

# **A Guide to the Defense Logistics Agency Equal Employment Opportunity Mediation Program**

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## INTRODUCTION

This Guide explains a new Defense Logistics Agency (DLA) initiative for reaching early resolution of Equal Employment Opportunity (EEO) related disputes. DLA has implemented a mediation program designed to provide our employees with quick, cost-effective, and fair resolution of EEO complaints. The program, called RESOLVE, is in addition to all current rights and entitlements under existing EEO procedures. RESOLVE stands for Reach Equitable SOLutions Voluntarily and Easily.

RESOLVE encourages maximum use of mediation as the preferred EEO dispute resolution technique. Mediation is one of many dispute resolution techniques collectively called Alternative Dispute Resolution or ADR. Mediation allows a neutral third party, called a “mediator”, to help negotiate a settlement to a particular dispute. Mediation can be very effective in resolving EEO disputes where an employee and manager reach an impasse and cannot avoid a continuing dispute without outside assistance.

Under the DLA RESOLVE program, employees now have the option of utilizing a skilled mediator to assist them in solving their allegations of employment discrimination. Participation in RESOLVE is absolutely voluntary. Any Civilian employee who contacts the EEO Office with an informal complaint of discrimination may request mediation of the complaint under the RESOLVE program. The employee does not relinquish the right to administrative or judicial relief through the EEO process by participating in RESOLVE.

DLA is incorporating the RESOLVE program into the EEO dispute resolution process because it presents both employees and managers with an excellent opportunity to pursue legitimate disputes in a reasonable and non-threatening manner. The primary purpose for RESOLVE is to amicably eliminate EEO disputes without litigation. Litigation can entail lengthy delays, high costs, ill will, and can be very disruptive to all parties involved with a dispute. Simply stated, RESOLVE philosophically views litigation as a last choice, not a first or even second choice for solving EEO disputes.

The Federal Sector Equal Employment Opportunity Regulations provide that if an employee believes that they have been discriminated against on the basis of race, age, sex, religion, national origin, color or disability, the employee is required to consult with the EEO Office to attempt informal resolution of the matter. The EEO Office must be contacted within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

This initial contact with the EEO Office is the perfect opportunity to consider the RESOLVE concept that reasonable individuals can work together to solve employment related disputes. All EEO staff members will be trained in mediation and/or ADR awareness or have immediate access to ADR experts to answer questions about the RESOLVE process.

Under RESOLVE, an aggrieved employee, after speaking with an EEO Intake Specialist, may request mediation. An agreement to participate in RESOLVE means that the

parties will use good faith in trying to solve their conflict. If the parties do solve their dispute using the RESOLVE program, the terms of the settlement agreement will be binding on the parties. Enforcement of an agreement will be the same as the enforcement of any agreement under the traditional EEO Complaint process. If the parties do not reach an agreement, the processing of the informal complaint of discrimination will proceed to a Final Interview. After the Final Interview, the employee may continue to the Formal Complaint process for investigation by an independent fact finder.

The Equal Employment Manager (EEM) for each Primary Level Field Activity (PLFA) will have program responsibility for mediation and ADR decisions made during the informal stage of the EEO Complaint process. The EEM will, upon request, provide a mediator to the employee. If mediation is not the best ADR technique, the EEM will seek to find another acceptable ADR process after consulting with other knowledgeable organization members, such as the DLA Equal Employment Opportunity Office (CAAH), Office of Counsel, Human Resources Office, and the PLFA Alternative Dispute Resolution Specialist. The decision by the EEM not to use ADR will only be made after its use in resolving an issue has been fully evaluated and discussed with management officials and the DLA Equal Employment Opportunity Office.

This Guide is primarily addressed to the parties to an EEO complaint and their representatives. However, it is also intended for use by those who provide administrative support for the EEO process. Its objective is to present useable information to our employees to encourage the use of the RESOLVE process and to avoid the need to file a Formal Complainant of Discrimination. The Guide also provides technical guidance and practical suggestions to help employees and management officials successfully conclude a mediation.

## **ADR IS EFFECTIVE IN RESOLVING EEO COMPLAINTS**

Alternative Dispute Resolution or ADR works best early in the dispute process, before parties have time to build strong emotional attachments to their positions. ADR is especially effective when there is a dispute requiring creative solutions.

Specifically, mediation can eliminate EEO disputes quickly and satisfactorily. It has been the experience of DLA, other Federal Activities and private industry that mediation can creatively resolve most EEO cases at an early stage of the dispute process. There has been extraordinary success in the Federal Government with mediation where the EEO issues were related to promotions, leave, training, awards, work duties, discipline and similar fact-based disputes.

Mediation works best in situations where the following types of concerns are present.

1. Relationships between a supervisor and the aggrieved individual, although strained over a particular action, will likely continue in the future. The parties might wish to avoid damaging a relationship that may preclude them from working together in the future.
2. Miscommunications exist between the parties. A skilled mediator can often improve communications between the employee and supervisor.
3. Strong emotions are present. The employee and management official could benefit from the presence of a neutral third party who controls the flow of information and can change the personal dynamics of the communications. This creates a better climate for dispute resolution.
4. The parties are flexible, reasonable, willing to talk and reevaluate their position, deferring formal litigation or other adversarial procedures.
5. Confidentiality is important. Fewer individuals are involved with a mediated settlement compared to a litigation settlement.
6. Cost savings are considered. Since RESOLVE involves direct negotiations between the parties in an EEO dispute, even if legal advisors are present, their costs are generally much lower with mediation than with litigation. Additionally, the employee does not have to pay for the mediator. DLA will incur all costs associated with retaining the mediator.
7. Parties want greater flexibility in developing settlement alternatives. The RESOLVE program offers far more flexibility allowing the parties to address relationships, procedural and substantive issues beyond those available in traditional formal litigation proceedings.

8. Parties are interested in retaining control over the case. As a voluntary participant, the employee is free to settle all or part of the complaint, not settle, or discontinue mediation services without any further obligation.
9. Parties desire to keep decision-making authority with the people who best know the problem. Both the employee and the management official preserve all decision-making authority throughout the voluntary process. The mediator cannot impose any settlement on the parties.
10. Time is important. RESOLVE is designed to be quick. Mediations can usually be scheduled within a few days and typically last less than one day.
11. The parties might benefit from the mediator's role of reality testing. Mediators act as "agents of reality" for the parties, placing unrealistic expectation into proper perspective.
12. Fairness is an issue. An adequate remedy may not be available through the formal EEO complaint process.
13. Value of the disputed issue is out of proportion to the potential litigation cost and disruption to the employee and the agency.
14. The dispute involves factual issues rather than legal issues. Factual issues generally include those situations involving qualifications, training, awards, work assignment, promotions, etc., that account for most EEO complaints.
15. The dispute does not involve precedential issues. Precedential issues are those rare "first time" cases that are so unique they may set a new policy in DLA.
16. Mediation offers a "no risk" option to continuing to dispute the matter in controversy.
17. There is a potential power imbalance between the employee and the management official. Mediation reduces the power imbalance often found between the disputing parties.

## **COMPARING MEDIATION TO EEO COUNSELING & INVESTIGATIONS**

Mediation under the RESOLVE program is an alternative to our traditional EEO Counseling and EEO fact-finding investigations. If mediation is successful, there will be no dispute and no need to retain a costly EEO fact-finding investigator.

Generally, mediation leads to different results far quicker than the traditional counseling and investigation procedure. Mediation acknowledges the emotional issues in a conflict. The process seeks to find a workable solution to the dispute rather than focusing on the cause(s) or finding who was at fault.

Mediation is similar to EEO Counseling and EEO fact-finding processes in many ways.

1. Counseling and mediation involve relationships between parties seeking an informal resolution to a particular dispute.
2. Similar skills are used to deal with issues and parties, such as: active listening, communications, problem solving, negotiating, and knowledge of EEO procedures.
3. Counselors, investigators, and mediators collect information about a particular EEO dispute.
4. Counselors, investigators, and mediators are all neutral third parties to the dispute.
5. The first step under counseling and RESOLVE is to contact the Equal Employment Manager or designee within 45 days of the event giving rise to the complaint of discrimination.

It is just as important to appreciate that mediation, counseling and investigation can greatly differ from each other.

1. Counselors and investigators are rights driven, mediators are interest driven. In mediation, disputes are frequently resolved based on the parties' common interests rather than who was "right" and who was "wrong."
2. Counselors and investigators represent an advocacy process preparing for potential litigation, while mediators represent a resolution process.
3. Counselors and investigators document their efforts for a record; mediators do not prepare a written record or report.

4. Investigators appraise a case for facts supporting or refuting allegations of discrimination, while counselors only gather information. Mediators do not collect or investigate the facts.
5. Resolutions are based on different criteria. Counselors seek resolution conforming with a perceived EEO framework, while a mediator seeks resolution according to the interests of the parties. Investigators do not seek resolution.
6. The aggrieved individual and deciding official (generally the supervisor with authority over the issue) sees the EEO Counselor and investigator as part of the EEO process. The mediator is viewed as part of a conflict resolution process.
7. Mediator training is substantially different from EEO Counselor or investigator training.
8. Mediation is more private than either counseling or investigating because fewer people are involved with the process.
9. The mediation process can lead to creative settlements not available through the Counselor/Investigator process.
10. Mediation is voluntary, counseling and investigations are mandatory.
11. Mediation is usually less costly than investigation.
12. Counselors can offer advice to the parties, while mediators and investigators do not offer advice.
13. Counselors are employees of the DLA activity; investigators are not employees of Government; and mediators are split, with some employed by the Government and others not employed by the Government.

## **RESOLVE IS NOT APPROPRIATE FOR EVERY CASE**

The decision not to offer mediation will only occur after a full evaluation of the dispute by the EEM or designee. It will be an exceptionally rare occurrence for management to decline mediation. DLA will be overinclusive, not underinclusive with its participation in the RESOLVE program.

However, mediation may not be in the best interest of the parties in very limited cases. In these situations, the Agency will evaluate the mediation request a bit more closely. Even in these rare circumstances, listed below, it is DLA's policy to mediate under the RESOLVE program whenever practicable.

RESOLVE may not be appropriate under certain circumstances.

1. A definitive or authorized resolution of the matter is required for legal precedential value, such as when a particular case may change DLA policy or procedure.
2. The issue is one of Government policy.
3. The matter significantly affects other parties not part of the same mediation proceedings. Mediation might not be appropriate, for example, if a particular case impacts on another employee's pending EEO case or involves a large scale Reduction in Force (RIF).
4. A full public record of the proceeding is important.
5. The Agency requires continuing jurisdiction over the matter in dispute. If the issue is expected to continue well into the future and require continuing agency support, it might not be an appropriate time to resolve the matter.
6. The issues focus on prohibited personnel practices, Hatch Act violations, or matters already subject to a collective bargaining agreement.
7. The dispute involves certain very sensitive issues related to EEO Complaints regarding the health, safety, and security of our employees.
8. The conflict is primarily over issues of disputed law not fact. For example, if the dispute is over the interpretation of a statute, mediation might not be appropriate.

## STARTING THE EEO MEDIATION PROCESS

Quick and easy access to mediation is important for RESOLVE to be effective. RESOLVE procedures are designed to be as simple and "user friendly" as possible. It begins with contacting the EEO Office to speak with an EEO Intake Specialist, who will be knowledgeable about the RESOLVE program.

Below is a summary of how an aggrieved employee can quickly enter into RESOLVE to mediate an EEO complaint.

1. Access to the DLA wide RESOLVE process begins with an aggrieved employee following locally posted/issued instructions to contact the EEO Office within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.
2. An EEO Intake Specialist will explain the EEO process, including the mediation option under the RESOLVE program.
3. If the employee wishes to mediate the dispute, the EEO Intake Specialist will coordinate the mediation, working closely with the EEM. If the employee does not wish to mediate the dispute, the case will proceed to counseling.
4. Mediation may be proposed by the employee, the EEM, EEO counselor, or any management official. Only the EEM (or designee) may schedule mediation for an employee with an EEO complaint.
5. After a decision by the EEM that the issues are appropriate for mediation, the mediation will be confirmed to the employee in writing.
6. Once mediation is accepted, the EEM will quickly assign a mediator or co-mediators suitable for each particular EEO dispute and the pre-complaint processing period will be extended in writing from 45 to 90 days.
7. The assigned mediator will be a trained neutral individual who may or may not be employed with a Government activity.
8. The EEM will notify the mediator of the issues accepted for mediation, identify the parties, and advise the mediator of any special needs by the parties.
9. The assigned mediator or a representative of the EEO Office will contact each of the parties directly to arrange the mediation.
10. If a party believes that the assigned mediator will not be able to handle the case fairly, they should immediately contact the EEM.

11. Mediation is available throughout the EEO Complaint process and may be offered both at the informal stage and again in the formal stage. The second opportunity to mediate may be offered before an EEOC hearing or Final Agency Decision without a hearing. Mediation is most efficient early in the process during the informal stage.
12. All parties have the right to representation during mediation. This can be an attorney or designated representative.

## **PREPARING FOR MEDIATION**

Once a mediator is assigned under RESOLVE, the parties might wish to prepare a few notes or outline their thoughts to make the mediation as productive as possible.

Mediation is simply a type of assisted negotiation, so the best way to prepare for mediation is to prepare for negotiations. It is a very flexible and informal process, geared to dispute resolution rather than compliance with a complicated set of legal or procedural requirements like adversarial (litigation) based resolutions.

Here is a checklist of items for both managers and employees to consider before starting a mediation session.

1. Why is there a dispute? Thinking about "why there is still a dispute" is the first step toward resolution. However, try not to assess blame for the dispute.
2. List your interests to be met for a satisfactory settlement. Your interests should be viewed from the perspective of creative problem solving. Is money or prestige or work assignments most important? Your "real" interests probably are fairly flexible. List each interest; you can sort through the priorities later. Consider traditional and nontraditional needs.
3. Next, try to list the interests and concerns of the other party. Speculate freely and list reasons that they might have to settle the case.
4. Consider the old story of the two children fighting over the last orange to illustrate how two party's interests can differ yet not be at odds. It seems a brother and sister each wanted the last orange in the house, resulting in the parents' decision to cut the orange precisely in half so each child could have the same amount. One sibling then ate the pulp and threw out the rind, while the other used the rind for baking and threw out the pulp. In litigation, by analogy, one sibling gets the entire orange, while the other gets no orange. With mediation, one child gets all the rind and the other child gets all the pulp because we find out the real interests of the parties.
5. Before entering mediation, remember your MOMS. MOMS is an acronym for Many Options Multiply Settlements. MOMS is your list of best possible settlement options.

Do a quick "reality test" with MOMS to determine if the list is realistic. MOMS could then be used as a basis of comparison for settlement options raised during mediation. The comparison will also assist you in determining when to stop negotiating and pursue another means of dispute resolution.

6. Write down as many different settlement options as you can, even if a settlement option only resolves part of a dispute. This is your opportunity to be inventive and flexible. Your list of potential settlements when added to those of the other party and the mediator's list will be the framework for settlement discussions lead by the mediator. Do not dwell on the obvious; think of your interests, rather than the merits of your case.
7. Another factor to contemplate before actual mediation is your expectation of future contacts with the other party after the negotiations. If you will be working together day to day, the nature of your negotiations may be different than if you anticipate no significant future contact.
8. Try to set strong emotions aside during the mediation. This means thinking about how feelings of anger or frustration can be expressed constructively.
9. Bring a list of unanswered questions to the mediation session. The mediator will cover all procedural issues at the beginning of the mediation session.
10. Be prepared to mediate in one or several sessions. The success of the mediation is tied more to the good faith efforts and creativity of the parties than time to mediate.
11. At the mediation session, be yourself. The mediator will help you through the process with as little stress as possible.

## THE EEO MEDIATION SESSION

Understanding the mediation process itself is an important element of RESOLVE. In order to gain a better awareness of the mediation process, it's useful to be familiar with the general steps followed during a typical mediation.

Most employees are familiar with the litigation process from TV, newspapers, movies, books, or personal experience. However, only a few of us have actually attended a mediation session or received sufficient training to really appreciate just how effective the mediation process is in solving workplace disputes.

DLA is committed to training and informing our employees about ADR in general and mediation specifically. This is one of the primary purposes of this Guide. DLA employees will see much more use of ADR and mediation in the EEO process as well as ADR for resolution of other personnel, environmental, and contract disputes.

Steps in the mediation process.

1. **Agreeing to mediate.** Appointment of a qualified mediator will be arranged by the PLFA Equal Employment Manager (EEM) or their designee soon after the parties agree to mediation. DLA has made the policy decision that almost all employee requests for mediation of an EEO complaint will be honored.
2. **Establishing ground rules.** The mediation will begin with the mediator introducing himself or herself to the parties, outlining the issues accepted for mediation, discussing procedural ground rules, explaining the use of caucuses (private meetings), and describing how settlement options are developed. Terminating the meditation with a settlement, partial settlement, or no settlement will also be addressed.
3. **Opening Statements.** Statements are made by the initiating party, then by the other party. Mediators will ask questions and summarize statements for clarity before continuing the mediation. As a courtesy, opening statements are not interrupted by the other party.
4. **Prioritizing issues.** After short opening statements, the mediator will prioritize the issues into a workable problem solving agenda. Less controversial issues might be dealt with first.
5. **Narrowing.** The mediator will focus on issues and facilitate joint discussions about common interests and possible areas of resolution.
6. **Caucusing.** Mediators may want to meet with the parties separately to help develop settlement options, evaluate a proposal, or do a bit of reality testing with a

party. This private discussion, called a “caucus”, may occur several times during a mediation session. After a caucus, the mediator may wish to caucus with the other party or have the parties meet jointly to discuss issues and potential settlement.

7. **Using confidential information.** All caucuses are confidential and may be held with one or more parties outside the mediation room. There is no significance associated with whether a party is inside or outside the caucus or how long a caucus has lasted.
8. **Developing options.** Settlement options are generated through structured discussions in joint sessions or developed through conversations with the mediator in caucuses.
9. **Drafting settlement.** If the parties agree to a settlement, the mediator will reduce the terms to writing. The settlement document will be signed by the parties.
10. **Approving settlement.** The signed settlement document is subject to review and approval by the Office of Counsel, and/or Office of Human Resources, and/or Command and any other office as appropriate. The EEM will be responsible for coordinating the review/approval process.
11. **Continuing Formal Complaint.** If the mediation does not lead to an agreement, the mediator will advise the EEM, and the case may proceed into the Formal Complaint process.
12. **Closing.** At the conclusion of the mediations process, the mediator oftentimes will return to the parties any documents they furnished to the mediator, and destroy any notes the mediator may have taken.
13. **Time requirements.** Remember, the mediator is always neutral and is there to assist you in resolving your dispute, not to represent either the employee or management. Mediation may last from one hour to several days, depending on the complexity of the case. Most cases last less than one day.

## **CONFIDENTIALITY OF MEDIATION**

To the extent allowed by law, regulation, and policy, conversations and material produced during a mediation session will be kept confidential. The mediator will not disclose or discuss with anyone outside of the mediation session anything that occurred between the parties during the mediation or which was communicated in private to the mediator. Resolutions arising out of a mediation will be disclosed only on a need-to-know basis for approval and implementation of the settlement.

This privacy enhances the party's ability to openly discuss settlement of disputes without fear that disclosures might impact future litigation should the case not be resolved. We believe that more settlements occur when the confidentiality of the mediation process is protected.

A mediator can often speed negotiations and increase chances for agreement by holding separate private confidential meetings with the parties, called caucuses. During caucus, each party is encouraged to give the mediator a full and candid account of their own interests, discuss what they would be willing to accept in terms of settlement, and consider alternative approaches. The mediator may also carry messages between the parties, launch a "trial balloon," or act as an agent of reality for the parties.

DLA will not seek to discover or force disclosure of a mediator's notes, memoranda, or recollections, or documents provided to the mediator in confidence during the mediation process. The parties will agree, in writing, not to require the mediator to testify regarding statements made in the mediation session. This means that the mediator cannot become a witness for any party at a future proceeding.

Exceptions to confidentiality include:

1. All parties to the mediation and the mediator consent in writing to waive confidentiality.
2. The communication has already been made public.
3. The communication is required by statute to be public.
4. A valid court order directs such testimony or disclosure.
5. One or both parties must disclose relevant information necessary to enable implementation or enforcement of the agreement. Disclosure shall be limited to that information and only those persons necessary to secure implementation or enforcement.
6. Significant health, safety, or security issues arise that require immediate attention by the agency. This rare circumstance might occur, for example, if a party seriously threatened violence to another party during mediation.
7. The gathering of general statistical information for research or educational purposes is permitted.

Any evidence otherwise discoverable will continue to remain discoverable, without regard to mediation. The mediation process will not make an available document unavailable merely because mediation was elected.

## COMMONLY ASKED QUESTIONS & ANSWERS

**Why does DLA prefer mediation to other forms of ADR?** Mediation is relationship oriented, and is designed to improve the process used by the parties to resolve a dispute. Mediation is highly flexible, voluntary, and allows the disputing parties to design and tailor their own agreement. DLA also prefers it to other third party decision making procedures because of its focus on party interests, not blame.

**Is there a fee for using mediation?** No. The agency will pay any fees charged by the mediator.

**What is the mediator's role?** The mediator's role is to help people who are involved in conflict work out a practical solution for themselves. A mediator does not weigh the law and evidence and then tell the parties who is right and wrong, like a judge. Mediators do not give employees advice, like a counselor.

**Can a deciding official decline participation in the RESOLVE program?** DLA has made the policy decision that managers should participate in the RESOLVE program. If they choose to opt out, they must state their reasons in writing, their declination must be approved by a higher authority, and they must discuss the matter with the ADR Specialist.

**Why should I consider mediation?** Traditional approaches to resolving conflicts, such as courtroom litigation, are slow and expensive. Litigation often does not succeed in settling the real issues underlying a dispute. Mediation offers a prompt, equitable resolution to the fundamental issues in a dispute.

**What if one of the parties want a different mediator?** If either party believes that the mediator is unacceptable, they may immediately contact the EEM to request another mediator. The EEM will determine whether to assign another mediator to the case. Generally, a reasonable request for a different mediator will be honored.

**When will the mediation begin?** Mediation will begin when the employee, management official and mediator can meet. Usually mediations are scheduled within a few weeks.

**How long does a mediation last?** There is no set time period. Most cases are completed in less than one day. Some cases take longer. Mediation will continue as long as the parties are negotiating in good faith and the mediator has determined that additional discussion may still be productive.

**Must an aggrieved employee participate in the Mediation Program?** No. The program is completely voluntary.

**If an employee has several EEO Complaints, can they be mediated together?** Each request for mediation is evaluated based on its own fact pattern. Cases are combined or mediated separately depending on the complexity of the cases and commonality of management officials.

**If mediation is unsuccessful, can the employee still pursue the complaint?** Yes. Participation in the RESOLVE program is in addition to all existing courses of action available to each employee. If mediation is unsuccessful, the employee can still file a Formal Complaint of Discrimination.

**Will mediation work in my case?** Agreements are reached in about 80% of the cases using mediation when the parties seeking resolution have authority to make and implement an agreement. Even when mediation does not result in an agreement, the process tends to narrow the issues making formal litigation more manageable.

**May the mediator terminate the mediation?** Yes, if it appears that resolution of the dispute is unlikely.

**Do the parties need an attorney to help mediate?** This is a difficult question to answer with a generalization. Each EEO case is different and depends on the complexity of the case as well as the parties' own communication skills. The RESOLVE program provides the employee and management official the opportunity to directly solve a dispute without any representative present. However, if an employee is not sure, he or she should seek guidance from a private attorney.

**Where is the mediation?** The mediator or the EEM will set the time and location of the mediation, usually at or near the worksite.

**Who has the "burden of proof" during mediation?** No one. The burden of proof is a legal concept used for litigation. Mediation precludes the need to prove a case since the emphasis is on resolution, not blame.

**Is there a stenographic record of the mediation session?** No. Mediation sessions emphasize confidentiality. Records received from a party during the mediation session are returned or destroyed at the end of the mediation.

**How does RESOLVE save money?** Both the employee and the Agency will save money by avoiding the significant costs associated with litigation. If an attorney is retained, the fees are generally far smaller than the fees for litigating the same case. The agency can often avoid the cost of the EEO investigator.

**Are the mediation sessions private?** Yes. Only the parties and their representatives may attend the mediation session. Other persons may only attend with the consent of all the parties and the mediator.

**What happens if a case is settled through RESOLVE?** The settlement agreement will be binding and will prevent any further action on the merits of the case before any administrative or judicial forum.

**Will the parties have to take an oath to tell the truth?** No. We believe the parties are acting in good faith and will not mislead, misstate the facts, or generally obscure the facts at issue in the controversy.

**Who selects the mediator?** The EEM will select the mediator from an approved source or may call DLA for a qualified mediator.

**If an EEO Complaint is pending before the Merit Systems Protection Board (MSPB), is ADR available?** Most likely, yes, however, MSPB actions are outside the scope of this Guide. Contact the EEM, union, or Human Resources Office for more specific guidance in this situation.

**If mediation is unsuccessful, will I proceed to the Counselor stage?** No. If the ADR attempt is unsuccessful, the case will be returned to the EEO office, where a report will be written. The report will consist of: a description of the initial actions taken by the EEO office, the issues, and notice that the ADR attempt was unsuccessful. The employee may then proceed directly to the formal complaint stage of the EEO process.

**Are mediators qualified?** Yes. All mediators must meet a high standard of excellence before DLA will accept them as part of its RESOLVE program. We have great diversity of mediators available from both inside and outside the Government. One commercial book list includes over 60,000 professionals involved in dispute resolution.

**How are the results of mediation documented?** The meeting is not documented, other than if an agreement is reached. The Agreement itself will be the documentation of the successful mediation. If an agreement is not reached, a record of the names, issues, and dates of mediation will be made. No documentation will be maintained for information gained in any caucus session.

**How does a manager benefit from mediation?** Managers benefit from mediation in many of the same ways as do their employees. They save money, make more efficient use of limited resources, and preserve the integrity of ongoing work relationships. Managers also have the opportunity to be more creative in developing resolution possibilities than is possible under litigation.

**Is it faster to have a dispute go to court or use RESOLVE?** Court proceedings are cumbersome, lengthy, and frequently take months or years to conclude. The mediation process will normally take only a few weeks to complete.

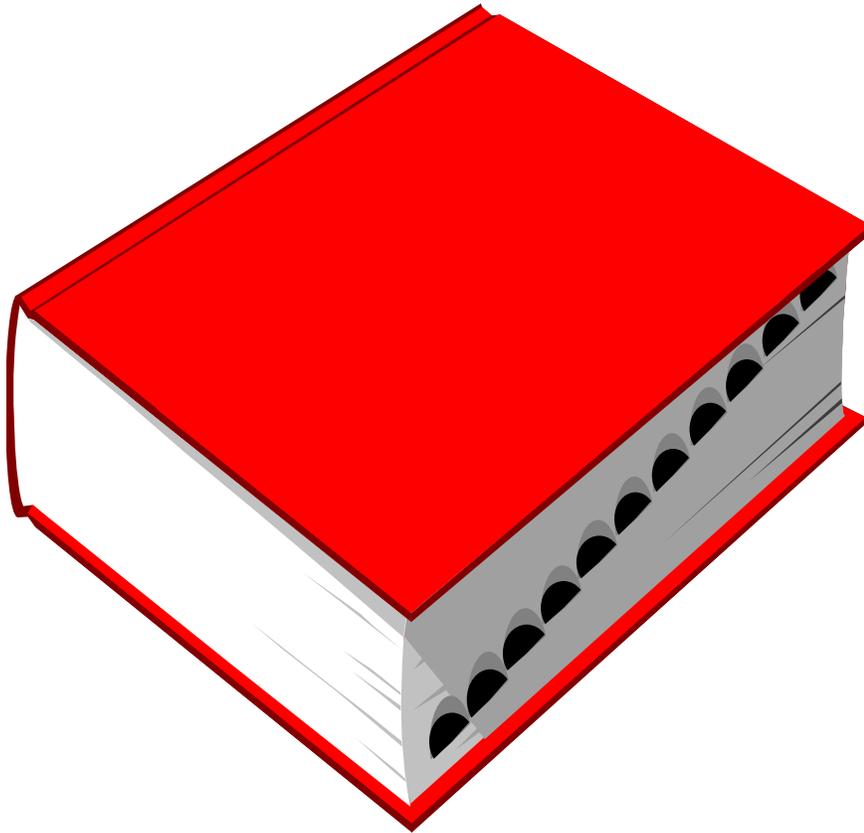
**How does RESOLVE protect relationships?** Mediation generally results in a settlement that both parties can accept and support. The process promotes better

communications between the parties and encourages a respectful and cooperative relationship. Mediation, unlike litigation, does not have winners and losers.

**What is the advantage to an employee to mediate an EEO dispute?** Mediation is completely voluntary, assuring that any settlement will be acceptable to the parties. The mediator, as a neutral party, may suggest ways of resolving the dispute, but cannot impose settlement on the parties. Mediation provides the opportunity for customized, creative, and equitable solutions tailored to the specific needs of the parties.

**What happens if only part of the EEO complaint is settled during mediation?** The Resolution Agreement will be enforceable for that part of the complaint that is settled. The part of the complaint that has not been settled will be the subject of a Final Interview. After the Final Interview, the case may proceed to the formal complaint process at the option of the employee.

# APPENDIX



## **GLOSSARY OF SELECTED RESOLVE TERMS**

**ALTERNATIVE DISPUTE RESOLUTION OR ADR** - Any technique for resolving complaints of discrimination without resorting to litigation in either an administrative or judicial forum. ADR techniques include: mediation, interest based negotiation, arbitration, mini-trials, early neutral fact-finding, conciliation, and peer review panels.

**ARBITRATION** - One of the oldest and most popular forms of ADR. Arbitration has historically been used to resolve labor/management and commercial disputes. This process is characterized by a formal adversarial hearing with a relaxed evidentiary standard. The neutral third party, called an "arbitrator," is usually a subject matter expert. An arbitrator or arbitration panel (two or more arbitrators) essentially serves as a "private judge," rendering an informed decision based on the merits of the dispute. The decision of the arbitrator may or may not be binding on the parties.

**CO-MEDIATOR** - Many mediations benefit from having more than one mediator. When two or more mediators are present, they are called "co-mediators." The process does not change when co-mediators are used.

**CAUCUS** - A private meeting between the mediator and one party that occurs during a typical mediation. The caucus allows the individual parties to privately explore unexpressed concerns, to come to a better understanding of the real interests of each party, and to brainstorm new concepts for resolution of the conflict. Information and statements made during a caucus are confidential.

**DECIDING OFFICIAL OR MANAGEMENT OFFICIAL** - The supervisor or person with organizational responsibility for taking (or not taking) an action in which an issue in controversy has arisen. For example, in a merit promotion based claim, it would be the selecting official. In a work assignment based claim, it would be the first line supervisor.

**EARLY NEUTRAL EVALUATION** - An ADR technique where an unbiased third party with experience evaluating EEO complaints reviews the merits of a party's position early in a dispute to facilitate a quick resolution.

**FACILITATION** - An ADR technique used to improve the flow of information within a group of individuals or parties in a dispute. It is a process in which the "facilitator" works with a whole group to provide procedural direction as to how the parties can effectively move through the negotiating process and arrive at a joint agreement. The facilitator's focus is on procedural assistance to conflict resolution, compared to a mediator who is more likely to be involved with substantive issues. It is common for a mediator to become a facilitator, but not the reverse.

**FACT-FINDING OR NEUTRAL FACT-FINDING** - An investigative process involving a neutral “fact-finder” who will independently determine the facts for a particular EEO dispute. This ADR technique is only used in disputes over matters of fact, not interpretations of law or policy. Fact-finding has long been an integral part of the DLA EEO Complaint process, whereby the Agency has contracted with independent investigators to gather facts related to a formal Complaint of Discrimination. The parties benefit by having the facts collected and organized in a fashion that will facilitate further negotiations or, in the alternative, be available for later use in formal litigation.

**INTEREST BASED NEGOTIATION OR INTEREST BASED BARGAINING** - An established negotiating technique where disputing parties identify and discuss the issues at hand to arrive at an acceptable solution. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute. The focus of negotiations is on the common interests of the parties rather than their relative power or position. The goal is to reduce the importance of how the dispute occurred and create options that satisfy both mutual and individual interests. This informal process is one of the most fundamental methods of dispute resolution, offering the parties maximum control over the process. It usually does not require the services of a neutral third party.

**LITIGATION** - Formal courtroom or administrative proceeding before a judge or presiding official. This includes Federal District courts and the Equal Employment Opportunity Commission. Although technically not an ADR technique, ADR becomes intertwined with all formal litigation, whatever the jurisdiction. Not every case can or should be mediated or settled. Even the most ardent mediation advocate does not expect mediation to replace all litigation. However, each EEO case proceeding toward litigation benefits by an evaluation for resolution as part of the DLA RESOLVE program.

**MEDIATION** - This is the DLA’s favored resolution technique for the EEO process in which a neutral person called a “mediator” assists the parties in negotiating a settlement. Throughout this voluntary process the mediator serves as an agent of reality to help the parties frame the issues, structure negotiations, and recognize self interests as well as the interests of the other side. The parties may meet with the mediator alternately, together, or individually as the circumstances dictate. Private meetings between a party and the mediator are called a caucus. The caucus allows the parties to vent their emotional positions, then move to productively define the issues and brainstorm potential solutions without further alienating the opposing party. Mediators have no decision making authority and cannot impose a resolution on the parties.

**NON-PARTY PARTICIPANT** - A person or entity who is not a party to the dispute, but who participates in the settlement proceeding, such as by providing information, analysis, advice, or views. Examples might include the individuals required to implement a particular solution to a dispute, such as: Office of Counsel, the EEM, and Human Resources Office.

**NEUTRAL OR NEUTRAL THIRD PARTY** - An individual skilled in dispute resolution who functions specifically to assist the parties in resolving a particular EEO controversy.

The individual may be a Government employee or someone outside the Government. Neutrals under the RESOLVE process are very knowledgeable about mediation and EEO but have no power to impose a solution on a party. The use of a neutral is always voluntary. A neutral does not have any official, financial, or personal conflict of interest with the issues in controversy or the parties.

**UNASSISTED NEGOTIATIONS** - Direct settlement discussions between the parties to a dispute. There is no assistance from a third party.



## **WHAT A MEDIATOR CONSIDERS WHEN ENTERING A NEGOTIATION**

Adapted from a publication by the Administrative Conference of the United States, below is a summary of what factors a mediator considers during a mediation.

1. The issues identified in the dispute.
2. The wants and needs of each party in the dispute.
3. The parties' proposals, positions, and real interests.
4. The parties' assumptions about the basis for the dispute.
5. The parties' alternatives to negotiation.
6. Who is bringing the action.
7. What the parties expect of themselves and their counterparts.
8. What the closers/ratifiers expect of their advocates and counterparts.
9. What the representatives expect of the negotiating process and the specific mediator.
10. Trust - the degree of trust that exists or can be restored.
11. The "facts" as agreed to by the parties (not as determined by the mediator).
12. The "politics" of the situation (inside and outside).
13. Outside factors affecting the negotiation.
14. The negotiation ground rules.
15. The relevant law or standards.
16. The power relationships and the criteria used by the parties to establish power.
17. Resources of the parties: legal, technical, political, financial.
18. The history of the relationship; is this a "one-shot" negotiation or part of a long-term relationship?

19. The objectives, strategy, and tactics of the parties. Is the purpose to: resolve a dispute, avoid a dispute, solve a problem, harmonize a relationship, or improve a relationship?
20. The sophistication and drafting skills of the parties.
21. The amount of discretion the deciding official has.
22. Ability to prevail in an evidentiary process as perceived by the parties.
23. Perception of willingness to go to trial.
24. Personalities of the advocates and their styles of convincing and being convinced (e.g., idealists, realists, pragmatists, synthesizers, analysts).
25. Whether participation in mediation is compulsory or voluntary.
26. Are there other possible processes for a negotiated settlement: hearing, court, arbitration, fact-finding, etc.
27. Effects of passage of time on the interests and expectations of the parties.
28. What is "just", "fair", "equitable," and "true" according to the parties.