice of Acceptance for Investigation letter) of the possibility to elect mediation, via the EEO Manager, during the formal EEO complaint stage. Should the employee elect mediation, and management agrees to participate in mediation, the EEO Manager will make arrangements for the mediation session. Should management decline to participate in mediation, the EEO Manager will advise the employee

Why Negotiations Fail

- 1. Parties not mediating with “good faith” intent to work together to resolve the dispute.***
 - 2. Parties not hearing what is said.***
 - 3. Parties not willing to separate the person from the problem.***
 - 4. Failure to have the right management representative present.***
 - 5. Parties remaining fixed in their position.***
-

accordingly, and the complaint-processing will be returned to the particular step in the formal EEO complaint stage for further processing.

WHO PARTICIPATES IN MEDIATION?

The employee raising the dispute, a management official with authority to resolve the



dispute, and the mediator are the key parties in a mediation. The management official will be responsible for engaging in creative problem solving at the lowest level in the organization. **Both parties are entitled to bring with them representatives of their choosing to assist them in the process.**

Must a Management Official Participate in Mediation if

Elected by the Employee?

Supervisors and managers are expected to attempt to resolve conflicts at the lowest levels in the organization and at the earliest stages, where appropriate.

WHAT HAPPENS IN A MEDIATION SESSION?

Mediation sessions usually begin with the introduction of the mediator to the two parties. The mediator will provide procedural ground rules, such as making no interruptions when the other party is speaking. He/she will explain the mediation process including clarification of the issue of session confidentiality, securing agreement on time allocation and securing a commitment from the parties to seek resolution in good faith. The mediator will then explain the role of the mediator — to be an impartial facilitator, not an advocate or judge of either party, and to assist the parties in arriving at their own solutions.

The mediator will end the opening statement by informing the disputants that any settlement agreement developed during the session must be reviewed by (at a minimum) the NNSA Office of



General Counsel (OGC), the Human Resources Manager, and the EEO Manager, before the parties sign. After it is signed by the parties, concurrence signatures must be obtained from (at a minimum) the Human Resources

Manager, the OGC, and the EEO Manager before the settlement agreement is enforceable and binding. After the opening statement from the mediator, the mediator will ask the person initiating the mediation session — usually the aggrieved employee — to explain in his/her own words the nature of the complaint and what type of remedy he/she is seeking. The mediator will then ask the respondent, or management official, to make an opening statement to explain in his/her own words his/her perspective of the complaint.

The mediator will proceed to facilitate the session so that clarifying questions can be asked and potential solutions can be discussed. Everyone is encouraged throughout the process to be thinking of ways in which the dispute might be settled to the satisfaction of each party.

Following the joint discussions, the mediator will caucus as necessary. A caucus is a private meeting during which the mediator talks with each party separately about the dispute. Information revealed in the caucus is confidential, and will not be shared in the other caucus or when the parties reconvene in a joint session, unless the party providing the confidential information permits the mediator to share it.

Following the caucuses, the mediator will reconvene the joint session and determine if there is any area of agreement between the parties on any issue. If not, the parties will continue to negotiate and caucus with the mediator, if necessary, until it is clear that a settlement is or is not going to emerge at this session. Sometimes there is a need to reconvene the mediation on another day, or to consult with another person at a later date before an agreement can be considered. In such instances, the terms of that decision must be made jointly by the parties and ***be put in writing***

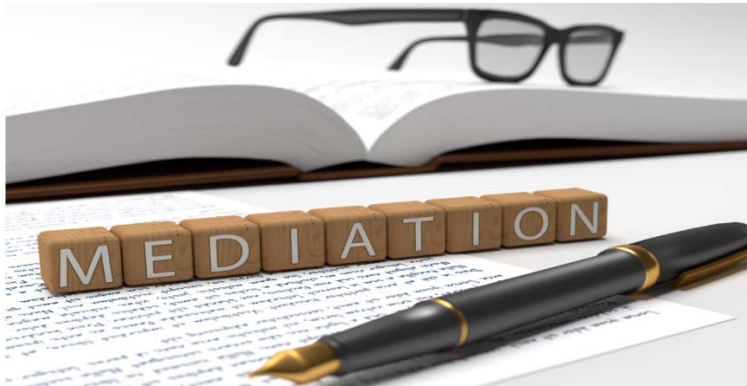
and signed before the conclusion of the mediation session. A copy of the decision necessitating additional time must be given to the EEO Manager.

If a settlement is reached, the parties will draft the terms of the settlement agreement that are acceptable to the parties. The draft agreement will then be reviewed by the OGC, the Human Resources management, and the EEO Manager. Once the settlement agreement is reviewed and cleared, the mediating parties will sign the settlement agreement. The agreement will then be submitted to the OGC, the Human Resources management, and the EEO Manager for execution. After all signatures are obtained, the agreement can then be implemented.

HOW WILL MEDIATORS BE SELECTED?

The NNSA ADR Program will work with requestors to have a mediator assigned and scheduled. Either party may ask that another mediator be obtained if there is a compelling reason — such as a conflict of interest based on personal relationship with the mediator — which would compromise the integrity and impartiality of the process. Either party must notify the EEO Manager, of such a conflict within three (3) working days of receipt of the mediator's name and biographical information. Upon receipt of such notification, the EEO Manager will review the facts and make a determination as to whether another mediator should be obtained.

HOW CAN A PARTY PREPARE FOR MEDIATION?



The most important factor in the success of a mediation session is the intention of the parties to mediate in good faith.

This means that each party is willing to listen to the other side, to keep an open mind, and to negotiate without holding to a fixed position. Both parties should make available at the mediation session any appropriate background information related to the dispute. And, both parties should be willing to reevaluate their positions based upon facts presented during the mediation. The aggrieved person must give adequate thought to his/her opening statement. The opening statement should clearly outline, in the most logical way possible, the events or circumstances which led to this dispute. It may be helpful to write the statement in advance. The facts should be stated as perceived, and should include any interests and desired outcomes for resolving the dispute. He/she should avoid including information that is not relevant to the issues being mediated. The party representing management must have authority to resolve the dispute. Prior to the mediation, he/she should contact Human Resources and the OGC to discuss any personnel related or legal issues, respectively, that might come up during the mediation. He/she should clearly understand the parameters of his/her authority. Should the proposed resolution exceed that authority, the management representative must be able to contact (during the mediation session) a senior level official to discuss and secure approval for the settlement terms.

Listening to clarify helps you verify the meaning intended by the other person speaking. If there is the least doubt in your mind, you need to ask questions for clarification, such as:

“I’m not sure what you mean by . . . ”

“Could you please clarify for me . . . ”

“Please explain to me what you mean by . . . ”

HOW DOES MEDIATION END?

The process ends when a determination is made that a settlement has, or has not, been reached. A signed settlement agreement can only be implemented when it is concurred on and executed by the OGC, the Human Resources management, and the EEO Manager. If either party believes that a solution cannot be reached and it is useless to continue the mediation, the dispute will return to the stage and step in the EEO complaint process where it originated for further processing. If returned during the Informal EEO Counseling stage, the EEO Counselor will conduct a final interview and advise the employee of their right to file a formal complaint. If returned during the formal complaint stage, the EEO Manager will advise the complainant of the next steps in the process.

ARE SETTLEMENT AGREEMENTS BINDING?

Yes, once all the necessary written concurrences are obtained, a settlement agreement is binding on both parties.

WHAT CAN YOU DO IF YOU BELIEVE THE AGENCY IS NOT ADHERING TO THE TERMS OF THE SETTLEMENT AGREEMENT?

If an employee believes that the Agency is not carrying out the terms of the settlement agreement, the employee must notify the EEO Manager in writing within 30 days of the date he/she first became aware of the alleged breach. The employee may request that the complaint be reinstated at the point processing ceased or that the Agency be ordered to comply with the terms of the settlement. If no breach is found, the employee will be notified of his/her right to appeal that decision to the EEOC.

HOW DOES PARTICIPATION IN MEDIATION AFFECT AN EMPLOYEE'S RIGHTS?

Persons participating in mediation do not waive any of their rights by coming to mediation. Employees' rights to pursue formal complaint processing, including administrative and court action, are not affected if they decide to mediate the issue. No person participating in mediation is to be penalized in any way because of such participation or by not reaching an agreement, as to do so would be retaliatory and illegal under the EEO laws and regulations.

FOR MORE INFORMATION

Contact your EEO Manager, Bonnie Baisden at (505) 845-6668
Call the Office of Civil Rights at (505) 845-5517

Office of Civil Rights NA-1.2
Building 384, 2nd Floor, North suite
1-800-825-5256, enter 845-5517
TTY: 1-866-972-1011
FAX: 1-505-845-4963

NNSA Enterprise SharePoint Portal: From the Portal Homepage, click the *NNSA EEO* link

Public-Facing Internet: <http://nnsa.energy.gov/aboutus/ouoperations/managementandbudget/civrights>

The information contained in this publication is intended as a general overview, and does not carry the force of legal opinion.

REV: MARCH 2017

Appendix A

TIME FRAMES IN THE EEO COMPLAINT PROCESS

The EEOC issues regulations that govern how discrimination complaints are processed. These regulations impose time limits on each step of the EEO complaint process. The following table shows some important time frames in the complaint process and how they are affected by electing EEO counseling or mediation.

Where in Process	Without Mediation	With Mediation
Informal EEO Counseling Stage	Counseling must be completed within 30 days of entering into Informal EEO Counseling.	Time period may be extended past 30 days, but cannot exceed 90 days from the date of entering into Informal EEO Counseling.
Formal EEO Complaint Stage, during Investigation	Investigation must be completed within 180 days of the filing date.	Investigation may be extended up to 90 days (270 days total). Investigation will continue during mediation.
Formal EEO Complaint Stage, during Adjudication	Times vary, depending on election of EEOC hearing or final agency decision.	All time limits on adjudication can be extended up to 90 days for mediation.

In all cases, extension of regulatory time frames must be agreed to by the complainant or his or her representative in writing. Extensions may be requested or granted for reasons other than electing mediation, and the time frame for completing investigations may be further extended if formal complaints are consolidated or amended.