

Alternative Dispute Resolution [52]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

This option would have DHS components establish and maintain robust alternative dispute resolution (ADR) programs to address employee claims arising from disciplinary or performance-based actions. This program would strongly encourage employees -- but not require them -- to utilize ADR: 1) during the proposed disciplinary and performance based action period; 2) during a disciplinary and performance-based action appeal; 3) prior to filing a grievance (negotiated or administrative); and 4) prior to filing an EEO complaint. Employees and managers would be expected to participate in ADR in good faith. All resolutions would be in writing.

The goal of component ADR programs is to resolve issues between management and employees as early as possible at the lowest level of management. ADR would promote open communication and encourage parties to work toward solutions that effectively address employee performance and conduct. As a result of ADR, there should be a reduction in the number grievances, disciplinary and performance-based action appeals, and EEO complaints.

Key Features:

- Components would establish an ADR program to address employee conflicts with management.
- Employees would be encouraged to use ADR: 1) during the proposed disciplinary and performance based action period; 2) during a disciplinary and performance-based action appeal; 3) prior to filing a grievance (negotiated or administrative); and 4) prior to filing an EEO complaint.
- This process would be available to all employees.
- ADR could be the **first step** toward resolving issues between employees and managers.
- Mediations would be expedited; sessions would take place no more than two weeks after an employee requests mediation.
- Employees and managers would participate in good faith.
- A neutral mediator would assist the parties in communicating and working toward a resolution.
- Participants own the process and are responsible for coming up with resolutions they can live with.
- If mediation is unsuccessful, employees do not lose any statutory or negotiated rights and managers may proceed with planned disciplinary and performance-based actions.

Relation to Other Options:

- This option should work effectively with any adverse actions and appeals option. Additionally, allowing employees to seek ADR prior to filing a negotiated grievance can be incorporated into union contracts.

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Implications (This section contains "possible advantages/benefits" and "possible problems/challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Could allow for early resolution of disputes between employees and managers.
- Could allow for resolution of disputes at the lowest level of management.
- Could reduce grievances, disciplinary and performance-based actions, disciplinary and performance-based appeals, and EEO complaints.
- Could promote open communication between employees and managers.
- Works well with any adverse actions and appeals system.
- Should be easy to implement.
- Uses a neutral third-party to help parties come to a resolution.
- Components could use a shared neutrals program to ensure mediators are neutral.
- The Federal Mediation and Conciliation Service is willing help components establish ADR programs and train mediators.
- Helps employees determine if future claims of discrimination or statutory violations have merit.

Possible Disadvantages/Challenges

- Managers might be reluctant to participate in mediation if they are skeptical that a resolution will be reached, especially in performance-based and disciplinary actions.
- If DHS employees serve as collateral duty mediators, other employees might not trust the process.
- Employees might wish to bypass mediation and pursue more formal avenues of redress.

Other Implications

- Components would have to establish an ADR or conflict resolution program.
- Employees and managers must be educated about the mediation process.
- Components may have to establish a cadre of employee mediators.
- ADR discussions could be considered "formal discussions" under the labor relations system, requiring that union representatives be afforded an opportunity to attend.
- If union representatives are not included in ADR discussions there is a risk that resolutions could conflict with collective bargaining agreements.
- Need decision-makers at the table with the authority to resolve disputes.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- Implementation of this option would result in minimal cost to components. Components would be responsible for training mediators and allowing mediators, employees, and managers official time to participate in mediations.
- If agencies do not have established mediation programs, the Office of Human Resources or Office of EEO could administer this program. The Office of EEO may have an available cadre of collateral duty mediators that are currently available during the information EEO process.

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Evaluation in Terms of Guiding/Design Principles:

Mission-Centered

- This option allows employees to seek early resolution of employment disputes. Early resolution of complaints allows all employees to maintain focus on the missions of DHS.

Performance Focused

- Open communication is encouraged through the use of ADR. Opportunities exist for managers and employees to create solutions that would improve or enhance employee performance.

Collaborative

- This system allows managers and employees to create solutions that effectively improve the work environment. It supports the notion that employees, managers, and HR professionals want an expedited process that resolves workplace issues.
- This option should gain the support of both managers and union officials because it would save precious resources and managerial time.

Contemporary and Excellent

- ADR has been used for many years in private industry and the public sector to resolve employment disputes. Our research indicates that in most human resources systems, ADR is used early in the process to address employee grievances, appeals, and discrimination complaints.

Generates Respect and Trust

- This option promotes open communication between managers and employees. Prior to engaging in ADR, employees and managers agree to participate in good faith.
- Settlement agreements reached through mediation are legally enforceable.
- A third-party neutral can assist the parties in understanding opposing views and talking about their interests.

Based on Merit System Principles and Fairness

- Mediation provides an opportunity for employees to respond to allegations of poor performance and misconduct prior to and after management takes any disciplinary or performance-based action.

Transition & Implementation:

- The success of this option would not necessarily be dependent upon the limitations or restrictions found in other HR systems. An ADR can be developed to work within any HR system.
- It is recommended that this option be piloted in a component with diverse employees. After the pilot period, the program should be evaluated and changes should be implemented to make the ADR program more efficient and effective.
- If employees will be designated as collateral mediators, then components must invest in at least 40 hours of training to certify employees as mediators. Mediators could be trained by the Federal Mediation and Conciliation Service or any qualified trainer in the GSA schedule.

**Detailed Description
By System Component and System Element**

B		Appeals
System elements:		Summary description:
1	Coverage	All employees eligible to file appeals would be eligible to participate in mediation prior to filing an appeal. Employees found to have violated national security would not be able to request mediation.
2	Reviewer	Not applicable.
3	Review Process	<p>Under an appeals system, appellants would have the option of electing to mediate their claims when they file a Notice of Appeal. The mediation would take place as soon as possible after filing the appeal. Management would be obligated to participate in mediations sessions in good faith. Timeframes for processing appeals would be tolled for mediation.</p> <p>Only managers who have the authority to make binding decisions on behalf of the component should mediate with employees. All agreements are binding on the parties.</p> <p>If mediations do not result in a settlement agreement, appellants would continue to pursue their claims without penalty.</p>
4	Decision	Not applicable.
5	Other Appeals Systems	ADR can also be used to appeal discrimination claims.
6	Evaluation	The effectiveness of ADR in the appeals process should be measured by capturing employee and manager satisfaction as well as determining the resolution rate of appeals through mediation. Careful attention should be paid to the amount of time spent mediating cases and agency resources dedicated to mediating disputes.

D		Discipline/Adverse Action System
System elements:		Summary description:
1	<p>Coverage</p> <ul style="list-style-type: none"> - Employees - Actions - Probationary/ trial period 	All employees would be eligible to participate in mediation.
2	<p>Basic Process</p> <ul style="list-style-type: none"> - Advance notice - Reply opportunity 	When employees receive a notice of proposed disciplinary or performance-based action, they may request mediation in lieu of a formal opportunity to reply or before the formal opportunity to reply. The mediation would take place on the same day the opportunity for reply would have been scheduled. If an employee elects mediation, management is obligated to participate in the session in good faith.

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D Discipline/Adverse Action System		
System elements:		Summary description:
	<ul style="list-style-type: none"> - Rep. right - Decision - Timeframes - Cause 	<p>If there is a settlement, an agreement would be created and signed by the parties. If mediation is unsuccessful, the disciplinary or adverse action process will proceed as usual under the specified regulatory timeframes.</p>
3	Evaluation	<p>The effectiveness of ADR in the disciplinary process should be measured by capturing employee and manager satisfaction as well as determining whether there was a settlement agreement as a result of the mediations. Careful attention should be paid to the amount of time spent mediating proposed actions and agency resources dedicated to mediating disputes.</p>

B Labor Management System		
System elements:		Summary description:
1	Administration	Not applicable.
2	Employee Rights	Not applicable.
3	Union Rights and Obligations	Not applicable.
4	Management Rights	Not applicable.
5	Bargaining Unit	Not applicable.
6	Negotiations	Not applicable.
7	Unfair Labor Practices	Not applicable.
8	Grievances – Arbitration	<p>Before filing a grievance, employees may wish to resolve disputes with management through the use of ADR. If an employee elects mediation, management is obligated to participate in the session in good faith. The mediation would be scheduled as soon as possible so as attempt resolution of the dispute as early as possible.</p> <p>If there is a settlement, an agreement would be created and signed by the parties. If mediation is unsuccessful, the employee may file a grievance under the contract.</p>
9	Dues Allotments	Not applicable.
10	Official Time	Not applicable.

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11	Evaluation	The effectiveness of ADR in the grievance process should be measured by capturing employee, manager and union satisfaction as well as determining the resolution rate of grievances through mediation. Careful attention should be paid to the amount of time spent mediating disputes and agency resources dedicated to mediating disputes.
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