

RETURN ON INVESTMENT FROM USE OF ALTERNATIVE DISPUTE RESOLUTION IN WORKPLACE DISPUTES

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I. Executive Summary

For more than two decades the Federal Government has promoted alternatives to litigation to resolve disputes, including civilian workplace disputes. Increasing costs and delays in litigation and other adjudicatory dispute resolution methods prompted Congress in 1990 to pass the Administrative Dispute Resolution Act to encourage greater use of ADR by federal agencies in their administrative dispute resolution programs. The success of the 1990 Act led to its renewal as a permanent statute in 1996, followed two years later by the Alternative Dispute Resolution Act of 1998, which requires all federal district courts to provide ADR as part of their civil dockets.

ADR processes such as mediation have a long track record of success in resolving workplace disputes with less cost and less delay than litigation. Moreover, by emphasizing collaboration over confrontation between the disputants, ADR processes promote better communication and tend to strengthen, or at least preserve, the parties' relationship. In most workplace disputes, there is an ongoing working relationship between employer and employee that will continue after the dispute is concluded, regardless of outcome. Both parties therefore have an interest in minimizing the divisiveness and animosity a dispute usually produces, and expediting the return to a productive work environment. This is especially critical in military organizations, where unit cohesion is essential to mission accomplishment. This white paper examines the tangible and intangible costs and benefits of using ADR instead of litigation and other adjudicative processes to resolve workplace disputes. Most of the data and information presented pertains to the Air Force ADR Program, but the analyses and conclusions drawn from the data are apropos to any civilian workplace ADR program, including the Army and other military services.

There are two primary categories of workplace disputes where ADR is routinely employed. The first is Equal Employment Opportunity (discrimination) complaints, which are under the jurisdiction of the Equal Employment Opportunity Commission. Since 1999, the EEOC has required that federal agencies have ADR available as an option for resolving both informal and formal complaints. Because of this mandate, EEO complaints account for the bulk of ADR in federal workplace disputes. In non-EEO disputes, such as employee grievances, adverse action appeals, and labor-management disputes, ADR utilization is much more uneven, depending on local factors, including employee population, caseload, resources, collective bargaining agreements, and interest on the part of commanders, managers, and their support staffs.

Gauging return on investment in workplace disputes is difficult. Most data tend to be anecdotal or estimates. Most costs are embedded personnel costs involved in processing a dispute, and are difficult to calculate. Nevertheless, it is intuitive that three or four hours of mediation at the front end of a dispute, if successful, avoids many hours of work down the line. When done correctly, ADR can resolve 70 percent, or more, of the disputes in which it is employed. ADR therefore represents a very cost-effective means of resolving disputes and avoiding the costs and delays of further litigation and appeals.

II. Introduction

Since 1990 the Federal Government has, by statute, favored the voluntary use of “alternative means of dispute resolution” over litigation to resolve disputes, whenever appropriate to do so. Driving this shift in emphasis away from litigation is the realization that most disputes do not involve novel points of law or unique facts that require a litigated outcome, and the acknowledgment that federal agencies simply cannot afford the increasing costs and delays that litigation demands.¹ In most cases, voluntary informal procedures selected and controlled by the parties produce satisfactory outcomes much faster and with much less cost than litigation. Since 1996, the Department of Defense has had a regulatory policy mandating the establishment and implementation of ADR programs by all DOD components. Both the Air Force and Navy have had extensive, award-winning ADR programs dating back to the mid-1990’s, and the Army, while not boasting a service-wide program until recently, has been in the vanguard of federal ADR practice with innovative programs implemented by Army Materiel Command and the Army Corps of Engineers, both of which have won national awards for excellence.

The primary considerations driving the emphasis on ADR are both tangible and intangible. The tangible benefits include the cost and time savings that most ADR processes offer when compared to litigation and other adversarial processes. ADR processes avoid overcrowded case dockets, move at a much faster pace than adversarial dispute resolution systems, dramatically reduce transaction costs (i.e., the out-of-pocket costs incurred in preparing for and conducting dispute resolution proceedings), and generally produce outcomes as good as, or better than, cases resolved by litigation and non-ADR settlements, and they do so in about 70 percent of the cases in which ADR is employed.

Among the intangible benefits of ADR are the ability of the disputants to maintain control over both the process and the outcome, and the ability to address and correct the problems that drive most workplace disputes without first having to find a violation of law or assign legal liability. Since ADR is a voluntary process, the parties have much more control over which procedure to use, who will serve as the neutral, which issues will be addressed, and what the outcome will be. Litigation and other adjudicatory procedures are much more rigid, with formal rules governing time limits, procedures that must be followed and evidence that can be considered, and the parties cede their control over the outcome to an outside decision-maker who may or may not understand or appreciate the factors underlying and driving the dispute. Moreover, unlike traditional adversarial procedures, ADR does not require a finding of legal liability to explore remedies to fix the problem. This is an important distinction in workplace disputes, since most such disputes do not involve a provable violation of law, but often involve genuine workplace problems such as lack of communication or management and leadership issues.

ADR is often a better choice than litigation, especially when preserving or improving the parties’ relationship is important, as it usually is in workplace disputes. Most workplace disputes involve managers and employees who must continue to work together while the dispute is pending and after it is concluded. Therefore, there is a significant interest in minimizing the divisiveness and animosity that disputes usually produce, and facilitating the return to a productive work environment as soon as practicable. This is especially critical in military organizations, where unit cohesion and teamwork are crucial to mission accomplishment.

¹ See discussion of the statutory basis for ADR in Section III, *infra*.

Any discussion of return on investment when using ADR in workplace disputes must take into account not only the tangible costs associated with dispute management and resolution, but the intangible effects on workplace cohesion, morale, and productivity that inevitably ensue when a dispute turns employer and employee into adversaries. By focusing on early, flexible resolution of disputes using interest-based negotiation techniques that stress a collaborative search for a solution rather than an adversarial battle for unconditional victory, ADR addresses both the tangible and the intangible costs of dispute management and resolution.

III. Statutory and Regulatory Bases for ADR

In its first foray into the use of ADR in federal administrative programs in 1990, Congress found that ADR processes are often preferable to the traditional administrative and judicial systems that rely on adversarial proceedings to resolve disputes. In the Administrative Dispute Resolution Act of 1990, Congress made the following specific findings:

- Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
- Alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
- Such alternative means can lead to more creative, efficient, and sensible outcomes;
- Such alternative means may be used advantageously in a wide variety of administrative programs; and
- The availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.²

In light of these and other findings, Congress directed all federal agencies to scrub their administrative adjudicative, regulatory, and dispute management functions to determine whether ADR would be beneficial, and to develop and test programs over the ensuing five years to promote the use of ADR in their exercise of those functions. As a result of the success of those programs, Congress enacted the Administrative Dispute Resolution Act of 1996,³ which forms the basis for ADR programs in all federal agency administrative dispute activities. Among the mandates of the Act is a requirement that each federal agency adopt a policy addressing the use of ADR, that the head of the agency designate a senior official as the agency Dispute Resolution Specialist, and that agency personnel be trained in the use of ADR, including training in mediation and negotiation skills. Two years later, Congress directed all federal district courts to adopt ADR programs as well,⁴ signifying its strong intent to maximize the use of ADR in all federal disputes, both administrative and judicial.

In addition to federal district court ADR programs, the various administrative boards and tribunals in which workplace disputes are adjudicated have, to varying degrees, adopted their own ADR programs encouraging litigants to resolve the dispute through mediation or some other collaborative process. The EEOC, by government-wide regulation, requires all federal

² Administrative Dispute Resolution Act of 1990, P.L. 101-552, § 2, 104 Stat. 2736 (1990), codified at 5 U.S.C. § 571 Note (1999).

³ P.L. 104-320 (October 19, 1996), codified at 5 U.S.C. §§ 571-584.

⁴ Alternative Dispute Resolution Act of 1998, Pub. L. 105-315, *codified at* 28 U.S.C. § 651, *et seq.* (Oct. 30, 1998).

agencies to ensure the availability of ADR to resolve EEO complaints.⁵ The Merit Systems Protection Board grants automatic extensions for filing appeals when the agency and appellant attempt ADR to resolve the appeal,⁶ and has an internal “Mediation Appeals Program” for appeals that are pending adjudication by the Board.⁷ The Federal Labor Relations Authority, which hears arbitration appeals and Unfair Labor Practice (ULP) charges in addition to other labor-management disputes, urges parties to utilize agency ADR processes in lieu of litigation, makes ADR available through its Collaboration and ADR Program, and offers training in the use of ADR to resolve ULP cases.⁸ In short, almost all administrative bodies that hear and decide workplace disputes in the federal government are stressing ADR, and many are requiring parties to at least attempt ADR before scheduling the dispute for hearing or trial. Once in ADR, parties are free to craft their own resolution. If no resolution is possible, they are free to resume the regular procedure.

In the Department of Defense, DoD Directive 5145.5, issued in 1996, requires all DOD Components to establish and implement ADR policies and programs and use ADR techniques as an alternative to litigation and formal administrative proceedings whenever appropriate. “Every dispute, regardless of subject matter, is a potential candidate for ADR.” DODD 5145.5, ¶ 4.2. Regulations implementing ADR programs have been issued by both the Air Force (Air Force Instruction 51-1201) and the Navy (SECNAVINST 5800.13A). Both regulations direct that ADR be used “to the maximum extent practicable.” The Army’s ADR policy, re-issued by the Secretary of the Army on June 22, 2007, uses similar, albeit less forceful, language: ADR use is urged “in appropriate cases,” and Army personnel involved in the resolution of disputes must “receive ADR training and consider ADR in each case.”

Given the clear statutory, regulatory and policy trends we have seen over the last two decades, there is an unmistakable pattern emerging. ADR is no longer a mere situational “tool in the toolbox,” to be employed only as a rare exception to litigation when tactical considerations dictate. It is, rather, a *fundamental* part of the federal dispute resolution landscape. In effect, the many years of successful ADR use in federal agencies including DOD and its components have produced a unanimous verdict that ADR represents a good return on investment. Still, it helps to examine and explain why this is so.

IV. The Dispute Environment

In the military services, workplace disputes eligible for ADR are generally limited to those arising between management and *civilian* employees, not military members. Although there may be exceptions, ADR as a dispute resolution response is not as good a fit in a military-to-military environment as it is in the civilian environment, because of the tension between the parties’ right of self-determination (a hallmark of ADR) and the commander’s obligation to maintain good order and discipline. Therefore, while ADR is not necessarily incompatible with military realities in all cases, it is always the commander’s prerogative whether to employ ADR, and under what conditions. As a result, ADR in workplace disputes tends to focus on civilian employees.

⁵ 29 C.F.R. § 1614.102(b)(2).

⁶ 5 C.F.R. § 1201.22(b)(1).

⁷ See <http://www.mspb.gov/appeals/mediationappeals.htm>.

⁸ See, e.g., 5 C.F.R. § 2423.7(a) (authorizes an “alternative case processing procedure” using a “problem-solving approach” to resolve Unfair Labor Practice allegations if the parties agree); 5 C.F.R. § 2424.10 (making available the Collaboration and Alternative Dispute Resolution Program to resolve negotiability appeals).

Workplace disputes fall into two broad categories: EEO claims and non-EEO disputes. For our purposes, the term “workplace disputes” covers six major categories of civilian employment-related disputes:

- EEO claims (alleging violation of specific federal laws prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, or reprisal).
- Employee grievances under a negotiated grievance procedure in a collective bargaining agreement (NGP).
- Employee grievances under an agency administrative grievance procedure (for employees not subject to a collective bargaining agreement).
- Employee appeals to the Merit Systems Protection Board (MSPB).
- Allegations of Unfair Labor Practices (ULP) under the Federal Labor-Management Relations Statute.
- “Other” disputes that arise in the workplace environment but defy categorization under any of the foregoing descriptions.

Since EEO claims, negotiated grievances (NGPs) and ULPs account for most workplace disputes (that has been the Air Force experience—see Chart 1), this paper focuses on those three dispute categories.

V. The Paradigm: EEO Complaints

EEO complaint processing in federal agencies is governed by rules and procedures established by the EEOC and enforced by the EEOC’s Office of Federal Operations (OFO). Under these procedures, federal agency EEO complaints are processed in two stages. The first stage is an informal, “pre-complaint” process, in which the agency attempts through counseling or ADR to resolve the employee’s complaint. There is no adjudication mechanism at this stage; therefore, any “resolution” must be one the employee and management accept. If the employee is not satisfied with the informal pre-complaint outcome, he or she may file a formal, written complaint of discrimination, which triggers a much more elaborate process that includes an agency investigation of the complaint, an opportunity for an administrative hearing before an EEOC administrative judge (AJ), a final decision by the agency, appeal to the EEOC itself, and possible litigation in the federal courts.

The administrative process for a formal complaint of discrimination entails a period of as much as 400 days from filing the complaint until the agency renders its final decision, assuming all time standards are met (less if the complainant does not request a hearing). In reality, a typical case takes 15 months or more to process through the administrative stage, another one to two years if it goes to hearing and AJ decision, several months for appeals to the EEOC, and an additional two-plus years if litigation ensues in federal court. By contrast, informal resolutions using ADR average less than 40 days.

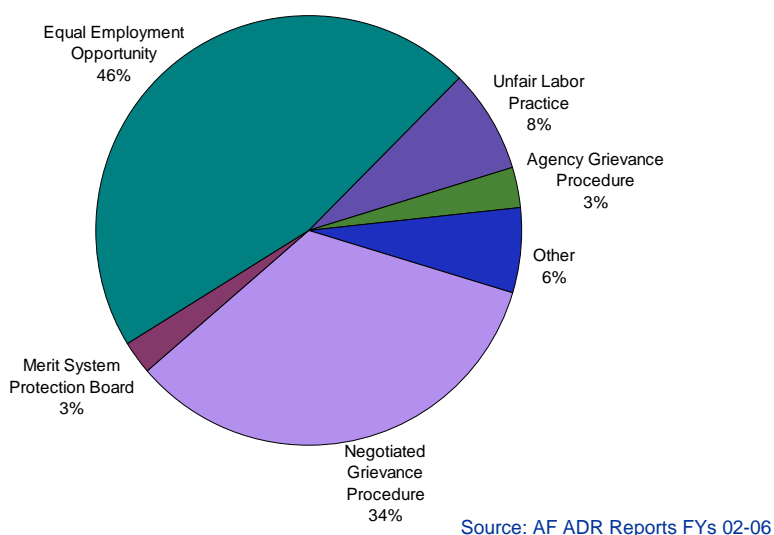
The federal EEO process is a logical starting point for any analysis of ADR return on investment. There are several reasons for this: First, EEO complaints and pre-complaints typically account for the single largest portion of civilian workplace disputes, accounting for almost half of all Air Force disputes from FY 02-06. See Chart 1.⁹ Second, DoD investigators have long used facilitative ADR techniques to encourage the parties to settle prior to the investigation, thus providing a an institutional history of ADR processes in EEO complaints.

⁹ Although the Army does not maintain detailed records of non-EEO cases, from ADR reports of recent years, the number of EEO cases (pre-complaint and formal complaint) appears to exceed the number of non-EEO cases.

Third, the EEOC regulations require all federal agencies to make ADR available to complainants at both informal and formal stages of a complaint, and EEOC federal agency guidance stresses the value of ADR at the informal, pre-complaint stage. This ensures at least a theoretical degree of uniformity in the EEO process that does not exist for other workplace dispute ADR programs. Fourth, federal agencies are required to report their EEO ADR activity annually to the EEOC, thus providing one of the few recurring sources of standardized statistical data. Finally, the EEO process is the only area of workplace disputes in which research has been conducted to quantify the comparative costs between formal and informal complaint processing.



Distribution of AF Civilian Workplace Disputes FY 02-06



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Chart 1. Types of disputes as a percentage of all Air Force workplace disputes- FY 02-06.

1. Early Involvement. In general, the earlier in the process a dispute is resolved, and the faster it is resolved, the greater the savings. In the informal pre-complaint stage of the EEO process, ADR is expressly authorized as an alternative to “traditional counseling.” Pre-complaints that are resolved at this stage go no further. Those not resolved can be filed as formal complaints, which are subject to the administrative machinery of investigation, adversarial hearings, appeals to the EEOC, and, finally, litigation in the federal courts. Resolving a complaint at the informal stage avoids the time and cost of the formal complaint process. A 1998 Air Force study found an 8-to-1 advantage in time and money in resolving an EEO complaint at the informal stage (Chart 3).

Overall, ADR is much faster at resolving EEO complaints than other resolution methods. For example, in FY 2011 the Army reported an average of 260 days to close 1279 formal complaints. Complaints that resulted in Final Agency Action, including cases with involvement of an EEOC administrative judge, was 296 days, and non-ADR settlements averaged 260 days. ADR settlements, however, averaged 160 days to completion.¹⁰ Informal pre-complaints

¹⁰ Source of data is the Army's Annual Federal EEO Statistical Report of Discrimination Complaints (EEOC Form 462), for FY 2010.

resolved through ADR took even less time—an average of 37 days. See Chart 2. In the EEO business, faster case closures equate to cost avoidance and less disruption in the workplace.

Many pre-complaints are resolved informally through the use of ADR-like techniques even when ADR is not selected to resolve the matter. Many EEO counselors are trained as mediators or as facilitators, and can use those skills to resolve the complaint as part of the traditional counseling process. These “early involvements” also promote the interest in early, informal, collaborative outcomes. The bottom line is this: whatever technique is used, the goal is to resolve disputes as early as possible, by the most expeditious means available, using the least resources, and at the lowest organizational level.

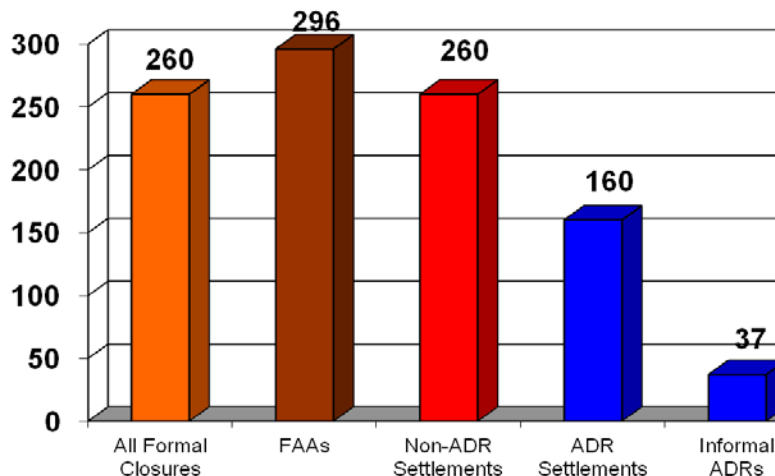


Chart 2. Average days to closure for EEO complaints in FY 2011 - ADR vs. non-ADR.

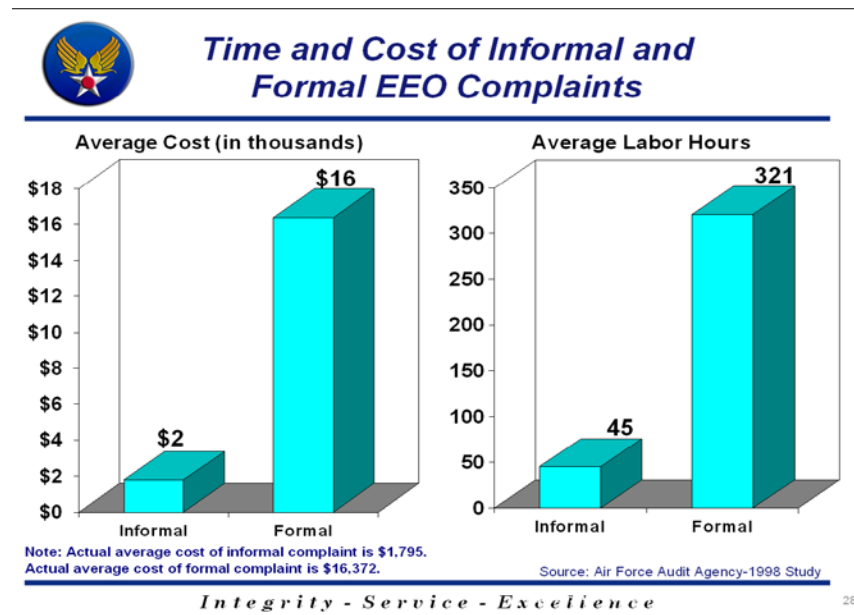


Chart 3. Average informal versus formal processing time and costs in EEO complaints. Source: Air Force Audit Agency.

2. What About the Outcome? Resolving disputes early in the informal stage through ADR is only half the story. Any case can be resolved if one side simply gives the other what it wants. To test whether early resolution through ADR really is a more economical way of doing business, we have to look not only at the transaction costs (i.e., labor hours and process costs), but also at the average settlements. Although most EEO settlements involve non-monetary elements, making case-to-case comparisons difficult, many do include monetary benefits, including back pay, compensatory damages, lump sum payments, and attorneys fees. Of course, these elements exist in the outcomes of formal complaints as well, whether they settle or not. The question is whether settling EEO complaints through the use of ADR results in significantly greater monetary benefits than resolving them through the traditional process. From data collected for the EEOC, the answer to this question is no.

As depicted in Chart 4, in FY 2009 (last year for which data is available), average monetary benefits paid in EEO cases that were settled informally, or via ADR at the formal complaint stage, were significantly less than in cases resolved through non-ADR means. In fact, monetary benefits in *formal* complaints settled through the use of ADR tend to be less than benefits paid in *informal* pre-complaints resolved without ADR. Compared to benefits paid in cases that went to hearing, there is no comparison. In addition, investigation costs for formal complaints cost an additional \$4,000 to \$8,000, or more, per case. ADR, whether used in the informal or the formal stage of complaint processing, avoids these extra costs and provides greater control over payouts than non-ADR resolutions, whether achieved by settlement or litigation. Between the savings in transaction costs and lower monetary benefits, ADR demonstrates its value as a cost-effective means of resolving EEO complaints.

Average Monetary Payouts in EEO Cases FY 2009

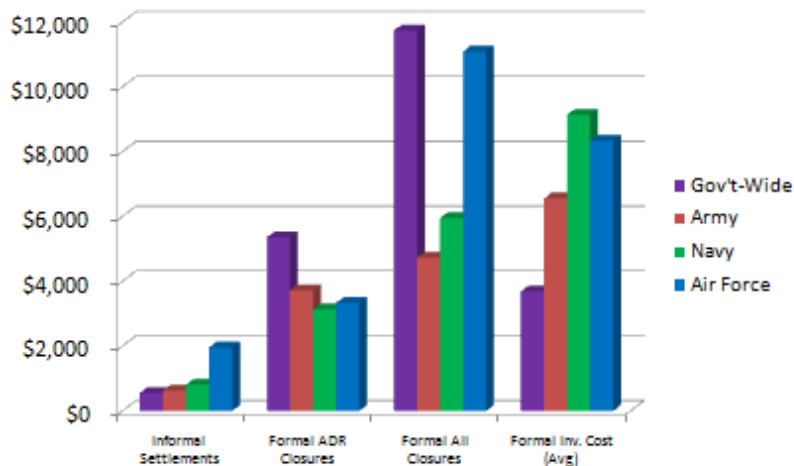


Chart 4. Average monetary pay-outs for EEO cases - ADR versus non-ADR (all agencies).

3. Intangible Costs and Benefits. Very few EEO complaints result in a finding of discrimination, usually around 3 percent or less. For example, of the 1279 formal complaint closures reported

by the Army to the EEOC for FY 2010, only 7 involved a finding of discrimination.¹¹ This works out to a finding rate of less than one percent. Yet that does not mean the other 99-plus percent of cases are all frivolous or totally without merit (although some undoubtedly are). In 1996 the EEOC conducted an exhaustive study of federal sector cases, and found that the large majority of cases that failed to establish actionable discrimination did involve a tangible workplace problem, usually a breakdown in communication. Whether a complaint stems from unlawful discrimination or a non-legal problem such as a lack of communication or a perception of unfairness, it represents a threat to the productivity of the work environment and a problem for management. When it goes unresolved, it becomes a continuing, and growing threat. In the military context, an ongoing, unresolved workplace dispute lowers employee morale and productivity, disrupts teamwork, erodes unit cohesion, increases the risk of absenteeism, on-the-job injuries, and additional complaints and grievances, and negatively impacts the mission. These in turn entail additional costs to command and management, who must process, evaluate, review, and respond to these complaints whether they have merit or not.

Unfortunately, the formal EEO complaint process does nothing to ameliorate these concerns. With its emphasis on lengthy investigations, pre-hearing discovery, overcrowded EEOC hearing dockets, delays in getting a decision, appeals to the EEOC, and possible legal action in the federal courts, the formal process amplifies the negative aspects of delay. Moreover, because the formal EEO complaint process is at bottom a legal process--designed only to answer the limited question of whether unlawful discrimination occurred--there is no mechanism for dealing with the underlying workplace problem in the vast majority of cases where no discrimination is found. In short, the traditional EEO process, particularly in its formal phase, stifles creativity in searching for a solution to the problem. Thus, the vast majority of complainants who pursue their rights through the formal process to its conclusion more often than not find themselves without a remedy, and back in the same environment that produced the complaint.

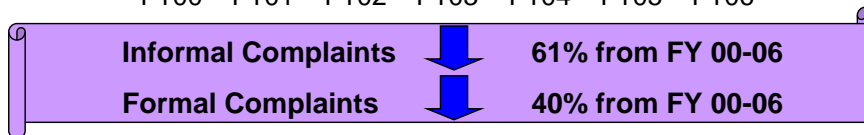
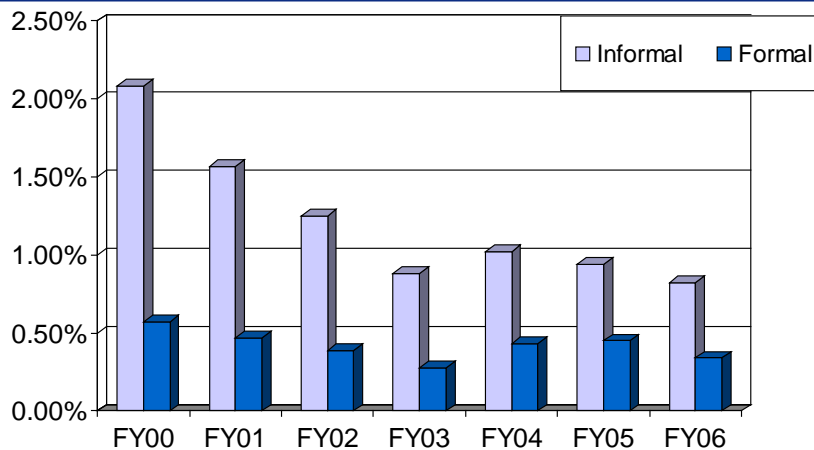
ADR solves that problem by allowing the *parties* to frame the issues for resolution and to craft the solution. Since there is never a finding or admission of liability, ADR settlements allow the parties to explore outcomes that are not available for the adjudication process. Rather than limit itself to the narrow legal questions involved in a formal hearing and adjudication of an EEO complaint, ADR techniques such as mediation allow the parties the flexibility to address the real basis of the dispute and develop creative options to fix it. Fixing the problem substantially reduces the likelihood of a repeat complaint and yields a more satisfied, more productive employee. For this reason, the EEOC has identified ADR as one of the key elements in its strategic plan.

It has long been believed in employment law that the more effective the dispute resolution process is at solving problems, the lower the incidence of complaint activity. The U.S. Postal Service has cited rapidly declining complaint rates following its adoption in 2000 of an aggressive mediation program known as "REDRESS" to make such a claim. Although the Air Force has not made such a claim, it too has experienced a significant downward trend since ADR was adopted as part of the EEO process in 2000, as shown in Chart 5.

¹¹ U.S. Army, Annual Statistical Report of Discrimination Complaints, Part VI (EEOC Form 462), FY 2011.



Percent of Civilian Workforce Filing EEO Complaints FY00-06



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Source: EEOC Form 462

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Chart 5. Percentage of civilian workforce filing EEO complaints, FY 00-06 (Air Force).

VI. Employee Grievances and ULPs

1. Grievances. Unlike the EEO complaint procedure, which is uniformly applied regardless of the agency, procedures for resolving grievances are negotiated as part of the collective bargaining agreement between management and the union. These agreements are bargained at the installation level, so an installation with more than one bargaining unit will have more than one collective bargaining agreement, each with its own negotiated grievance procedure. Although all grievance procedures share common features (for example, they all must provide for binding arbitration), there can be considerable variance in scope and process. Accordingly, meaningful and tangible cost and benefit data are hard to come by. Nevertheless, one can make the case for ADR as a cost-effective alternative to the typical grievance procedure found in most collective bargaining agreements.

For example, a typical three-step negotiated grievance procedure requires the grieving employee to file a written grievance with his or her supervisor, who then refers the grievance to a management official, known as the Designated Management Official (DMO), for decision. An employee dissatisfied with the outcome at step one can file a step two grievance with commander or other senior official, who considers the matter and renders a decision. An employee who is dissatisfied with the decision at step two can request the union to invoke binding arbitration (step three), but only the union can invoke arbitration. Arbitration costs are typically split equally between the union and management. A typical one-day arbitration costs about \$5,000 or more, depending on the arbitrator's fees and travel costs. The union's share would be \$2,500 or more. Not surprisingly, the union invokes arbitration in relatively few employee grievance cases unless the issue is of particular union interest or affects a large number of bargaining unit employees. Accordingly, most employee grievances effectively end at steps one or two, with or without a resolution to the employee's satisfaction.

In grievances that do end up in arbitration, the arbitration award is potentially subject to further legal proceedings by either or both parties. The decision, or award, by the arbitrator is binding on both parties, meaning they cannot simply disregard or disavow it. Either party can appeal the award by taking exceptions, which are heard by the Federal Labor Relations Authority. Grounds for appeal are extremely limited, in keeping with federal labor policy to promote the finality of arbitral decisions. In those limited situations where an appeal is actually upheld, the parties are back at square one, with further proceedings and expenditure of resources likely. If the arbitration concerns a complaint of discrimination (federal law permits a negotiated grievance procedure to include discrimination complaints), the award may be appealed to the EEOC, where it is likewise vulnerable to possible reversal and further protracted proceedings. If the arbitration concerns a matter that is appealable to the Merit Systems Protection Board, the award may be appealed to the MSPB, with similar authority to reverse and remand the award for further proceedings. In short, binding arbitration, though technically an ADR procedure in its own right (because it avoids litigation in the courts), is a procedure that modern-day ADR programs try to avoid because of cost, lengthy appeals, and lack of finality.

Fortunately for the agency, most grievances do not go to arbitration, thus avoiding the costs and potential costs of hearings, appeals, and further proceedings. But even though the agency avoids these additional costs in most employee grievances, it doesn't avoid all costs. There is the time spent by supervisors, designated management officials and commanders or their designees reviewing the grievance and supporting documentation, interviewing witnesses if necessary, conferring with personnel specialists and lawyers, and preparing the decision. There is the time spent by personnel specialists preparing the grievance file and advising decision officials, and there is the time spent by the lawyer advising the decision official and reviewing the package for legal sufficiency. Finally, there is the official time allowed the employee and his or her union representative to pursue the grievance.

Given the informal nature of most negotiated grievance procedures at the early stages and the escalating cost potential as a grievance moves through the procedure to binding arbitration, the negotiated grievance procedure is usually an excellent candidate for ADR. Of course, introducing an ADR option into the negotiated grievance procedure must be negotiated with and agreed to by the union before it can become effective.

2. Estimates of Cost Savings Using ADR in Grievances – the Hill and Tinker AFBs Experience

Hill Air Force Base, a large Air Logistics Center (ALC) in Utah, offers mediation very early in the NGP procedure, and also offers peer-review¹² as an alternative to arbitration at the third step. Hill estimated that early mediation avoided costs of \$910,000, and peer review avoided another \$23,678 in FY 2006.¹³ Hill has championed proactive dispute resolution through preventive mediation and conflict coaching to identify and address conflicts before they become disputes, thereby avoiding another estimated \$268,000 in processing costs. In arriving at these estimates, Hill used a consensus estimate between its ADR program manager, HR office and union local of the average hours spent in mediation (14 hours from filing the grievance until settlement/impasse) versus the various steps of the grievance procedure (up to 144 hours if arbitration is invoked). Applying the Center's standard hourly labor rate (a combined rate Hill

¹² Peer review is a procedure in which a management-union panel considers and decides a grievance. It is usually offered as a voluntary alternative to binding arbitration.

¹³ Last year for which data are available.

charges its depot repair customers that accounts for all embedded white and blue collar labor costs) to these agreed-upon averages yielded the estimated labor hours and cost savings.

Tinker AFB, a large Air Logistics Center in Oklahoma, estimated it avoided \$276,000 and saved \$241,500 using early mediation in 69 grievances (average cost: \$500) instead of processing them through to arbitration (average reported cost: \$4,000). In disputes in which the employee chose not to file a grievance, the use of ADR to resolve 72 complaints avoided \$288,000 and saved \$252,000.

The cost savings and cost avoidance figures cited by Hill and Tinker are estimates only, and they presume that every dispute not resolved by ADR would have pursued the regular process to its ultimate conclusion, an unlikely scenario. However, every dispute resolved at an early, informal stage, with minimal investment of time and resources, ensures that it goes no further, thus limiting the installation's exposure to additional costs and returning the workplace to a more productive environment. Accordingly, these analyses show that on a case-by-case basis, the use of ADR to settle a workplace dispute at an early stage in the process saves money and conserves resources in three ways: (1) it focuses on early resolution, before substantial investments of time and resources; (2) it effectively limits further exposure to additional dispute resolution costs by carrying a high resolution rate; and (3) it facilitates the quick return to a less hostile, more productive workplace environment.

3. Notional Cost-Comparison: Mediation vs. Grievance Procedure Step Process

As long as a dispute resolution program has a fair idea of the amount of time spent by all participants in resolving a grievance using both the NGP and ADR, it can do at least a rudimentary comparison of transaction (i.e., processing) costs to see if ADR is in fact a cheaper, faster alternative to the process it replaces. We can illustrate this comparison as follows: suppose Fort X averages 100 grievances per year. Assume it costs an average \$2,000 in manpower and other embedded costs to process each grievance through Step 2 of the NGP (no arbitration). The total cost of resolving those 100 grievances using the NGP is \$200,000 for the year (100 grievances X \$2,000 per grievance). If half of those grievances are mediated, at an average cost of \$500 per case, the total cost is only \$125,000 ($50 \times \$500 + 50 \times \$2,000 = \$125,000$), or 38.5 percent less, a significant savings.

The above comparison assumes that every case that goes to mediation settles. Of course, that does not happen. Most cases do settle, and the ones that don't can resume the regular NGP at the point they were at when the parties elected to try ADR. For purposes of our illustration, let us suppose a resolution rate of 70 percent, which is typical in grievances. If 50 grievances go to ADR, 35 will be settled ($50 \times 70\% = 35$). The remaining 15 that do not settle can resume the regular negotiated procedure. Therefore, our total cost to resolve 100 grievances using a half-and-half mixture of ADR and the NGP is \$155,000 (35 grievances successfully mediated at \$500 per grievance, + 50 grievances resolved using the NGP at \$2,000 per grievance, + the 15 grievances unsuccessfully mediated that switched over to the NGP, at \$2,500 per grievance). That still represents a \$45,000 cost savings compared to using the regular NGP to process all 100 grievances.

Using this analysis, we can see that the more ADR is used, the greater the ability to avoid costs. If 60 of our 100 grievances go to mediation, and 80 percent are resolved, the total cost drops to \$134,000 (48 grievances successfully mediated at \$500 per grievance, + 40 grievances resolved using the NGP at \$2,000 per grievance, + 12 grievances unsuccessfully mediated that

switched over to the NGP). The bottom line is that increasing the use of ADR in negotiated grievances should incrementally reduce the costs of resolving them.

This analysis looks only at so-called “transaction” costs, i.e., the costs associated with actually processing the complaint. Of course, there are also “outcome” costs, i.e., the value of any terms of an agreement. In most workplace disputes, some of these terms may have a readily discernable monetary value, such as back-pay or a performance award, but most terms are not strictly monetary, such as a higher score on an appraisal or removal of an item in the employee’s personnel file. Those costs are difficult to measure precisely in most cases. So how do we know that mediating grievances saves time and money? We really don’t, but any process that empowers both sides to find common solutions, does it in an average four to six hours, and achieves a mutually acceptable settlement agreement 70 to 80 percent of the time, has to be better than the processes it replaces, not to mention less divisive to the work environment.

4. Unfair Labor Practice (ULP) Charges.

Unlike grievances, ULP charges are filed with the General Counsel of the FLRA, alleging that the other party (usually management in a union-filed charge, but it can also be the union in a management-filed charge) has committed a prohibited “unfair labor practice” under the Federal Service Labor-Management Relations Statute (5 U.S.C., Chapter 71). Once a ULP charge gets before the cognizant FLRA Regional Director, its processing and disposition are largely left to the Authority’s procedures, although the Authority, like most federal administrative adjudicative boards, has been promoting the use of ADR and other settlement techniques in recent years to reduce its caseload and encourage better labor-management relationships.

Before a ULP charge gets to the Authority, management and the union have several options for using ADR to resolve it locally. They can agree to submit ULP charges to mediation before going to the Authority. They can set up a peer review program to consider and decide ULPs and other disputes as a joint labor-management endeavor. Charleston Air Force Base instituted a peer review program to handle what had become a crushing level of ULP allegations. After the program was up and running for a year, ULPs dropped to zero, and not a single labor complaint had to be referred to an outside party (like the FLRA) for decision, thus significantly cutting the \$120,000 the base usually spent on resolving labor disputes each year. For its efforts, Charleston was recognized by the Office of Personnel Management in 2001 as an Outstanding ADR Program in the Federal Government.

Does keeping a ULP charge on post and resolving it locally save money and resources over inviting the FLRA in to investigate and, if necessary, adjudicate it? Merely to ask the question is to answer it. Of course it does. One need only consider the procedure for a ULP complaint that gets filed with the Authority: investigation by the Regional Director, which requires the time and effort of the legal office, the Civilian Personnel Flight, supervisors, possibly the commander, and employees called as witnesses. If based on the investigation the Regional Director believes there is sufficient evidence to prosecute, a formal complaint is issued. At that point the matter is referred for a hearing before an Administrative Law Judge. As an adversarial proceeding, preparation for and presentation of the case entails a considerable amount of attorney time, discovery costs, witnesses, and support from Civilian Personnel. Decisions of the ALJ can end up in lengthy appeals to the full Authority, where the case can be tied up for an additional year or more, followed by possible appeals to the Federal Circuit Court of Appeals.

On the other hand, agreements to submit all ULP charges to ADR before they can be filed with the Authority guarantees fast consideration, if for no other reason than there is a 180-day limitation period during which a charge must be filed or will be considered untimely. Moreover, given the resolution rates in ULP cases that go to ADR, it is likely that 50-70 percent or more of those potential ULP cases will never make it to the Authority because they will have been settled, thus avoiding further proceedings. As previously mentioned,¹⁴ the Authority has resources to help parties pursue ADR in ULP and other labor-management disputes.

While specific cost savings are often difficult to quantify and will vary from case to case (for example, many ULP charges do not result in the FLRA issuing a complaint following the investigation, thus effectively dismissing the case), there can be no doubt that resolving a ULP through the use of panels made up of volunteers before the FLRA gets involved is a much more cost-effective solution. Moreover, such an approach results in an outcome that is dictated by the parties to the dispute, rather than an outside decision maker who may or may not appreciate the impact of a decision on the agency or its employees.

VII. Conclusion

Although empirical evidence can be elusive, the foregoing discussion demonstrates that ADR in workplace disputes saves money and resources three ways: (1) it focuses on early resolution, before substantial investments of time and resources are made; (2) it limits exposure to additional costs by resolving (and terminating) a high percentage of disputes, thereby avoiding appeals and other additional proceedings; and (3) it helps heal the wounds of a fractious workplace environment. With its focus on early intervention, flexibility, informality, and collaborative problem-solving, ADR avoids the trappings of expensive, adversarial processes like litigation, and increases the likelihood of a lasting, fair settlement to a dispute. All of these advantages combine to provide better value for commanders, managers, and employees, and better, more focused support to the warfighter.

¹⁴ See Note 8.