

ADR LAW NOTES



Legal Developments, Issues and Other Matters of Interest Concerning Alternative Dispute Resolution

Defense Logistics Agency ADR Practice Group APRIL 2003

ONE MEDIATOR'S PERSPECTIVE ON MEDIATING CASES WITH A HEARING IMPAIRED PARTICIPANT

Every mediation comes with its unique set of circumstances, and mediators have learned to adapt their styles based upon the requirements and the personalities involved. I believe that some mediations can be particularly more challenging than others. I've had some lessons learned in respect to communicating with the hearing impaired, and I'll share them with you in these ADR Law Notes. Perhaps these recommendations can be useful to you.

I had mediated complaints of two hearing-impaired employees in the past (aided by an interpreter) and when asked to mediate the complaint of another hearing-impaired employee, I felt well prepared for the task. The complaint involved six issues that we painstakingly discussed and negotiated through three mediation sessions, aided by an interpreter, and resulted in a written Settlement Agreement. The resolution was quite an accomplishment and I believed the parties had made significant progress toward putting their workplace disputes behind them.

Then disaster happened and the Complainant alleged breach. We were back in mediation and the Complainant contended that she never agreed to the terms of the agreement and that she did not properly understand them. In the new mediation, I implemented two techniques, which eventually resulted in a successful resolution. First, I took extraordinary measures to make sure the Complainant fully understood our discussions, by using simpler sentences. Once she concurred, I rephrased the sentence using words with the same meanings to make sure she understood. I learned that some English words take on a totally different meaning when signed, depending on the type of sign language the Complainant and interpreter learned. Finally, I explained what she/or management would have to do in order to comply with the agreement by giving a step-by-step scenario. Second, I had the Complainant and management initial every term agreed to on my

rough notes. This way, when we were ready to prepare the written settlement agreement, both parties had already affirmed that they concurred with the resolution on that issue.

A few months later the same Complainant had two new informal complaints (and two old formal complaints that had not been investigated) with several dozen issues, and requested mediation. While contracting for the hearing interpreter, our EEO Officer learned that the company also could provide the services of a hearing impaired advocate who aids in difficult facilitations as a third-party neutral. The advocate's role is to assist the hearing impaired employee better understand the discussions, and implement their own form of reality testing if it appeared the hearing impaired employee is being unreasonable. We contracted for the advocate and two interpreters (to exercise the buddy relief system) knowing our discussions would be lengthy. We also requested the services of a co-mediator. I listed each of the Complainant's issue on butcher-block paper and hung them on the walls. We started with the easy issues first, and by the first session were able to resolve eleven of the issues (which were crossed off and initialed by the parties.)

When we reconvened for the second and third sessions, the management representative expressed his frustration with the amount of communication between the Complainant and her advocate. The representative expressed his displeasure because he did not know what they were saying in sign and their communications were quite rambunctious. We discussed the issue and the parties agreed to utilize the services of the two interpreters simultaneously -- one to sign to the Complainant and the advocate what the speaking parties were saying, and the other to verbalize what the Complainant and advocate were signing. The system worked remarkably well and helped to level the playing field for the parties.

Eventually we were able to come to resolution on the two informal complaints. With the spirit of cooperation and trust beginning to grow, I asked the

Complainant if she would be interested in mediating her two formal complaints and she agreed. With more conversation, the parties were able to resolve those issues as well and we were able to reach a global settlement on all four complaints.

In summary, mediating complaints of hearing impaired employees can be successfully accomplished if the mediator speaks to everyone in simplistic terms, seeks assurance that the Complainant fully understands, and then rephrases the resolution to make sure everyone does, in fact, understand what they are agreeing to. I'd also recommend utilizing the services of a hearing impaired advocate for more difficult cases, if available. If an advocate is employed, utilizing two interpreters as described above, assists greatly in the communication process.

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BROADENING THE USE OF ADR TO RESOLVE CONTRACT ISSUES

There are lots of ways to use ADR to resolve contract disputes, other than in the "traditional" sense when one of the two contracting parties specifically asks the other for it. ADR can be used to resolve contract issues raised in Congressional inquiries or FOIA requests, or raised by the Small Business Administration. Using ADR in these situations can be very fruitful in resolving the dispute, and certainly can help de-fuse political tensions that may accompany the issue.

Many have worked on inquiries from a member of Congress writing on behalf of a DLA contractor complaining about a contract issue. Answering these letters can be a challenge. The facts are often complicated, and sometimes confusing, typically accompanied with a previous history of disagreement between the parties. Due dates for responding are compressed, replies have to be coordinated at different levels, and re-work is typical. The result often focuses on the *issue* not the *interests*, and often generates further inquiries, sometimes at higher levels. Instead of this traditional approach, consider suggesting ADR in the response. The response is easier to write and coordinate, the matter (if ADR is accepted) gets out of the escalated, letter-writing mode and back in the hands of the directly affected parties, and the agency gets to offer something constructive to the member of

Congress. In turn, he or she can appear more helpful to his or her constituent, and hopefully less likely to initiate further inquiries on that point.

ADR can also be used to resolve contract issues raised in FOIA requests or by SBA. For example, in one FOIA appeal received at Headquarters, the company was asking for contract information internal to DLA that arguably was not releasable. However, the information, even if released, did not appear to be helpful to the company or explain DLA's actions. In a case like this, ADR might be a good approach; the company may be far more interested in hearing, even without specifics, the agency's overall approach, than disputing the releasability of something potentially useless to him. DLA benefits in making sure our approach was sound, and in eliminating a FOIA appeal to the Director and possible future litigation or challenges. Similarly, the next time a contract issue arises with SBA, consider ADR; nothing prevents ADR from being used in Government-to-Government disputes. Working cooperatively and constructively with SBA on small business issues can be very helpful, and certainly can be preferable to some alternatives. With small business issues coming under increasing scrutiny, this approach makes sense.

As always with ADR, there is virtually no downside or risk in suggesting it, and the payoff, in many different ways, can be great. New experiences are broadening, they say; here are opportunities for all of us!

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CHANGES EXPECTED AT THE EEOC

The EEOC has announced that it expects to make changes to the EEO complaint process, perhaps sometime in the Fall of 2003. A coalition of several private law firms, a union organization, and a variety of associations recommended several changes to include mandatory ADR. At the present time, it is unknown what changes for the complaint process are in the works.

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