

ADR LAW NOTES



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

Defense Logistics Agency ADR Practice Group JANUARY 2004

OFPP ISSUES AWARDS FOR ACQUISITION ADR PROGRAMS

At a ceremony on December 3, 2003, OFPP issued awards for effective and innovative acquisition ADR programs. The two awardees were the Army Materiel Command (AMC) and the Armed Services Board of Contract Appeals (ASBCA). AMC won for its agency protest program, which has been in effect since 1991. Agency protests are resolved in an average of 17 days, and only 9% proceed to GAO or court; of those, only 4 cases have ever been sustained. The ASBCA was recognized for its high success rate (96% of ADRs successful) and for its commitment to ADR, especially for making its judges available as ADR neutrals.

Special recognition was also given to the American Bar Association (ABA) Public Contract Law Section for its efforts supporting ADR. Part of the Section's work efforts included the work by the Task Force on Dispute Avoidance and Early Dispute Resolution. Elizabeth Grant of DLA-DG was a member of that Task Force, and DLA field offices have all received a copy of the Task Force Monograph: *An Ounce of Prevention: Best Practices in Dispute Avoidance for Government Contracting*.

Mr. Robert Burton, Associate Administrator of OFPP, hosted the program and presented the awards; keynote addresses were made by David Leitch, Deputy Assistant to the President and Deputy Counsel, and by Robert McCallum, Jr., Associate Attorney General.

Although DLA did not receive an award, it was one of only three DoD components competing for recognition (DLA, AMC, and the Navy). It is a real accomplishment for the agency to have an acquisition ADR program sufficiently developed to compete in this league.

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UPDATED DLA ADR REPORT AND ACQUISITION ADR IMPLEMENTATION PLAN

DLA issued its revised ADR Report in June 2003. This short report updates the June 2000 version, and provides an excellent summary of DLA's ADR program overall. Agency ADR specialists should already have a copy of this report; it is also a useful introduction to DLA lawyers and clients getting familiar with the agency's ADR program. The June 2003 report is available on the ADR Home Page website. www.dscc.dla.mil/Offices/legal/adr/adr.html <<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>>.

DLA issued its revised Acquisition ADR Implementation Plan in October 2003. This plan, revising the 1999 version, is intended to give flexibility to the field in designing and developing local ADR Acquisition programs, while still highlighting program components required overall. Key program elements include: training, publicity, institutionalizing ADR, and program evaluation. The 2003 Implementation Plan is in the process of being added to the DLA ADR web page.

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The U.S. Equal Employment Opportunity Commission reported on their web site the following on December 2, 2003:

EMPLOYERS RECOUNT WORKPLACE BENEFITS OF EEOC MEDIATION, CALL FOR INCREASED PARTICIPATION

Commission Receives Latest Mediation Study, Posts New Material on Web Site

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today held a public meeting to examine its National Mediation Program,

the workplace benefits of mediation, and employer participation in EEOC mediation. During the meeting, representatives of corporate America, the private bar, and professionals in dispute resolution and human resources encouraged employers to participate in EEOC mediation, one of the largest employment-related mediation programs of its kind nationwide, with over 11,500 mediations conducted annually.

"For more than a decade now, the EEOC has experimented with mediation as a means of effectively resolving workplace disputes to the satisfaction of all involved parties," said Commission Chair Cari M. Dominguez, who has made mediation the centerpiece of her Five-Point Plan to improve the agency's overall operations. "We have observed, time and again, that mediation offers advantages over traditional enforcement and litigation strategies relative to speed, efficiency, relationships and outcomes."

Commissioner Leslie E. Silverman, who has made the EEOC's National Mediation Program one of her top priorities, noted that: "Mediation is a win-win approach because it saves time and money, is non-adversarial, and often results in favorable outcomes for all parties. We know the program works, but sometimes our word is not enough. That is why I am delighted to have employers of different sizes, representing different industries here today who will explain why they have embraced the EEOC's mediation program."

During the meeting, employer representatives from ConAgra Foods, Inc., Safeway Inc., Johns Hopkins Health Systems Corporation, the Equal Employment Advisory Council (which represents Fortune 500 companies), and the Society for Human Resource Management (the largest international association for HR professionals) hailed the benefits of workplace mediation in general and EEOC mediation in particular, including: increased productivity, enhanced communications, positive employee relations, cost reductions, and faster settlements of disputes.

Linda I. Workman, Vice President of Workforce Effectiveness for ConAgra Foods, Inc., commented, "The EEOC mediation program is a valuable tool and a sound approach for addressing the resolution of administrative charges in the workplace. For this reason, we have entered into a universal agreement at the national level to mediate. We encourage other employers to consider using mediation and we commend the Commission for making the program available."

Since 1999, EEOC has mediated more than 50,000 cases with approximately 70% being successfully resolved in an average time of 85 days, nearly half the time it takes to resolve a charge through the investigative process. Additionally, EEOC's experience over the years has shown that 13-20% of mediated cases are resolved based solely on a non-monetary benefit.

"As a result of mediation, we are able to keep our pending EEOC claims to a minimum and avoid the time and money it takes to investigate and respond to a claim," said Donna M. Gwin, Director of Human Resources for Safeway, Inc. Noting that EEOC mediation is "exceptionally worthwhile," she said: "I would highly recommend it to any company that has a charge filed against them."

Laurice Royal of Johns Hopkins Health System Corporation, Office of General Counsel, said: "Hopkins is striving to be an 'Employer of Choice.' We think that participating in the EEOC's mediation program moves us much closer to that goal."

Also during the meeting, Professor E. Patrick McDermott (Ph.D, L.L.M., J.D.) of the Perdue School of Business at Salisbury State University presented the Commissioners with an independent study on the reasons why employers decline participation in EEOC mediation. He and his colleagues found that rather than any negative perception of the EEOC or its mediation program, "employers who declined to mediate did so because they did not believe that the EEOC charge had merit and thus preferred that the EEOC investigate the charge," he said. "In the vast majority of cases, the EEOC could not have done anything differently for employers to mediate the charge."

As part of its mediation expansion, EEOC has been partnering with large employers by entering Universal Agreements to Mediate (UAMs) at the national, regional, and local levels. A UAM is an agreement between EEOC and an employer to mediate all eligible charges filed against the company, prior to an agency investigation or potential litigation. To date, the agency has signed 23 national UAMs (mostly with Fortune 500 companies) and more than 500 regional and local UAMs at the district office level. The Commission also recently launched a "Referral Back" mediation pilot program in which private sector discrimination charges filed with the EEOC will be referred back to a participating employer's internal dispute resolution program, as appropriate.

Further information about the EEOC's acclaimed

National Mediation Program including the new report on employer participation, Q&A fact sheet on UAMs, and the remarks of panelists at today's Commission Meeting is available on the agency's web site at www.eeoc.gov.