



USAID
FROM THE AMERICAN PEOPLE

OFFICE OF CIVIL RIGHTS AND DIVERSITY

Valuing Diversity
Appreciating Our Differences

ALTERNATIVE DISPUTE RESOLUTION: MEDIATION



Your guide to the process
and how it can work for you



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ALTERNATIVE DISPUTE RESOLUTION: MEDIATION

This guide is provided by the USAID
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Alternative Dispute Resolution (ADR) generally refers to a continuum of processes and approaches that are designed to resolve disputes in a manner that avoids the cost, delay, and unpredictability of more traditional adversarial and adjudicatory processes, such as litigation, hearings, and appeals.

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MEDIATION

The U.S. Equal Employment Opportunity Commission (EEOC) regulations require Federal employers to make available an Alternative Dispute Resolution (ADR) program during both the pre-complaint process and the formal complaint process. Accordingly, USAID has established procedures to use mediation as the ADR method to resolve select employment disputes that arise as equal employment opportunity (EEO) complaints.

Mediation is an ADR process in which a neutral third party, the mediator, assists two or more parties to work together to communicate with each other, identify issues, and find mutually agreeable solutions to their problems. However, although mediators help parties explore creative solutions to problems, it is the parties who agree upon the solution. The mediator does not have the power to force a decision on either party and has no independent decision-making authority.

Mediators are impartial, with no personal interest in the dispute they are mediating. They do not judge or assess blame. A mediator is expected to guide the negotiations and communications between the parties. In cases where the issues are clearly defined, the mediator may simply facilitate discussions. However, because mediators are specially trained and experienced in conflict resolution techniques, they are also able to help the parties work through strained or emotional communications, distrust, and longstanding conflict.

During the mediation process, neither party has a burden of proof, as one would in the hearing of a formal EEO case; there is no determination of fault or blame. Agency management does not have to argue the Agency's defense of the case or present evidence during the mediation. Rather, the goal of mediation is to identify the issues, explore options for resolution, and preserve or mend the working relationship.

Agency officials should keep in mind that the complaining party feels strongly that he/she has been wronged by the Agency and has sought some form of relief by contacting the Office of Civil Rights and Diversity (OCD). The complaining party has agreed to mediate in an attempt to resolve the complaint at the earliest possible stage and prior to a final decision on the merits of the case.

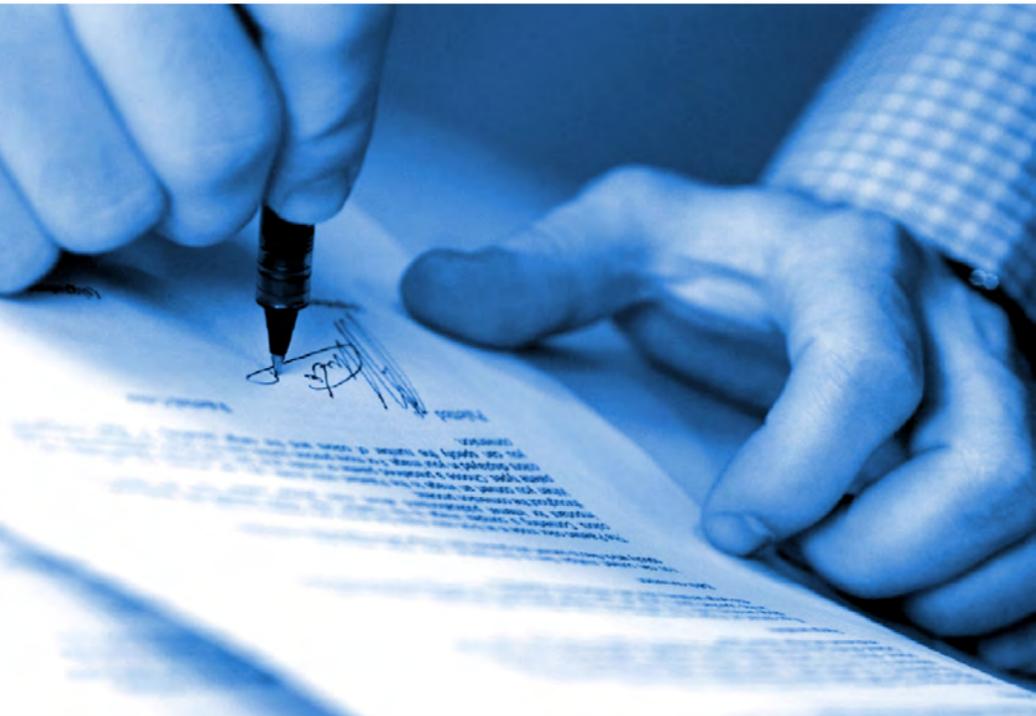
Mediation sessions are strictly confidential. Private conversations held separately with the mediator are confidential. Information shared during mediation may not be used as evidence in future proceedings; it shall remain strictly confidential, except for contact with Agency officials necessary to develop and implement terms of resolution. There is no paper record of the events, other than a resolution agreement, if the matter is settled. The mediator will not keep permanent records nor disclose any information given in confidence without permission. The parties to the proceeding will sign a confidentiality agreement prior to the mediation.



WHY IS ADR BENEFICIAL?

The mediation process:

- Is confidential. The sessions are not taped or transcribed. No records are kept regarding the discussions and meetings.
- Is fair. It involves a neutral third party who has no interest in the outcome.
- Is non-adversarial.
- Helps maintain or improve working relationships by opening lines of communication and reducing tensions.
- Avoids lengthy and unnecessary litigation.
- Empowers employees and managers to control their fate by involving them in the development of solutions.



WHEN IS ADR AVAILABLE?

The USAID ADR program covers EEO complaints initiated by all current employees, including bargaining and non-bargaining employees, who present issues that are actionable under the covered statutes and EEOC regulations.

Determinations as to which circumstances lend themselves to use of ADR are made by the OCRD Director. Certain types of cases are excluded from the ADR process.

Mediation is not available in complaints involving termination, separation, any disciplinary or adverse action, or any other matter first raised in a negotiated grievance procedure. Other specific types of complaint issues that will not be mediated are:

- Class actions
- Security clearances
- Complaints raised by applicants or non-USAID employees
- Reductions-in-Force

Mediation can occur during either the informal or formal phase of the complaint process.

ROLES & RESPONSIBILITIES

DIRECTOR, OFFICE OF CIVIL RIGHTS AND DIVERSITY

The OCRD Director has delegated authority for USAID's EEO programs, including ADR, and is the Agency's EEO complaint settlement official. As such, the OCRD Director determines whether a complaint is appropriate for ADR. In addition, all proposed

resolution agreements must be cleared by the OCRD Director, who will ensure that settlement agreements are in accordance with regulatory requirements. Coordination and monitoring of the ADR process is the responsibility of OCRD staff members.

COMPLAINANT

The Complainant must provide complete and accurate information and relevant documents to the mediator. He/she has the right to have a representative of his or her choosing, provided that the representative does not pose a conflict of interest. The Complainant must sign an agreement to mediate and abide by the requirements of the process.

COMPLAINANT'S REPRESENTATIVE

The Complainant's representative may attend the mediation session(s). His/her participation is limited to advising the Complainant. He/she cannot speak in lieu of the Complainant.

IN THE ADR PROCESS

DEPUTY AGENCY MANAGEMENT OFFICIALS

The Administrator has assigned Deputy Assistant Administrators (DAAs), or their equivalents, to be responsible for EEO matters within their bureaus/offices. When an EEO complaint is selected for mediation, a DAA from the bureau/office where the complaint arose is the designated management official to participate in the mediation. Management officials responsible for the matter(s) at issue in the complaint will be afforded the opportunity to hear the concerns of the Complainant and respond directly during the first phase of mediation. As appropriate, and in consultation with the mediator, the DAA may continue to involve these managers during subsequent phases of the mediation.

MEDIATOR

The mediator is a trained, neutral participant who assists in resolving disputes. The mediator does not have the power to force a decision on either party. Instead, the mediator attempts to focus the attention of the parties on their needs and interests rather than on their rights and positions. Mediators are generally obtained from the Federal Mediation and Conciliation Service.

**Think about what you want, why you want it,
and what you are willing to give in return.**

INFORMAL COMPLAINT STAGE

A complaining party's concerns are initially raised during the pre-complaint (counseling) stage of the EEO complaint process. After consultation with an EEO counselor or OCRD staff member—unless OCRD management determines that ADR is inappropriate—the complaining party will choose to either attempt to resolve the issue(s) through mediation, or to complete the EEO counseling process.

Participation in mediation for the complaining party is voluntary. Participation in mediation is mandatory for management. However, neither party is required to reach resolution. If an employee agrees to participate in mediation to resolve his/her complaint, whether in informal EEO counseling or after a formal complaint is filed, he/she will be required to sign a mediation agreement.

The participants in the mediation will be the mediator, the complaining party, and the DAA designated for the mediation. Other participants may include the complaining party's representative and other designated officials involved.

If the complaint is resolved, a written agreement is drafted immediately, cleared and signed by the OCRD Director, and signed by the DAA and the complaining party. Where resolution is not reached, the matter is returned to the EEO process, and the complaining party is promptly issued the Notice of Right to File a Formal Complaint by the EEO Counselor.

FORMAL COMPLAINT STAGE

The EEOC promotes early resolution of complaints and has encouraged agencies to design ADR programs that make dispute resolution procedures available to the parties throughout the complaint process. Participation in ADR during the formal EEO complaint process indicates that parties very much want an opportunity to share their perspectives in a “safe” environment. The mediation environment accomplishes the objective of providing that forum for exchange, which maximizes the resolution potential while allowing parties to exchange information safely and directly.

OCRD may make a determination that the matters at issue in a formal EEO complaint are appropriate for ADR either upon the filing of a formal complaint or upon review of the final investigative report, and offer the Complainant an opportunity to participate in mediation. Upon election to participate, mediation efforts will be carried out in the manner described above. Resolution agreements obtained will be reduced to writing. Such agreements are binding under EEOC regulations governing the EEO complaint process.

If mediation is not successful the complaint will be returned to the formal complaint process for an investigation within the time frames required by governing regulations; or, if the investigation has been completed, the Complainant will have 30 days to request either a hearing or a final agency decision.

THE MEDIATION SESSION(S)

OCRD will arrange for a safe, confidential environment in which to conduct the mediation. Mediation usually lasts no more than one day, which includes a first meeting with all parties, “caucuses,” and follow-up joint meetings, as needed to reach conclusion. A caucus is a separate meeting between one of the parties and the mediator for the purpose of discussing confidential issues, addressing settlement options, and avoiding confrontation with the other party. Either party or the mediator can call for a caucus. Any information the mediator is asked to hold confidential during the caucus will not be revealed to the other party. Depending on the complexity of the complaint, the mediator may determine that there could be one or more sessions. The EEO complaints process is held in abeyance until the mediation concludes. The employee loses no rights to proceed with the complaint if mediation is unsuccessful.

THE MEDIATION PROCESS

Mediation allows parties in dispute to jointly seek and find long-term resolutions to problems, increasing the prospects for successful teamwork in the future. The process typically involves five stages: preparation, introduction, overview of the issues, problem solving, and agreement.

I. PREPARATION

Parties entering into mediation should prepare in advance by assessing their interests and expectations before arriving at the mediation table.

Both parties are encouraged to:

- Know the facts and underlying issues of the complaint. To that

end, OCRD will provide the appropriate management officials with information and documentation regarding the nature and date of the case, the type of discrimination alleged, and the issues identified for mediation.

- Be able to define own interests and consider the interests of the other party.
- Collect and organize documents related to the matters in dispute.
- Brainstorm about possible resolutions. Be creative. The time spent in planning will result in concrete dividends during the mediation process.

The key to a successful outcome in mediation is to explore all possible options for resolving the complaint. A creative solution may not be limited to reassignment, money, or elimination of an adverse action. There may be other tangibles or creative non-monetary remedies that can be proposed.

2. INTRODUCTION

The mediation session begins with the mediator:

- Making introductions
- Explaining the role of the mediator
- Reminding the parties to the mediation of the confidential nature of the session
- Setting the ground rules for the session

3. OVERVIEW OF THE ISSUES

This stage of the process gives each party an opportunity to listen to and really hear the other person's perspective. Each party will have equal time to:

- Describe the factual situation from his/her perspective
- Share his/her thoughts, concerns, and feelings about the issues involved
- Discuss documents relevant to the dispute

4. PROBLEM SOLVING

During this stage, the parties attempt to:

- Build common interest
- Narrow the differences between them
- Remain open to exploring the most promising options

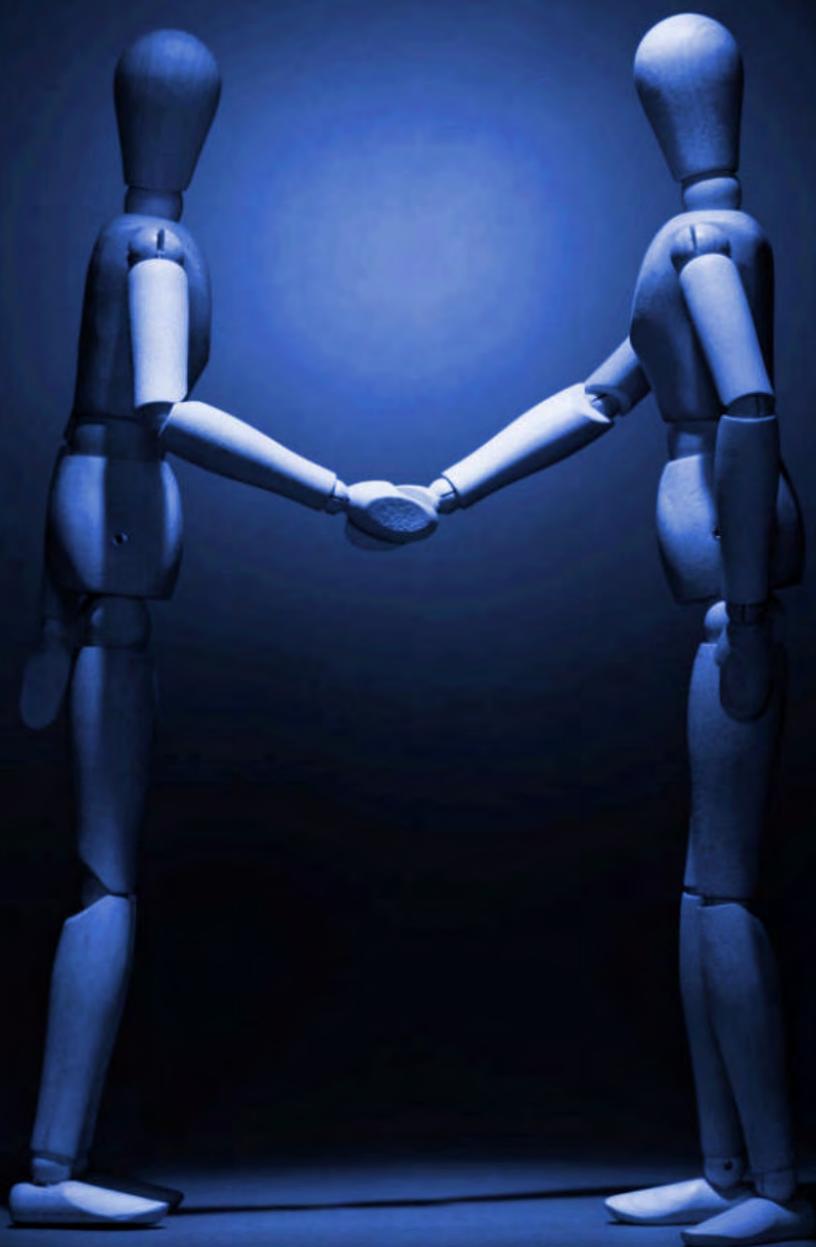
5. AGREEMENT

The agreement is a written document describing:

- Who is agreeing to what
- When the agreed-upon actions will take place
- How the agreement will be carried out

Proposed resolution agreements must be cleared by the OCRD Director, who will consult with Agency officials, as necessary, to ensure that Agency resources are available to implement the agreed upon terms of resolution. When resolutions are reached, they will be committed to writing and signed by the complaining party, responsible management official(s), and the OCRD Director. All resolution agreements must be signed by the OCRD Director, consistent with current delegations of authority.

The Agreement is binding and enforceable. Unless there are allegations concerning a breach of the Agreement, the case is closed, and the complaining party is precluded from filing a complaint on the issues settled by the Agreement. Allegations concerning a breach of the settlement agreement will be processed under EEOC regulations contained in 29 CFR Part 1614.



TIPS FOR SUCCESSFUL MEDIATION

- Mediate in good faith. Be willing to listen to the other party's perception of the dispute, maintain an open mind, consider various options for resolution, negotiate without holding to a fixed position, and share all relevant information.
- Use the principles of common courtesy. Listen to each other, be respectful, do not interrupt, and avoid the use of inflammatory language.
- Be aware of nonverbal language.
- Look at the conflict from the other person's perspective.
- Take responsibility for any role you may have had in the conflict.
- Use direct communication.
- Remain open-minded and flexible.
- Focus on the future.
- Be willing to build off each other's ideas to move toward joint resolution of the conflict.
- Look for common ground and be willing to concede less important issues.
- Be tolerant of the other party's opinions and take his/her concerns seriously.
- Maintain a commitment to resolve the dispute.

AVOID COMMON BARRIERS TO RESOLUTION

- Attacking
- Interrupting
- Defensiveness
- Lack of desire to understand the other party's interests
- Unrealistic expectations
- Rigidity
- Attaching blame
- Knee-jerk reactions

For more information, contact:

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