

Note from the Field

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Mediation and the Equal Employment Opportunity Complaint Process

Mediation is nothing new to the equal employment opportunity (EEO) complaint process. For years, federal sector EEO counselors have attempted to resolve complaints informally between management and the employees who filed the complaints.¹

Mediation is an alternative dispute resolution (ADR) technique that is designed to resolve disputes without resorting to litigation. A neutral third party, the mediator, facilitates and directs communications between the adverse parties in an effort to aid them in resolving the conflict with a solution of their own making. The mediator is not a judge or a jury, and he often does nothing more than offer suggestions or potential solutions.

Mediation is particularly well suited for federal EEO complaints. The first goal of mediation is to improve communication between the parties. Mediation can achieve where litigation fails because it improves the interpersonal communications and relationships between the parties. This is important because the parties often forget that many times the complainant is still on the job the following week, the next year, and perhaps the next ten years after filing the complaint.

Mediation can offer other tangible benefits over litigation. The parties can attempt mediation at any time during the informal processing of an EEO complaint. Furthermore, mediation is cost effective. Unlike an adversarial formal hearing, in mediation there are no transcript fees, no witness travel costs, and often no costs for attorney representation, which is not required during mediation. The only cost is the time that the participants are willing to spend in trying to resolve the conflict. Most importantly, mediation can provide lasting agreements because parties may be more likely to adhere to a contractual agreement of their own making.

Mediation has recently been in the spotlight as a method of resolving federal sector disputes. A federal statute, entitled the Alternative Means of Dispute Resolution in the Administrative

Process,² mandated mediation for the federal government. On May 1, 1998, President Clinton issued an executive memorandum concerning the designation of interagency committees to facilitate and to encourage agency use of alternate means of dispute resolution.³

Formal mediation is now included in the EEO process. In the spring of 1997, the Equal Opportunity Employment Commission (EEOC) began a voluntary mediation diversion program of federal sector cases on a trial basis. Cases that the EEOC administrative judges were scheduled to hear are instead being mediated by local attorneys on a pro bono basis. Fort Bliss, in El Paso, Texas, implemented this pilot program in May 1997. While local attorneys have mediated only two cases to date, this program gives mediation an opportunity to resolve EEO complaints formally.

The problem with the current approach, however, is that mediation comes too late in the complaint process to offer much success. When the case is diverted to mediation, it has already been informally and formally processed and investigated by the Department of Defense Civilian Personnel Management Service's Office of Complaints Investigation. When the case is diverted, both parties are already prepared for litigation. Once prepared for litigation, parties usually lack an open, compromising attitude. The current approach should add one more step and follow the lead of the Government Accounting Office (GAO).

Government Accounting Office Model Program

The GAO began a formalized mediation program in November 1990.⁴ Since then, the GAO has mediated over one hundred grievances, with an astounding resolution rate of almost ninety

1. See U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS, para. 2-2(f) (18 Sept. 1989) (authorizing the use of ADR procedures during the precomplaint stage).

2. 5 U.S.C. A. § 571 (West 1998).

3. Memorandum from President William J. Clinton on Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998). This memorandum can be found on the internet at <<http://www.pub.whitehouse.gov>>.

4. *GAO Succeeds with Mediation*, FED. EEO ADVISOR (LRP Publications, Horsham, Pa.), Apr. 1998, at 9 [hereinafter *GAO Succeeds with Mediation*].

percent.⁵ One-half of the grievances that were mediated from 1991 to 1997 involved work relations, which is the same type of complaint that is normally received in the Department of Defense (DOD). While the GAO mediation program attempts to mediate a complaint at any stage in the EEO complaint process, the program's success lies in mediating complaints as early in the process as possible. Within the first one or two weeks of the pre-complaint process, the complaint is screened to see if it is suitable for mediation. If suitable, trained mediators immediately attempt to resolve the complaint between the parties.

Fort Bliss has made a similar, but informal, effort with some success. As with the GAO program, the Fort Bliss EEO office uses government employees who are trained and certified mediators during the pre-complaint processing stage. Because it is a voluntary program, however, few cases are diverted to mediation. A standardized mediation program is needed for the informal complaint processing stage.

The EEOC has already recognized the need for mediation and other forms of ADR in the pre-complaint process. The EEOC has proposed a new rule that would require federal agencies to develop formal ADR programs in addition to the current provisions that merely encourage the use of ADR to resolve complaints.⁶

By mediating cases during the informal processing stage (like the GAO program and as suggested by the EEOC), the parties undoubtedly have a greater chance of success than if they mediate immediately prior to litigation. Parties should be more willing to negotiate during the pre-complaint stage

because they are not entrenched, psychologically and monetarily, into a set position for litigation.

There are several ways through which a pre-complaint mediation program could be implemented in the DOD. Equal employment opportunity counselors could receive formal instruction in mediation and attempt to mediate between the complainant and the agency. In the alternative, EEO counselors could screen complaints to identify those complaints that are likely to be mediated and refer to the cases to a trained mediator who could resolve the cases during the pre-complaint stage. Fort Bliss currently uses this second approach. A third approach is for different federal agencies that are in the same area to share mediators.⁷

Mediating a complaint does not have an impact on processing deadlines. The Code of Federal Regulations has a ninety-day processing extension for attempts at alternative means of resolution, such as mediation.⁸

Training is the key to success in implementing a pre-complaint mediation program. Not only do EEO counselors need to be trained in mediation techniques, but officials in the chain of command should also be briefed on mediation to gain an understanding of the mediation process and its goals.

The GAO program is quantifiable proof that mediation during the pre-complaint processing stage pays great dividends.⁹ Considering the costs that installations sustain merely to process and to investigate EEO claims, a formal mediation program that is conducted during the informal complaint stage is a solid, low-cost investment.

5. *Id.*

6. Equal Employment Opportunity Commission Notice of Proposed Rulemaking, 63 Fed. Reg. 8995 (1998) (to be codified at 29 C.F.R. pt. 1614).

7. *How to Meet EEOC's Coming ADR Requirements*, FED. EEO ADVISOR (LRP Publications, Horsham, Pa.) Feb. 1998, at 9 (noting that 17 different federal agencies in Louisville, Kentucky make their employees who are qualified mediators available to other agencies to mediate their complaints).

8. 29 C.F.R. § 1614.105(f) (1998).

9. GAO Succeeds with Mediation, *supra* note 114.