

**United States Section
International Boundary and Water Commission**

Directives Management System

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Part 0700 : Executive Office of the Commissioner
Chapter 0702 : Equal Employment Opportunity
Directive : Equal Employment Opportunity Alternative Dispute Resolution
Citation : SD.I.07023
Proponent : Equal Employment Opportunity
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1. **Purpose.** This United States International Boundary and Water Commission (USIBWC or Agency) directive establishes the USIBWC policy regarding the use of Alternative Dispute Resolution (ADR) methods to resolve disputes involving Equal Employment Opportunity (EEO) issues.
2. **Requirement and Authority.** The Equal Employment Opportunity Commission (EEOC) regulations require that “each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.” 29 C.F.R. § 1614.102 (a). In order to implement its EEO program, each agency shall “establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process.” 29 C.F.R. § 1614.102 (b)(2).
3. **Applicability.** This directive applies to all USIBWC employees, to include its field offices.
4. **Definitions.**
 - A. Alternative Dispute Resolution (ADR). Any technique designed to resolve disputes in a manner that avoids the cost and delay of more traditional adversarial and adjudicatory processes, such as litigation in an administrative or judicial forum. ADR does not replace litigation, but is intended to divert from formal channels those cases that may be resolved in an informal, non-adversarial setting. ADR techniques can include mediation, facilitation, fact finding, early neutral evaluation, the use of an ombudsman, settlement conferences, minitrials, and peer review.
 - B. Alternative Dispute Resolution Act of 1996 (ADRA), codified at 29 C.F.R. § 571 *et. seq.*, requires that federal agencies “adopt a policy that addresses the use of [ADR] as a means of dispute resolution and case management.”

- C. Alternative Dispute Resolution Manager (ADRM). The ADRM is a senior agency official designated by the USIBWC Commissioner to implement the Agency's overarching ADR program for workplace disputes as required by ADRA.
- D. Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces federal laws prohibiting employment discrimination. These laws protect employees and job applicants against employment discrimination when it involves.
- (1) Unfair treatment because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), mental or physical disability, or genetic information.
 - (2) Harassment by managers, co-workers, or others in the workplace, because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), mental or physical disability or genetic information.
 - (3) Denial of a reasonable workplace accommodation that the employee needs because of religious beliefs or disability.
 - (4) Retaliation because the employee complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.
- E. Equal Employment Opportunity issue (EEO issue). An EEO issue is a matter between the Agency and an employee, or two or more employees, that involves discrimination in the workplace, as described in Section IV. E. (1)-(4) above, or the laws (and related regulations) enforced by EEOC, which are listed below.¹ EEO issues are the only issues that will be processed by the EEO Officer and the EEO ADR program.
- (1) Title VII of the Civil Right Act of 1964, as amended. This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.
 - (2) The Pregnancy Discrimination Act of 1978, as amended. This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

¹ Information in Section IV. F. (1) – (8) located at <http://www.eeoc.gov/laws/statutes/index.cfm>.

- (3) The Equal Pay Act of 1963, as amended. This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- (4) The Age Discrimination in Employment Act of 1967, as amended. This law protects people who are 40 or older from discrimination because of age. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- (5) Title I of the Americans with Disabilities Act of 1990, as amended;. This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business
- (6) Sections 102 and 103 of the Civil Rights Act of 1991, as amended. Among other things, this law amends Title VII and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.
- (7) Sections 501 and 505 of the Rehabilitation Act of 1973, as amended. This law makes it illegal to discriminate against a qualified person with a disability in the federal government. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business
- (8) The Genetic Information Nondiscrimination Act of 2008, as amended. This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e. an individual's family medical history). The law also makes it illegal to retaliate against a person because the person

complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

- F. Equal Employment Opportunity Officer (EEO Officer) is the employee designated to manage the Agency's EEO Program.
- G. Issue in Controversy. An issue that is material to a disagreement or dispute between the Agency and an employee, or between two employees. The issues in controversy for the EEO ADR program must involve laws, regulations or other matters that are enforced by the EEOC.
- H. Mediation. An ADR method that must be provided in a nonthreatening environment to facilitate open communication between the disputing parties. Mediation is the intervention in a dispute or negotiation by an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.
- I. Mediator. A USIBWC employee, federal employee, or federal contractor who has received the basic training required for professionals in the mediation industry, who facilitates the ADR mediations in USIBWC.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach an agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individual, in caucuses, to explore acceptable resolution options or to develop proposal that might move the parties closer to resolution

- J. Neutral. A neutral is an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy. 5 U.S.C. § 571 (9). This individual may be a permanent or temporary employee of the USIBWC, another federal agency, a contractor hired by the Agency, or any other individual who is acceptable to the parties to a dispute resolution proceeding. Qualifications required of neutrals is discussed more in Section V.
- K. Non-EEO issue. A non-EEO issue is a matter between the Agency and an employee, or two or more employees, that does not involve the laws, regulations, or matters enforced by the EEOC. Non-EEO issues should be processed through the Agency's ADR program or other grievance systems and not through the EEO Officer or the EEO ADR program.

5. General Policy and General Parameters of the EEO ADR Program.

- A. It is the policy of the USIBWC to offer the EEO ADR program broad access to personnel and facilities in order to address any conflict, dispute, complaint, grievance or dissatisfaction arising in the workplace.
- B. Voluntary participation in and ADR process will not affect any individual's statutory and/or regulatory avenues of redress (i.e., EEO complaints, formal grievances, appeals, etc.)
- C. This directive is intended only to improve the internal management of the EEO ADR program at the USIBWC. This directive shall not be construed as a rule or regulation and is issued at no cost to the Agency. This directive shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, the USIBWC, its officers, or any other person with this directive. Nothing in this directive shall be construed to obligate the United States to offer funds to settle any case or complaint, accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to submit to binding arbitration or to alter any existing delegation of settlement or litigating authority.
- D. Nothing said or done during attempts to resolve the matter through EEO ADR proceedings may be made the subject of an EEO complaint, including the failure of the Agency to provide a neutral. EEO Management Directive-110, 3-8 ("EEO-MD-110"), available at: <http://www.eeoc.gov/federal/directives/md110.cfm>.
- E. The EEO ADR program shall incorporate the EEOC's core principles² for ADR programs, which are:
 - (1) Fairness: The overriding requirement placed on agency ADR programs is that of fairness. The EEO ADR must be fair to the participants, *both in perception and reality*. Fairness should be manifested throughout all EEO ADR proceedings by incorporating each of the EEOC's core principles as well as by providing as much information about the ADR proceeding to the parties as soon as possible.

Fairness requires that the Agency provide the opportunity for assistance during the proceeding to any party who is not represented.

² Information in Section V. E., is directly from: (1) EEO-MD-110, 3-2; (2) *Appendix H* of EEO-MD-110, available at <http://www.eeoc.gov/federal/directives/md110/appendixh.html>; (3) *EEOC update on Revised EEOC Regulatory Requirements for Alternative Dispute Resolution Programs in the Federal Sector*, available at: <http://www1.eeoc.gov/federal/digest/xii-1-3.cfm?renderforprint=1>

- (2) Voluntariness: The EEO ADR program will be voluntary for the parties because the laws against employment discrimination require that a federal forum always be available to an aggrieved individual. The parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes. Employees or applicants must also be made aware that they retain the right to proceed with the administrative EEO process if they decide that they prefer to do so or if a resolution is not reached.

Once the EEO Officer determines that ADR is appropriate for the specific case, the Agency offers ADR, the aggrieved elects to participate in ADR, and both parties have signed an agreement to participate in ADR, both parties have voluntarily, knowingly and willingly entered into EEO ADR.

- (3) Neutrality: ADR proceedings will rely on a neutral third party to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality will help maintain the integrity and effectiveness of the ADR program.

Neutrality means that the ADR proceeding must be impartial and independent of control by either party, *in both perception and reality*. Use of a neutral-- an individual with no stake in the outcome of the proceeding--as a facilitator or mediator ensures this impartiality.

In keeping with this principle of neutrality, an EEO Counselor or other agency EEO official assigned to play a role in processing a particular case *may not* serve as the neutral in that case. Although the Agency is not prohibited from using internal neutrals, agencies are strongly encouraged to go outside the agency in obtaining the services of a neutral to assure the neutrality and impartiality of the neutral. Optimally, the neutral is not an agency employee and knows none of the parties.

- (4) Confidentiality: Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties and their representatives; any Agency employees who are involved in the EEO ADR proceeding; any EEO staff, including the EEO Officer; and any outside neutral or other ADR staff. This will enable parties to ADR proceedings

to be forthcoming and candid, without fear that frank statements may later be used against them.

To ensure confidentiality, the nondisclosure provisions of Title VII and the confidentiality provisions of Alternative Dispute Resolution Act of 1996 ("ADRA"), codified at 5 C.F.R. § 571 *et seq.*, which impose limitations on the disclosure of information, apply to EEO ADR proceedings. In order to encourage participation in a Commission sponsored ADR program, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will notify the parties to the dispute of the protection offered by confidentiality provisions.

Those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have been involved. The dispute resolution process must be insulated from the investigative and compliance process. In addition, both parties must agree in writing not to request or subpoena the ADR neutral as a witness in any subsequent administrative process or judicial proceeding regarding the dispute at issue.

The taking of notes by the parties and their respective representatives is discouraged during the ADR process. The individual serving as neutral is responsible for ensuring that any notes taken by the ADR neutral during the ADR process or in preparation for the proceeding must be destroyed by the neutral at the conclusion of the ADR process. Information disclosed during the mediation is confidential and shall not be disclosed except as provided by law. In recognition of the importance of this principle, the Alternative Dispute Resolution Act of 1996 contains enhanced confidentiality provisions, in Section 574, which require that neutrals in ADR proceedings not voluntarily disclose or be required to disclose dispute resolution communications, with certain statutory exceptions. These provisions further exempt "qualifying dispute resolution communications" from disclosure under the **Freedom of Information Act**.

The agreement to enter into ADR will state that any information disclosed during the ADR process, other than discoverable documentation, will remain confidential whether or not ADR is successful. However, any threat of physical harm or disclosure of waste, fraud, abuse, or any other illegal activity will be exempt from confidentiality and will be reported to the appropriate officials. Both parties must also agree not to request or subpoena the ADR neutral as a witness in any subsequent administrative process or judicial proceeding regarding the dispute at issue. The taking of notes by the parties and their respective representatives is discouraged during the ADR process.

- (5) Enforceability: Any agreement reached during an EEO ADR proceeding must be enforceable. An allegation that an EEO ADR settlement agreement has

been breached should be brought to the attention of the EEO Officer. The Agency will review and investigate the allegation and determine whether it will utilize its authority and resources to seek enforcement of the agreement. Enforceability of EEO ADR proceedings must be maintained by everyone involved in the proceeding--the parties; any neutral third party; and agency employees, including any employees involved in the implementation of a resolution. This means that information concerning the underlying facts of an EEO ADR proceeding and records generated as part of that proceeding (except the settlement agreement) **may not be made part of the EEO complaint record.**

Settlement agreements reached through participation in agency ADR programs are enforceable. Federal regulation sets forth specific procedures by which the EEOC enforces all settlement agreements, including those reached in ADR proceedings. 29 C.F.R. 1614.504. In order to ensure enforceability of ADR settlement agreements, federal agencies must consistently provide access to agency officials with settlement authority throughout all federal sector ADR proceedings.

An agency's ADR program cannot abrogate an individual's right to pursue his or her claim under the Part 1614 regulations (e.g., cannot require waiver of the individual's right to an investigation or an administrative hearing).

- F. Whatever EEO ADR process is utilized will be accessible to individuals with disabilities. A disability accommodation request should be made utilizing the procedure for a reasonable accommodation. Disability awareness training should be provided to ADR staff and neutrals who will be involved in mediations in any capacity.
- G. If a resolution is achieved during the EEO ADR process, the terms of the resolution will be set forth in a written negotiated settlement agreement that conforms with the requirements set forth at VIII. D. (2) herein and that is binding upon both parties.

6. Limitations on EEO ADR and Refusal to Offer ADR.

- A. The USIBWC is free to decide which ADR techniques to employ and whether to offer access to its overarching ADR program in any particular EEO ADR case.
- B. The USIBWC may opt to limit the use of ADR in other ways (i.e., geographically or by issue) but may not decline to offer ADR because of the particular bases involved.
- C. While every EEO dispute is a potential candidate for resolution by ADR, it may not be appropriate in every case. ADR will not be used:

- (1) Where an employee's employment with the agency has been terminated.
- (2) Where an employee wishes to remain anonymous.
- (3) In cases where there are allegations of sexual harassment.
- (4) In cases of misconduct involving violence in the workplace.
- (5) In cases of misconduct involving theft.
- (6) In cases involving non-employees such as contractual personnel.
- (7) In cases indicating that fraud, waste, or abuse has been committed.

B. Pursuant to ADRA, 29 C.F.R. § 572 (b), the following indicators may warrant the declination of the Agency's overarching ADR program and the EEO ADR for a particular issue in controversy where:

- (1) A definitive or authoritative resolution of the matter is required for precedential value. An ADR proceeding is not likely to be accepted generally as an authoritative precedent.
 - (2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made. An ADR proceeding would not likely serve to develop a recommended policy for the agency.
- (3) Maintaining specific policies is of special importance so that variations among individual decisions would not be appropriate. Decisions in successive unrelated ADR proceedings may not reach consistent results.
- (4) The matter significantly affects persons or organizations that are not parties to the proceedings.
- (5) A full public record of the proceeding is important. A dispute resolution proceeding cannot provide such a record.
- (6) The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances. A dispute resolution proceeding may interfere with the agency's fulfilling that requirement.

Before declining to enter into ADR, the matter will be discussed with the USIBWC Equal Employment Opportunity Officer in her/his role as the Alternative Dispute Resolution Program Manager, the Legal office and the Human Resources Office.

- L. The EEO officer will decide on a case-by-case basis whether it is appropriate to offer ADR to an aggrieved individual. The EEO Officer will notify the aggrieved and the ADRM in writing of the determination to offer or refuse to offer EEO ADR. If the EEO Officer refuses to offer EEO ADR, the Officer must provide a written explanation of why a refusal was made.
- M. The EEO ADR process will only be used to address disputes where the dispute involves EEO issues. **The EEO Officer must refer employees to the ADRM if a dispute involves only non-EEO issues.** If a non-EEO issue is processed through the Agency's ADR program or other grievance methods and resolution of the issue is unsuccessful, non-EEO disputes cannot be accepted for investigation as a part of an EEO formal complaint unless the issue is like or related to EEO issues raised during the EEO pre-complaint process.
- N. If a dispute involves both non-EEO issues and EEO issues, the matter must go through the EEO ADR.
- O. While it is USIBWC policy to attempt to resolve complaints of discrimination at the earliest stage, EEO ADR may be offered by the Commissioner or designee anytime during the complaint process prior to the appointment of an EEOC administrative judge.

7. Roles and responsibilities of USIBWC employees.

A. The United States Commissioner:

- (1) Will establish an effective, comprehensive ADR Program that complies with ADRA.
- (2) The Commissioner will appoint an ADRM from his senior officials at USIBWC Headquarters to establish and implement the Agency's ADR program.

B. EEO Officer will:

- (1) Serve as the proponent for establishing and implementing EEO ADR policy, plans, and guidance; and for administering the EEO ADR program.
- (2) Ensure the EEO ADR program complies with all relevant federal regulations.
- (3) Administer the EEO ADR program, including ensuring: all agreements, and documents are properly executed; participants have been advised of the ADR process and been given all other required information; federal rules and complied with during the EEO ADR process; the ADRM is consulted and updated on the implementation of the EEO ADR program.

- (4) Monitor implementation and evaluate program execution and results.
- (5) Draft and submit reports on ADR programs required by the EEOC or consult with ADRM on drafting and submission of those reports.
- (6) Make the initial determination whether an EEO-related matter should be submitted to the EEO ADR program in accordance with this directive.
- (7) The EEO Officer will ensure that Agency managers and staff will participate in EEO ADR once it is offered.
- (8) The EEO Officer will ensure that staff necessary for the ADR process, such as legal office staff or human resource staff, will be available for management representative consultation during the mediation.

C. Neutral.

- (1) Any person who serves as a neutral in the EEO ADR process must meet the following criteria:
 - (a) Have the same level of professional training in the method of dispute resolution utilized by the Agency as is generally recognized in the dispute resolution profession. For example, if the Agency chooses mediation as an ADR method, then the neutral must have training in the basic skills required of a mediator as generally recognized by mediation professionals. A mediator must have at least 40 hours of training in basic mediation skills.
 - (b) Must have participated as a neutral at least 3 times in an ADR process. If mediation is the selected ADR process, then all three times must be in mediation to include serving as a co-mediator.
 - (c) Must be familiar with: EEOC laws, including the EEOC complaint process governed by 29 C.F.R. Part 1614, including its timeframes; the statutes enforced by the EEOC as described in Section IV.D, and E. above; and the Civil Service Reform Act.
 - (d) Those neutrals who will participate in cases involving the Rehabilitation Act or Americans with Disabilities Act issues should receive training which specifically addresses accommodation of the needs of individuals with disabilities in the ADR process.
 - (e) No neutral can have official, financial or personal conflict of interest with respect to the issues in controversy.
 - (f) The neutral must be familiar and act consistently with ADRA.

- (g) The neutral must be familiar with theories of discrimination and reasonable accommodation, and federal employment remedies, including compensatory damages, and attorney's fees and costs
- (2) Neutrals utilized in the EEO ADR proceedings are responsible for ensuring that ADR proceedings are conducted in accordance with EEO law, part 1614 regulations, and the core principles enunciated by the EEOC. This includes ensuring the parties are provided with the opportunity to be represented by any person of their choosing through the proceeding, ensuring the enforceability of an agreement between the parties, and ensuring confidentiality.
- (3) The neutral must act in good faith and be neutral and honest.
- (4) The neutral must ensure that the Agency representative participating in the ADR proceeding has the authority and responsibility to negotiate in good faith and has the authority to approve or enter a settlement agreement or has access to such a person.
- (5) Neutrals for the EEO ADR process will be selected from contract services.
- (6) Since the effectiveness of ADR relies on the perception of neutrality, the EEO Officer, EEO Counselors, HR staff, and staff of the Office of Legal Advisors, regardless of training and skill, may not serve as ADR neutrals. It is the responsibility of the EEO Officer to ensure that the potential ADR neutral is neither acquainted with nor an employee from the same unit or directorate as either the aggrieved or the management official.
- (7) The neutral will serve as an advocate for the ADR process, but does not serve as an advocate for a particular side in a controversy.
- (8) The neutral will facilitate open communication between the aggrieved and designated management official in a collaborative, non-adversarial manner, rather than to evaluate the positions of the parties.
- (9) The neutral will inform the EEO Officer and ADRM, in writing, of any proposed settlement. The EEO Officer is responsible for assuring necessary coordination and completion of any settlement agreement.

D. Managers, Supervisors, Agency Staff:

- (1) Once EEO ADR has been offered and accepted, and an ADR Agreement is executed, managers, supervisors, and Agency employees have a duty to participate in the ADR.
- (2) Have a duty to cooperate and ensure their subordinates fully cooperate with ADR neutrals and mediators.

- (3) Have a right to personal representation during the complaint process. The mediator will decide to what extent personal and agency representatives will actively participate in the process.

8. Procedure for EEO ADR.

A. How to Handle Initial Contact and Pre-Complaint Processing:

- (1) If the ADRM is contacted by an employee without initially meeting with the EEO Officer, then the ADRM must determine if the matter involves an EEO issue or is a non-EEO issue complaint. If the matter involves an EEO issue, then the ADRM must provide the notices and information discussed in Section 8.A.(3) below to the employee. EEOC MD-110, Ch. 3, Section III. (That is, during this initial contact with the ADRM, the ADRM must provide the aggrieved with the same information that the EEO Officer would provide during an initial contact.) Further, this initial contact with the ADRM serves as the initial contact from which the 90-day EEO pre-complaint counseling period will begin to run. The ADRM must also immediately refer the employee to the EEO Officer and not later than two (2) days after the initial contact, notify the EEO Officer of the matter in writing.
- (2) If the EEO Officer is the first contact for the aggrieved, then the EEO Officer must provide the notices and information discussed in this Section 8.A.(3) below and in EEOC MD-110, Ch. 3, Section III, to the employee.
- (3) During the pre-complaint processing, the EEO Officer or the ADRM must advise that, where the Agency agrees to offer EEO ADR, the employee must choose between ADR and EEO counseling activity. 29 C.F.R. § 1614.105 (b) (2). Before this choice is made, the EEO Manager or the ADRM must fully inform the individual about the EEO counseling process and the EEO ADR program. The EEO Officer or ADRM must also advise the individual of his or her rights and responsibilities in the EEO complaint process as set forth in 29 C.F.R. 1614.105 (b).

B. Making an Offer.

- (1) Upon receiving notification of an informal contact where the aggrieved individual has waived anonymity and the claims are specific enough to determine if the complaint is appropriate for ADR, the EEO Officer must determine, on a case-by-case basis, whether the matter is appropriate for EEO ADR and whether ADR will be offered or refused.
- (2) The EEO Officer must send a notice, in writing, to the ADRM stating that the EEO Officer has determined that ADR is appropriate or inappropriate for the matter.

- (3) If the matter is deemed inappropriate for ADR, and ADR is refused, the EEO Officer must provide a written explanation of why the matter is inappropriate for ADR, and such explanation must be signed by the EEO Officer, the ADRM, and the appropriate supervisor, manager or key staff official, and routed through the appropriate Agency channels within 5 working days following the refusal or determination that the matter is inappropriate for mediation.
- (4) The EEO Officer must request that a neutral be assigned to facilitate the ADR or provide a neutral that satisfies the requirements of neutral.
- (5) The EEO Officer must notify the aggrieved and the Agency that participation in the ADR will toll the timelines applicable to the EEO process. 29 C.F.R. § 1614.105 (d). If the Agency offers ADR during the pre-complaint process and the aggrieved agrees to the ADR, the EEO pre-complaint processing period is 90 days. 29 C.F.R. § 1614.105 (f). If the ADR takes place at a later stage, applicable complaint processing time periods may be extended by agreement for up to 90 days. See EEOC MD-110 at Ch.3, Section 8.
- (6) In order to enter into and ADR, the parties must execute a written agreement. The EEO Officer will provide the written agreement to the aggrieved and the Agency representative and ensure that it is duly executed by both parties prior to starting the EEO ADR process.

C. Roles and Responsibilities.

- (1) Management is strongly encouraged to expedite the ADR process and make every effort to complete it as early as possible.
- (2) Agency staff must participate in the ADR process when an aggrieved employee has elected ADR.
- (3) USIBWC Employees as mediators or neutrals. A USIBWC employee qualified under the accepted practices for a particular ADR process may serve as a mediator or third-party neutral under the ADR Program. A USIBWC employee may only serve as a third-party neutral on a USIBWC issue in controversy with the prior approval of the ADRM and the EEO Officer. Conflict of interest principles will be observed in approving the use of a USIBWC employee as a mediator or a third-party neutral on an USIBWC issue.

D. Concluding the process.

- (1) If a resolution is reached, the resolution must be reduced to writing and reviewed for legal sufficiency by the Agency's Office of Legal Advisors. In any event, the responsible mediator or neutral must complete a Negotiated Settlement Agreement with the EEO Officer or ADRM and all parties must sign

the agreement after it has gone through a legal sufficiency review. The Human Resources Office should be included in any review in which a personnel action is part of the proposed resolution/agreement.

- (2) If the complaint is resolved during the ADR proceedings, the Negotiated Settlement Agreement must:
 - (a) be in writing and include all terms that are to be implemented *and* are agreed upon by both parties;
 - (b) identify the claims that were resolved;
 - (c) be signed by both the aggrieved person, and the Agency head, 29 C.F.R. 1614.603;
 - (d) set out the procedures available under 29 C.F.R. § 1614.504 in the event the Agency is in noncompliance;
 - (e) comply with EEOC's Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes, posted at www.eeoc.gov, "Enforcement Guidance and Related Documents;" and
 - (f) comply with any applicable requirements imposed by the Older Workers Benefit Protection Act of 1990, see EEOC-MD-110, at Ch. 3, Section 13; Pub. L. 101-433 (1990), the Age Discrimination in Employment Act of 1967 (ADEA), subsection (f), 29 C.F.R. Part 1625.
- (3) If the matter is not resolved at the pre-complaint stage, the EEO Officer must ensure that an EEO Counselor's report is prepared and that the aggrieved person receives a final interview and is given notice of right to file a formal appeal.

9. Reporting Requirements:

- A. Pursuant to the EEOC's authority in 29 C.F.R. 1614.602(a) to collect federal complaints processing data, and pursuant to the Agencies' obligation to report EEO Activity to the EEOC, agencies are required to report information concerning the nature and operations of their ADR programs to the EEOC on an annual basis through EEOC Form 462. EEOC MD-110 at 3-15.

10. **Supersession:** This Directive supersedes SD.I.07023 Alternative Dispute Resolution (ADR), dated 17 July 2014.

Approved:

///ORIGINAL SIGNED///
Edward Drusina, P.E.
Commissioner

04/08/15
Date