

Alternative Dispute Resolution Handbook  
Don't Escalate! Choose to Mediate!

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## **I. INTRODUCTION**

The FCC Chairman has encouraged supervisors, managers and employees to consider “Alternative Dispute Resolution (ADR) as a voluntary option to resolve disputes at the earliest opportunity and at the lowest possible level.” ADR is a process in which a third-party neutral assists the parties to reach an amicable resolution through the use of various techniques. While FCC employees have several forums to address workplace conflicts (*See* Section VII.D. *infra*), ADR is a voluntary option that has the potential to resolve workplace conflicts at the earliest opportunity and the lowest possible level. The ADR Program offers FCC employees and managers the opportunity to confidentially resolve workplace conflicts through the less adversarial process of mediation in most cases within 21 days of the date the employee initially contacts the ADR program.

Any FCC staff member (managers, supervisors or employees) may refer disputes to the program. When an employee elects to participate in mediation concerning a matter that is ripe for ADR, and that matter involves a supervisor or manager, that supervisor or manager must participate in the mediation. If the dispute is not resolved through the ADR Program, employees may still have the option to pursue the matter through other forums.

The program is fully accessible to individuals with disabilities. Accordingly, individuals with disabilities should advise the Program staff during the intake process of any accommodations that are necessary for them to effectively participate in the mediation process.

## **II. BACKGROUND**

- A.** In 1990, the Administrative Dispute Resolution Act (ADRA) required each federal agency to adopt a policy on ADR use. In 1996, ADRA was reenacted as the Administrative Dispute Resolution Act of 1996. In 2000, the Equal Employment Opportunity Commission (EEOC) required all federal agencies to establish or make available an ADR program during the pre-complaint and formal complaint stages of the EEO process. Additionally, Section 1614.603 of the EEOC’s Rules, 29 C.F.R. § 1614.603 requires agencies to make reasonable efforts to voluntarily settle EEO discrimination complaints as early as possible, and throughout, the administrative process.

## **III. PURPOSE**

This Handbook describes the FCC’s ADR Program and its operational procedures. It also describes the role and duties of the Special Counsel for ADR, other program staff, and the mediators. This Handbook provides general guidance and is not intended to, does not, and may not be relied upon to create any rights, or change any laws, regulations, or directives.

## **IV. AUTHORITY**

The use of ADR is fully consistent with the FCC’s Office of Workplace Diversity’s mission to ensure FCC compliance with Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act, the Genetic Information Nondiscrimination Act, and the EEOC’s Management Directive for 29 C.F.R. Part 1614 (MD-110). The use of ADR is also predicated on the Administrative Dispute Resolution Act (ADRA), and Executive Orders 12778 and 12871. In March 2017, the FCC Chairman issued a Policy Statement committing to use alternative methods to resolve disputes in FCC workplace activities where appropriate and feasible.

## **V. GOALS**

The FCC’s ADR Program goals are to:

- Furnish an informal, confidential, timely, and impartial dispute resolution process for the resolution of workplace conflicts;

- Promptly resolve workplace conflicts before employees opt for another forum;
- Create a workplace environment of open and honest communication between all employees; and
- Promote a wider understanding, acceptance, and use of ADR techniques in the prevention and resolution of workplace conflicts.

## VI. DEFINITIONS

- A. Alternative Dispute Resolution (ADR).** The term “Alternative Dispute Resolution” or “ADR” refers to a variety of techniques, methods, or processes involving a neutral third party which are used as alternatives to the traditional dispute resolution processes. ADR includes but is not limited to the following ADR techniques: mediation; facilitation; early neutral evaluation; mini-trial; and arbitration.
- B. Days.** Unless otherwise indicated, the term "days" means calendar days.
- C. Dispute (“Workplace Conflicts”).** The term “dispute” or “workplace conflict” refers to the issue(s) raised in the ADR process.
- D. Employee.** The term “employee” refers to present or former non-managerial FCC staff.
- E. Employee Representative.** The term “Employee Representative” refers to a person, selected by the employee, to be present during the mediation to assist the employee. The representative can be an attorney or a union official.
- F. Facilitation.** The term “facilitation” refers to a form of ADR that involves the use of techniques, mainly procedural in nature, to improve the sharing of information in a meeting between parties to a dispute.
- G. Facilitator.** The term “facilitator” refers to a person trained in Facilitation techniques who serves as a neutral third party on behalf of the ADR Program.
- H. Mediation.** The term “mediation” refers to an informal ADR process with a trained neutral third party assisting the parties to reach a negotiated resolution of a dispute.
- I. Mediator.** The term “mediator” refers to a person trained in reconciliation techniques who serves as a neutral third party on behalf of the ADR Program. The mediator facilitates open discussions between the parties and assists them in negotiating a mutually acceptable resolution. The mediator does not have the authority to impose a decision or resolution on the parties.
- J. Parties.** The term “parties” refers to FCC employees (staff, supervisors and managers) involved in a workplace dispute.
- K. Responsible Management Official.** The term “Responsible Management Official” or “RMO” refers to official(s) who, according to the employee’s allegations, is (are) responsible for the action or made the decision that allegedly harmed the employee.
- L. Settlement Agreement.** The term “Settlement Agreement” refers to a written document signed by the parties containing the terms the parties mutually agreed upon to resolve their dispute.
- M. Settlement Official.** The term “Settlement Official” or “SO” refers to an individual who has the authority to grant or deny the requested relief and is not a party to the dispute.
- N. Special Counsel for ADR.** The term “Special Counsel for ADR” refers to a person who controls or directs the ADR Program.
- O. Union Official.** The term “Union Official” refers to an officer or steward of National

## VII. THE INTAKE PROCESS

Employees who contact the ADR Program will complete the ADR Intake process. During the Intake process, the Special Counsel for ADR will explain the mediation process, collect information related to the workplace conflict, provide information about other dispute resolution processes, and determine whether ADR is an appropriate forum to resolve the dispute.

### A. Explaining the Process

During this introductory intake phase, the Special Counsel for ADR will provide information on the:

1. Core principles of mediation;
2. Role of the mediator; and
3. Role and responsibilities of the parties.

### B. Collecting Preliminary Information

After providing an overview of the process, the Special Counsel for ADR will:

1. Open an official case file; and
2. Review the requesting party's intake form containing relevant information about the workplace conflict.

All information collected during this process will remain confidential (See Exhibit A for the Intake Form).

### C. Information on Other Forums

The Special Counsel for ADR will inform all employees who seek ADR that using the ADR process to resolve a dispute does not suspend the filing requirements for other forums. While mediation is an expeditious process, there is no guarantee that the mediation process will be completed prior to the expiration of the filing deadlines for other forums. Therefore, it is incumbent upon employees to research their options regarding other forums.

### D. Notice of Other Filing Requirements

To assist employees in understanding their rights and obligations regarding other forums, the Special Counsel for ADR will provide employees with a written notice of the filing requirements for the other forums and their rights and responsibilities under those processes. Participation in the Federal Communications Commission's (FCC) ADR Program does not suspend the time frames for employees seeking redress pursuant to other forums. Accordingly, to assist employees in understanding their rights and obligations regarding other forums, the Special Counsel for ADR will provide employees with a written notice of the filing requirements for the other forums and their rights and responsibilities under those processes. The employee must sign a copy of this notice upon receipt and return it to the Special Counsel for ADR. The notice covers the following processes:

1. Equal Employment Opportunity (EEO) Process

Applicants, employees, or former employees who believe that they have been discriminated against on the basis of their race, color, religion, national origin, gender, age (40 and over), disability, genetic information or in reprisal for opposing or participating in protected EEO activity must contact an EEO Counselor within 45 days of the date of the alleged discrimination. In order to avoid confusion and help ensure that participants do not miss the deadline for contacting an EEO Counselor, participants will be advised that participating in ADR **does not** satisfy the requirement to contact an EEO Counselor within 45 days of the date of the alleged discrimination. Accordingly, ADR participants wishing to pursue the

EEO complaint process must initiate contact with an EEO Counselor within 45 days of the date of the alleged discrimination in addition to any actions taken under the ADR program.

a. Person Initiates FCC ADR Process First

ADR participants who initiate the ADR process first may file an EEO complaint by contacting an EEO Counselor or the Office of Workplace Diversity (OWD) within 45 days of the date of the alleged discrimination. Failure to contact an EEO Counselor or the OWD within 45 days may result in the dismissal of the ADR participant's EEO complaint pursuant to Section 1614.107(a)(2) of the EEOC's Rules, 29 C.F.R. § 1614.107(a)(2).

b. Person Initiates EEO Process First

ADR participants who initiate the EEO process first and request ADR during the Informal Complaint phase will be advised by the EEO Program Manager that the informal counseling period will be extended to 90 days. Additionally, the EEO Program Manager will refer the matter to the Special Counsel for ADR to initiate the ADR process. In the event that the matter is not resolved in the mediation process within that time period, EEO Counselors will give Complainants a final interview and inform Complainants of their right to file a formal complaint.

ADR participants who seek to participate in ADR after filing a formal EEO complaint may opt to participate in the ADR program by notifying the EEO Program Manager of their decision. The EEO Program Manager will refer the EEO Complainants to the ADR Special Counsel. The time period for completing an ongoing investigation of an EEO complaint may be extended up to an additional 90 days in order to allow the parties to participate in the ADR Program. *See* Section 1614.108(e) of the EEOC's Rules, 29 C.F.R. § 1614.108(e).

2. Administrative Grievance Process

FCC Personnel Manual, Chapter 771, Agency Grievance Procedure, permits non-bargaining unit employees to file grievances on matters affecting their terms and conditions of employment. Seeking assistance through the ADR process **does not** suspend the time frames for filing a grievance under the administrative grievance procedures. Employees should consult FCC Personnel Manual, Chapter 771, Agency Grievance Procedure, for additional information regarding the procedures and timing for filing an administrative grievance.

3. Negotiated Grievance Process

Article 38 of the Basic Negotiated Agreement between the FCC and the NTEU permits bargaining unit employees to file grievances on matters affecting their terms and conditions of employment. Seeking assistance through the ADR process **does not** suspend the time frames for filing a grievance under the Basic Negotiated Agreement. Employees should contact their NTEU representative for additional information regarding the filing of a grievance.

4. Unfair Labor Practices

An employee eligible to file an unfair labor practices (ULP) charge with the Federal Labor Relations Authority (FLRA) may attempt to resolve the dispute through the ADR Program prior to filing a ULP. However, participation in the ADR Program **does not** suspend the time frames for filing a ULP under the FLRA regulations. To preserve their rights under the FLRA, employees must file a ULP within six months of the alleged incident with the FLRA.

5. Merit Systems Protection Board (MSPB) Process

Use of the ADR Program to resolve a dispute **does not** automatically suspend the 30-day deadline for filing an appeal with the MSPB. However, individuals may participate in ADR prior to the expiration of that deadline. If the parties wish to continue ADR efforts beyond the 30-day deadline for filing an appeal, they must submit a written notice to the MSPB prior to the timely filing of an appeal, which explains that

the parties are engaged in ADR efforts. The MSPB will then extend the time limit for filing an appeal by 30 days - for a total of 60 days. *See* 5 C.F.R. §§ 1201.22(b)(1)&(2).

#### 6. FCC Anti-Harassment Policy and Procedures

The FCC's Anti-Harassment Policy and Procedures outlines the responsibilities for compliance and establishes procedures for ensuring that appropriate FCC officials are notified of harassment in the workplace and have the opportunity to prevent and correct such conduct before it rises to the level of illegality. The conduct covered is broader than the legal definition of unlawful harassment and includes hostile or abusive conduct based on race, color, religion, sex (including pregnancy, sexual stereotyping, gender identity or sexual orientation), national origin, age (40 and over), disability, retaliation, or genetic information, marital status, parental status, or political affiliation, even if such conduct does not rise to the level of illegality. An employee who believes he or she has been subjected to, or witnessed, harassment, or hostile or abusive behavior based on any of the protected characteristics covered under this policy should immediately report the incident to his or her manager or supervisor, or to the manager or supervisor of the employee who engaged in the inappropriate conduct and document the incident using FCC Anti-Harassment Intake Form. Employees should report harassment as soon as it happens and are encouraged to do so as promptly as possible and generally no later than 45 days from the date of the incident. Seeking assistance through the ADR process **does not** suspend the time frame for reporting anti-harassment claims to the appropriate FCC officials. Further, the ADR Program does not address sexual harassment claims.

#### E. Determining ADR Eligibility

Generally, the ADR Program is suited to address most workplace conflicts involving an employee's working conditions, terms and conditions of employment, personnel actions, and allegations of employment discrimination, which are common disputes. The decision to accept or reject a dispute for ADR will be made on a case-by-case basis by the Special Counsel for ADR, who will consider factors such as the nature and complexity of the dispute, the relationship of the parties, and the relief sought by the parties. The Special Counsel for ADR will not accept matters that are clearly brought to the ADR Program for a purpose other than to make a good faith effort to resolve a genuine workplace conflict.

The Special Counsel for ADR may act as an impartial facilitator to resolve certain workplace conflicts prior to referring the workplace conflict to mediation, particularly disputes between two co-workers. As a facilitator, the Special Counsel for ADR will work with the parties and provide procedural direction to help the parties move efficiently through a problem-solving process and arrive at a joint resolution of the dispute. Facilitation will not be used to resolve disputes involving discrimination claims.

#### F. Dispute Accepted for Mediation

If the Special Counsel for ADR accepts a dispute for resolution through the ADR Program, the Special Counsel for ADR will take the following steps:

1. Remind supervisors and managers of their obligation to participate in the mediation process.
2. Ensure the Responsible Management Official(s) who should participate in the mediation is/are ascertained, notified of the dispute and that the dispute has been accepted into the ADR program.
3. Settlement Officials who have the authority to resolve disputes should either attend the mediation sessions or be available by telephone during the sessions.
4. Remind participants of their obligation to sign a Mediation Agreement and a Confidentiality Agreement before proceeding to mediation.

## **VIII. THE MEDIATION PROCESS**

A mediator will be assigned to assist the parties in resolving the dispute. The assigned mediator or the Special Counsel for ADR will contact the parties upon receipt of the assignment. Mediations may be conducted in-person or by telephone, if the Special Counsel for ADR determines that a mediation by telephone is appropriate.

### **A. The Participants in the Mediation Process**

1. Participants in the Mediation Process Include:
  - a. Parties to the dispute
  - b. Mediator
  - c. Settlement Official with the authority to resolve the dispute who is not a party to the dispute.
  - d. Employee Representative – attorney or a union official – may participate but is not required.
  - e. Legal representative – Office of General Counsel - for supervisor/manager to the dispute may attend when employee's legal counsel is present during the mediation session.

### **B. Time for Participation**

Both employees and their representatives, if union officials, are entitled to a reasonable amount of official time/administrative time (as appropriate) to participate in the mediation process. The actual number of hours will vary depending on the nature and complexity of the dispute and length of the mediation process.

NOTE: "Reasonable" is defined as whatever is appropriate, under the particular circumstances of the case.

In establishing time for mediation, the Special Counsel for ADR will consider the FCC's mission and the FCC's need to have its employees available to perform their normal duties on a regular basis. As well, the employees and the Special Counsel for ADR, in consultation with the employees' supervisors, should arrive at a mutual understanding as to the amount of official time/administrative time to be used before employees use such time.

#### 1. Role of the Parties

When engaging in the mediation process, the parties must make a good faith effort to resolve the dispute(s) in controversy. To that end:

- a. Parties should prepare for the mediation session by thinking about the causes of the dispute and how it can be resolved.
- b. Prior to the mediation session, the Settlement Official should explore the range of options to resolve the dispute.
- c. During the mediation session, the parties should be prepared to present their versions of the dispute, their interests, and to specify what is needed, from their perspective, to resolve the dispute and/or improve the working relationship.

### **C. The Mediators in the ADR Process**

The Special Counsel for ADR shall develop and maintain a list of qualified mediators. Mediators will be assigned internally through the ADR Program, or externally through an outside entity such as, the Shared Neutrals Program, which is administered through the Federal Mediation and Conciliation Service.

## 1. Qualifications of the Mediator

All mediators must meet the minimum qualifications described in Chapter 3 of EEOC's MD-110 which require mediators to have at least: (1) 20 hours of basic mediation skills training; (2) three co-mediations with a qualified mediator or five independent mediations and positive evaluations from a qualified trainer/evaluator; (3) two verifiable references from two qualified mediators or trainer/evaluators, and (4) knowledge of federal personnel procedures, policies and practices and the laws governing federal sector EEO.

## 2. Role of the Mediator

- a. The mediator conducts the mediation session. He/she is a neutral third party with no stake in the outcome of the mediation process. The mediator helps the parties develop creative solutions to the dispute and may suggest ways of resolving the dispute. However, the mediator does not decide the dispute or impose a settlement on the parties. The mediator's sole function is to assist the parties in reaching an agreement to resolve the dispute themselves.
- b. The mediator shall ensure that he/she has no conflict of interest with respect to the proceeding (e.g., material or financial interest in the outcome, personal friend or relative of a party, working relationship with a party), unless such interest is fully disclosed in writing to all parties and all parties agree that the mediator may mediate the case.
- c. The mediator will attempt in every case to accomplish the following objectives:
  - Explain the mediator's role in the purpose of the proceeding;
  - Allow the parties to present their side of the dispute uninterrupted by the other party;
  - Facilitate discussion for improved understanding;
  - Navigate the issues to determine underlying interests and concerns;
  - Improve the flow of communication;
  - Assist the parties in finding areas of agreement;
  - Assist the parties in incorporating areas of agreement into a resolution of the dispute; and
  - Assist the parties in preparing a written settlement agreement using the Mediation Terms worksheet.

## 3. The Location of the Mediation Proceeding

The Special Counsel for ADR is responsible for securing a location for the mediation session that provides a sufficient level of privacy to promote open and frank communication between the parties. In some cases, it may be necessary to conduct the mediation away from the workplace or by telephone.

### **D.** The Steps of the Mediation Process

#### 1. The Mediation Proceeding

Although there are no required steps or phases to mediation and the mediation session, typically, the mediator will ask both parties to present their versions of the matter in dispute. Moreover, the mediator may also meet with the parties individually in private caucus sessions, which allows each party to provide

confidential information to the mediator. The mediator will not reveal any information from an individual caucus to the other party without permission from the party who disclosed the information.

## 2. Concluding Mediation

Most mediations conclude within one day, although some may take longer. The ADR Program seeks to complete in most cases the mediation process within 21 days of the date that employees initially contact the ADR program. Employees can end the mediation process at any time in order to pursue a formal dispute resolution process.

## 3. Settlement Reached

If the parties reach an agreement, the mediator will provide the Mediation Terms Worksheet to the Special Counsel for ADR to draft a settlement agreement, containing the terms of the agreement and the time frames for execution of the terms.

The Special Counsel for ADR will coordinate the circulation of the draft settlement agreement with the Settlement Official present at the mediation and any other appropriate FCC offices to ensure compliance with applicable regulations and laws. After all reviews and edits have been completed, the parties will review and sign the settlement agreement. The mediator shall destroy all of his/her notes taken during the mediation or in preparation for the mediation.

## 4. Breach of a Settlement Agreement

- a. Non-EEO Disputes - If a party believes that the other party has breached the settlement agreement, he/she should report the breach to the Special Counsel for ADR within 30 days of when the party knew or should have known of the alleged breach. The Special Counsel for ADR will investigate the allegation and, if appropriate, work with agency management to enforce the agreement.
- b. EEO Disputes - If a Complainant believes that the FCC has breached a settlement agreement which was reached during the EEO complaint process, the Complainant should follow the procedures for breach of settlement agreements contained in Section 1614.504 of the EEOC's Rules, 29 C.F.R. § 1614.504. These procedures require the Complainant to notify the OWD Director, in writing, of the alleged breach within 30 days of when the Complainant knew or should have known of the alleged breach. If the Complainant is not satisfied with the FCC's attempt to resolve the matter, the Complainant may file an appeal with the EEOC for a determination of whether the agency has complied with the terms of the settlement agreement.

## **IX. TRAINING**

All employees will receive an orientation on the ADR Program's procedures and the mediation process. Additionally, the OWD will offer semi-annual training sessions on the ADR Program.

## **X. CASE TRACKING PROCESS**

Case files are established and maintained by the ADR Program. As mentioned above, these files are confidential. Accordingly, only the Special Counsel for ADR and ADR staff will have access to these files. Settlement agreements reached as a result of EEO Complaint proceedings are maintained and kept on file for three years after resolution of an informal complaint and seven years after resolution of a formal complaint. All other settlement agreements are maintained for three years after the settlement is implemented or the case is discontinued.

## **XI. EVALUATION OF THE ADR PROGRAM**

In order to evaluate the effectiveness of the ADR Program, the Special Counsel for ADR will track the use of mediation, including acceptance rates, resolution rates overall and by mediator type, the average processing time of cases from the date the employees contact the ADR Program and monetary and non-monetary benefits obtained through the program. Additionally, the Special Counsel for ADR will ask participants to complete a customer satisfaction survey. The Program will also evaluate timeliness and cost effectiveness as compared to other forums.