

# **ADR Program Manual**

**Colorado Federal Executive Board**



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# CHAPTER 1

## INTRODUCTION

### Federal Executive Boards Mission and Vision

*“Although each executive agency and its field organizations have a special mission, there are many matters on which the work of the departments converge. Among them are the management and budgetary procedures, personnel policies, recruitment efforts, office information duties and similar matters. There are opportunities to pool experience and resources, and to accomplish savings. In substantive programs there are also opportunities for a more closely coordinated approach in many activities.”*

President John F. Kennedy  
Presidential Directive 465

Memorandum on the Need for Greater Coordination  
of Regional and Field Activities of the Government  
November 13, 1961

The Colorado Federal Executive Board’s (CFEB) mission is to build partnerships for intergovernmental collaboration, creating value for the public by fostering communication, coordination and collaboration with federal, state and local government agencies.

Since their creation, Federal Executive Boards (FEBs) have served as models for partnership-based government by identifying common ground and building cooperative relationships across agency lines.

There are twenty-eight FEBs across the nation in major metropolitan locations where there are high concentrations of federal agencies and federal employees. Board members are the highest ranking federal leaders in their locales and represent civilian, military, postal and law enforcement agencies. Policy direction and guidance is provided by the

Office of Personnel Management (OPM). The Colorado Federal Executive Board (formerly the Denver Federal Executive Board) is one of the original FEBs created in 1961.

One of the functions of the FEBs is to provide cost-effective services to resolve disputes and preserve working relationships through use of Alternative Dispute Resolution (ADR).

During the past fifty years, the role of the FEB has been shaped to address emergent trends and identified needs across the federal system. In 1996, the FEBs were charged with coordinating alternative dispute resolution services for their member agencies. Since this time, the FEBs commitment to the ADR service has been strengthened by both long-term results and significant cost savings realized by member utilization of ADR.

FEBs provide low or no cost, high-quality mediation services to federal agencies through the efficient resolution of disputes and formal claims. Cost-avoidance measurements as determined by OPM are based upon the study *Cost Savings Associated with the Air Force Alternative Dispute Resolution Program, 1996*, and have been adjusted for inflation using the Bureau of Labor Statistics inflation calculator.

The CFEB is committed to building and upholding the spirit of responsible problem-solving represented by the FEB ADR programs nationally. As such, the CFEB continues to conduct outreach to inspire and educate key pools of talent needed by government; provide cost-effective services to resolve disputes and preserve working relationships through ADR programs; and develop the Federal workforce by providing critical training opportunities and learning experiences.

## CHAPTER 2

### BACKGROUND

#### Administrative Dispute Resolution Act of 1996

The Federal Government expressly required federal agencies to employ ADR in 1996 with the passage of Public Law 104-320, also known as The Administrative Dispute Resolution Act, (ADRA, or “The Act” ). The Act speaks to the use of ADR to offer an “inexpensive means to resolving disputes as an alternative to litigation....” Subchapter IV, Alternative Means of Dispute Resolution in the Administration Process provides definitions and instructions which have been referenced in the creation of the CFEB ADR Program Manual.

See Appendix 4 for the complete wording of the ADR Act of 1996 and Appendix 5 for a list of ADR resources and websites.

<http://www.justice.gov/adr/pdf/adra.pdf>

#### EEOC Guidelines

Since November of 1999 EEOC Regulation 29 CFR Part 1614 has required Federal agencies to make an ADR program available during the EEO pre-complaint and formal complaint processes. Management Directive 110 includes specific instructions for designing an ADR process to address EEO complaints. The directive prescribes a set of ADR Core Principles that is also the foundation of the CFEB ADR Program.

#### ADR Core Principles

It has been found that there are certain requirements that are necessary for the successful development of any ADR program. These requirements are sometimes referred to as "core

principles." These core principles are derived from EEOC's ADR Policy Statement.

### *Fairness*

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the ADR proceeding by, at a minimum: providing as much information about the ADR proceeding to the parties as soon as possible; providing the right to be represented throughout the ADR proceeding; and providing an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:

### *Voluntariness*

Parties must knowingly and voluntarily enter into an ADR proceeding. An ADR resolution can never be viewed as valid if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, some dissatisfaction may survive after the ADR proceeding. Such dissatisfaction could lead to dissatisfaction with other aspects of the workplace, or even to charges that the resolution was coerced or reached under duress. In addition, aggrieved parties should be assured that they are free to end the ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they decide that they prefer that process to ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management or EEO officials, and not the third party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

### *Neutrality*

To be effective, an ADR proceeding must be impartial and must be independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator assures this impartiality. A neutral third party is one who has no stake in the outcome of the proceeding. For example, he or she

might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Alternatively, he or she may be an employee within the same agency as long as he or she can remain neutral regarding the outcome of the proceeding. The agency must ensure at all times the independence and objectivity of the neutral.

### *Confidentiality*

Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices with a need to have that information. Neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential. Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.

### *Enforceability*

Enforceability is a key principle upon which a successful ADR program depends. EEOC Regulation 29 CFR Part 1614 Section 1614.504 provides that: "Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." The regulation sets forth specific procedures for enforcing such a settlement agreement. Agreements resolving claims of employment discrimination reached through ADR are enforceable through this procedure.

### *Flexibility*

The ADR program must be flexible enough to respond to the variety of situations individual agencies face. There is not necessarily one ADR model which will work for all of an agency's programs or all of its offices within the same program. Because agencies have different missions and cultures, they have flexibility in designing their ADR programs. Agencies must also exercise flexibility in implementing the ADR program. This flexibility will allow agencies to adapt to changing circumstances that could not have been anticipated or predicted at the time the program was initially implemented.

### *Training and Evaluation*

An ADR program, to be successful, will require that the agency provide appropriate training and education on ADR to its employees, managers and supervisors, neutrals and other persons protected under the applicable laws. An evaluation component is essential to any ADR program and should be in place before an ADR program is implemented. The evaluation will assist in determining whether the ADR program has achieved its goals and will provide feedback on how the program might be made more efficient and achieve better results. Additional background on the use of ADR throughout the Federal system can be found at <http://www.opm.gov/er/adrguide/toc.asp>.

<http://www.eeoc.gov/federal/directives/md110/chapter3.html>

## What is Alternative Dispute Resolution?

The Administrative Dispute Resolution Act defines ADR as “*any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsman, or any combination thereof.*”

The FEB's nationally have established ADR under a number of titles, including the Shared Neutral Program and Shared Mediator Teams. The Colorado FEB will refer to its program as simply, The CFEB ADR Program. Each FEB works cooperatively with their member agencies to customize the program to the needs of

the region served. The CFEB uses a shared neutral model and coordinates volunteer mediators to provide mediation services to requesting parties. Government employees who have been trained and who have experience in mediation are assigned to cases for which they do not have a conflict of interest.

## Mediation

Mediation is defined as a voluntary, confidential informal process whereby a trained neutral third party; a mediator, assists the disputing parties in finding a mutually acceptable solution in a manner different from traditional methods. Unlike litigation, for example, the rules of evidence do not apply, no testimony is taken and the mediator does not decide the dispute. The term neutral is used to denote an individual who with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

The CFEB ADR process relies on mediation as its primary means of assisting government employees address workplace disputes and grievances. The use of mediation as a dispute resolution method in the workplace has become prevalent during the past 20 years, as employers in both union and non-union settings seek to help employees address workplace conflict in a constructive manner.

### *The Process Helps People Assume Ownership of the Problem*

Providing easily accessible mediation services for employees helps assure that individuals who are willing to address their concerns in a spirit of collaboration are likely to do so expeditiously and without great cost to themselves or their other relationships in their work place. Many individuals who have been a party to a successful mediation report have formed a stronger working relationship with their colleagues and have developed communication skills that have empowered them and often made them more skillful in handling conflicts that naturally arise in the workplace.

## Benefits of Mediation

- ♦ Productivity is increased as conflict is decreased.
- ♦ Most workplace disputes are resolved in a few weeks, often with just one day's time spent by each party. In contrast, EEO Complaints can take years to resolve and cost hundreds of hours and many thousands of dollars.
- ♦ After mediated resolutions, there are fewer repeat disputes between the same parties.
- ♦ Mediations through the CFEB ADR Program are free.
- ♦ Requesting agencies only pay travel and parking costs.
- ♦ The agency providing the mediator pays that employee's salary.
- ♦ Relationships and morale often improve after mediation has taken place.
- ♦ When the parties informally discuss their issues and vent their frustrations, they learn more about each other and how to resolve their conflicts cooperatively.
- ♦ No one is forced to agree to anything. If the mediation doesn't result in agreement, the parties may seek to resolve their disputes in another forum.
- ♦ The parties maintain control of the process.
- ♦ Mediators work to identify and satisfy both parties' interests.
- ♦ No outside party, like a judge, imposes an outcome.
- ♦ There is no loser, as there is in court.
- ♦ The mediators are impartial and preserve confidentiality.
- ♦ Because CFEB ADR Program mediators come from an outside agency, the parties feel more comfortable and assured that the process will be conducted fairly.
- ♦ The parties do not know and will probably never again see the CFEB ADR Program mediators after the mediation.

## Using Shared Neutrals to Keep the Process Neutral

One noted concern in the development of an agency-supported mediation program is the need to assure that the process remains both confidential to the disputants and is both perceived and valued as neutral. A mediation process that is embedded into an organization's administrative process may lose its perceived

neutrality. By having volunteer mediators from a cross-section of Federal, state and local agencies serve as mediators; the CFEB is able to assure that the mediator assigned to a case will be there strictly to provide the best mediation service possible to assist the disputants.

## Choosing to Mediate

Many employment disputes, including discrimination claims, lend themselves to mediation. The following types of situations are especially well suited for mediation:

- ♦ Where the employee still works for the employer: The parties may be able to maintain or re-establish a good working relationship, which is obviously hard to do when the parties are engaged in adversarial litigation.
- ♦ When private or sensitive matters are involved such as sexual harassment claims, the parties, especially the employer and the alleged harasser, often prefer to discuss and resolve such matters in the confidential context of mediation, without the embarrassment or discomfort of public proceedings.
- ♦ When “reasonable accommodations” are sought under the Americans with Disabilities Act: the employee and employer, who are most familiar with the employee’s condition and abilities and with the functions and nature of the job, can work together constructively to find effective ways for the employee to do the essential functions of the job.

Whatever the nature of the dispute, the parties and their attorneys must have a good faith interest in trying to resolve the dispute on reasonable terms. If either party lacks such good faith going into the mediation, the chances of a resolution are highly unlikely.

## CHAPTER 3

# CFEB ADR PROGRAM PROCEDURES

### Participating Agency Commitment

Agencies are not required to have a mediator employed with their Agency to participate in the CFEB ADR Program. However, all agencies utilizing and participating in the CFEB ADR Program must sign and submit an Agency Agreement to Participate. This signed agreement assures the agency director knows the program requirements, is able to commit support staff to the program, is familiar with the confidentiality guidelines outlined in section 4 of the Administrative Dispute Resolutions Act, 5 U.S.C. 584 and assigns an Agency Point-of-Contact to serve as the agency's coordinator for all mediation requests.

### Agency POC Responsibilities

The Agency Director must assign a POC who can devote the time to serve as the agency's coordinator for all mediation requests, stay current with the CFEB ADR Program policies and documents, and adhere to the ADR confidentiality guidelines outlined within this manual.

As the drafters of the Administrative Dispute Resolution Act, 5 U.S.C. 584 explicitly recognized, protecting sensitive dispute resolution communications is critical to successful agency use of alternative means of dispute resolution. Confidentiality enhances participants' frank and open communications in, and effective use of, all of these ADR processes. Parties, program administrators, mediators, ombudsman and others who engage in activities under the Administrative Dispute Resolution Act will need an adequate understanding of the confidentiality framework within which they will be working. In particular, they must be aware of the legal,

practical and ethical ramifications and limitations of ADR confidentiality.

The POC will work with agency employees seeking to address a dispute. They will inform the employee regarding the CFEB ADR Program and work with the employee to prepare a formal request for mediation. The POC will offer to contact the other party to the dispute to assure they are willing and able to participate in the mediation. The POC will also work to assure that employees understand that mediation is both a voluntary and confidential process. The POC must be sensitive to the needs and concerns of the parties to the dispute. Though they should explain the CFEB ADR Program process and how mediation may serve them, they should not do more than encourage the individuals to pursue mediation.

## REQUESTING ADR ASSISTANCE

### INTAKE

#### *Employee seeks ADR assistance*

The request for mediation commences when an employee who is party to a dispute seeks counsel from their ADR Agency Point of Contact (POC) and requests mediation. The employees in dispute are advised and provided information about the CFEB ADR Program and the mediation process. If all parties to the dispute agree to attend mediation, then each participant signs and submits a Consent to Mediate Form to the Agency POC to initiate the mediation request.

#### *Formal Request for Assigned Mediators*

The Agency POC uses the signed Consent to Mediate Form and any supporting documents submitted by the parties to set up the case file. These case documents DO NOT belong to the CFEB and should not be sent to the CFEB ADR Program Manager. The POC submits an Agency Mediation Request to the CFEB ADR Program Manager to formally initiate scheduling and proceedings.

The form must contain preferred dates and times and other logistical requirements. This information provides the disputants a sense of control and consideration over the mediation conditions that work best for them. The CFEB ADR Program Manager acknowledges receipt of the request and works closely with the submitting Agency POC to assure the case is suitable for mediation. Additionally, they will clarify any agency issues or limitations for the resolution of the case.

#### *CFEB solicits Mediators*

Once contacted by the Agency POC to request a mediator, the CFEB ADR Program Manager submits the request to the cadre of mediators to solicit a mediator and co-mediator for the case. The CFEB Program Manager will send the request for a mediator out within 48 hours of receiving the request for a mediator from the Agency POC.

## **SCHEDULING**

#### *Mediator Assignment*

The volunteer mediators are formally assigned to perform the mediation by the CFEB ADR Program Manager. The mediators will make contact with the Agency POC who will provide the assigned mediators the signed Consent to Mediate Form and any assembled materials from the parties to the dispute.

#### *Mediators and Parties to the Dispute Confirm Schedule and Location*

The Agency POC will coordinate the schedule for the mediator and the parties to the mediation. The Agency POC will attempt to schedule the mediation within 48 hours of a mediator being assigned to the mediation. Schedule permitting, the Agency POC will schedule the actual date of the mediation no later than two weeks after the parties to the mediation consent to mediate and a mediator is assigned to the mediation. Generally, a basic

mediation takes between three to eight hours and the Agency POC will ask the parties to clear their calendars and devote themselves to the mediation process for that day. The standard commitment needed from the parties is eight hours. If additional time must be scheduled for the mediation, the mediator will coordinate this with the Agency POC before agreeing to the date and time. The Agency POC will assure that the location of the mediation is a neutral setting for all parties and that the meeting space is comfortable and provides for limited distractions.

### *Conduct Mediation*

Assigned mediators implement and support the mediation. In opening the mediation, the assigned mediators may use the opening script to ensure there are no conflicts and that the parties to the dispute fully understand the process.

## **TRACKING & REPORTS**

The CFEB ADR Program requires both the mediators and the Agency POC provide procedural and evaluative information to document the program's effectiveness. To meet OPM reporting requirements, the CFEB will track:

- ♦ The number and types (EEO versus non-EEO) of mediations requested and performed during the program/fiscal year,
- ♦ The success rate of these cases. The success rate is calculated by dividing the successful cases by total cases for the year.
- ♦ Calculation of costs avoided. OPM provides a formula for calculating cost avoidance.

Once the mediation has been assigned to a mediator and co-mediator, the CFEB ADR Program Manager records the case in a tracking spreadsheet to document the process.

*Report from Mediation*

A formal Settlement Agreement is used to report the results of the mediation back to the employee's supervisor and the Agency POC. The agreement is developed with the parties in mediation and is written up during the mediation. Each party signs and retains a copy of the agreement and a copy is filed at the office of the requesting agency.

*Mediators Provide Status Report to Agency/CFEB*

Mediators will deliver a mediation report to the CFEB ADR Program Manager and Agency POC after a completed mediation that provides the following information:

- ♦ The number of hours and other resources needed to perform the mediation
- ♦ The result of the mediation; i.e., whether the parties reached a negotiated agreement; and,
- ♦ Evaluation form from the parties.

*Mediators Provide an Annual Mediator Training and Activity Report to the CFEB*

Mediators must log all training and activity for the fiscal year (Oct 1 to Sep 30) on the Annual Mediator Training and Activity Report, sign and date the report and submit it to the CFEB ADR Program Manager no later than September 30 of each year. The CFEB Program Manager will compile all mediator training and activity for the fiscal year, calculate cost avoidance and submit a report to OPM through the CFEB Executive Director.

## **EVALUATION**

An important component of the CFEB ADR Program procedures is the evaluation process. The CFEB needs both qualitative and quantitative information to assure that the program and the work of the cadre of mediators provides a high standard of service to the government workforce. At the conclusion of the mediation, the parties to the mediation are asked to complete the CFEB ADR Evaluation Form. This information is provided to the CFEB.

Mediators will deliver the CFEB ADR Evaluation Form to the CFEB ADR Program Manager for spreadsheet recording, tracking and reporting. Once the information has been applied to CFEB tracking documents, the documents will be destroyed.

## CHAPTER 4

### MEDIATOR INFORMATION

#### Selection

The CFEB ADR Program is comprised of trained and skilled volunteer mediators who serve as the program's resource pool and who work in pairs to co-mediate the cases referred to the CFEB ADR Program. Individuals who are trained in mediation and meet the requirements of the CFEB ADR Program are encouraged to volunteer. Volunteer mediators who are accepted into the CFEB ADR Program Mediator Pool must agree to mediate a minimum of three workplace disputes per year, two of which must be for the CFEB ADR Program. Volunteer mediators are required to complete a Mediator Application Form and obtain authorization from their supervisor and their ADR Agency POC to be considered. See Application Process.

#### Mediator Training & Program Requirements

All CFEB ADR Program mediators must complete a certified 40 hour professional mediation training course. New mediators are required to co-mediate a minimum of five cases before serving as a lead mediator for the CFEB. CFEB lead mediators will serve as mentors to help new mediators gain the experience and expertise they need to become lead mediators.

The following are required qualifications for CFEB mediators:

- ♦ Complete a 40 hour certified mediation training course
- ♦ Co-mediate a minimum of five cases with a CFEB lead mediator prior to becoming a lead mediator

- ♦ Attend a minimum of two CFEB Quarterly Mediator meetings annually
- ♦ Pursue a minimum of eight hours of continuing professional development annually
- ♦ Submit mediation reports within five days of completing a mediation
- ♦ Submit the Annual Mediator Training & Activity Report by close of business on September 30 of each year
- ♦ Assume a non-directive mediation style
- ♦ Be willing to assist with development of the ADR Program
- ♦ Work cooperatively and collaboratively with other members of the ADR Program
- ♦ Be willing to mediate anywhere within Colorado with supervisor and Agency POC approval
- ♦ Have minimal scheduling conflicts.

## Application Process

### *Volunteer Mediator Confers with CFEB ADR Program Manager and Requests Application*

Any interested individual is encouraged to apply to the CFEB ADR Program. The Mediator Application and Agreement is available on the CFEB website ([www.colorado.feb.gov](http://www.colorado.feb.gov)). Once the application has been completed, the mediator should assure the support of their supervisor for the role and have them sign off on the application. The application and supporting materials are then sent to the CFEB ADR Program Manager.

### *CFEB Application Review*

The CFEB ADR Program Manager will review the application within 48 hours of receipt. Once reviewed, the CFEB ADR Program Manager will interview the applicant in person or by telephone.

*Response to Applicant*

All applicants will be notified of the CFEB ADR Program Manager's decision within 30 days of being interviewed.

*Volunteer Mediator Agreement Signed and CFEB Mediator File Established*

The CFEB ADR Program Manager will create a file for each mediator. This will contain the mediator's application, training summary, annual reports filed and other supporting documentation submitted by the mediator, and evaluation information collected from mediations performed in the program.

**Removal Process**

CFEB ADR Program Manager shall maintain a roster of mediators consisting of persons who meet the criteria for listing.

*Adherence of Standards and Requirements*

Persons listed on the Roster shall comply with CFEB ADR Program Manual rules and regulations pertaining to mediation and with such guidelines and procedures as may be issued by the CFEB Program Manager. Mediators shall conform to the ethical standards and procedures set forth in this manual.

*Listing on Roster and Removal*

Listing on the Roster shall be by decision of the CFEB ADR Program Manager. Any member of the CFEB Mediator Pool may recommend removal and the CFEB ADR Program Manager may remove any person listed on the Roster for violating the CFEB ADR Program Standards. The reasons for removal include whenever a member of the Roster:

- ♦ Fails to meet the criteria for admission.

- ♦ Fails to make periodic reports in a timely manner to CFEB ADR Program Manager, as required in the Mediation Report, concerning activities pertaining to mediation.
- ♦ Has been the subject of a complaint by parties who use CFEB ADR Program services and the CFEB ADR Program Manager, after appropriate inquiry, concludes that cause for removal has been shown.
- ♦ Is determined to be unacceptable to the parties who use CFEB ADR Program services. Such a determination of unacceptability may be based on CFEB ADR Program records which show the number of times the mediator's name has been rejected by the parties to the mediation.
- ♦ Has been in an inactive status for longer than two years. Refer to paragraph on inactive status for further clarification.
- ♦ Fails to show for a scheduled mediation.
- ♦ Fails to demonstrate the skills necessary to resolve conflict.
- ♦ Fails to complete needed forms.
- ♦ Fails to turn in needed forms on time.
- ♦ Fails to draft or assist parties in drafting an effective and enforceable settlement agreement.

#### *Procedure for Removal*

Prior to any recommendation to remove a mediator from the Roster, the CFEB ADR Program Manager shall conduct an inquiry into the facts of any such recommended removal. When the CFEB ADR Program Manager recommends removal, a written notice will be sent to the mediator. This notice shall inform the mediator of the CFEB ADR Program Manager's recommendation and the basis for it, and that he or she has 60 days from the date of such notice to submit a written response or information showing why the mediator should not be removed.

When the CFEB ADR Program Manager removes a mediator from the Roster, he or she shall inform the mediator of this in writing, stating the effective date of the removal and the length of time of the removal if it is not indefinite. A mediator so removed may seek reinstatement to the Roster by making written application to the CFEB Executive Director no earlier than two years after the effective date of his or her removal.

### *Suspension*

The CFEB ADR Program Manager may suspend for a period not to exceed 180 days any person listed on the Roster who has violated any of the criteria in this section. Mediators shall be promptly notified of a suspension. The mediator may appeal a suspension to the CFEB Executive Director. The decision of the CFEB Executive Director shall constitute the final action.

### *Inactive Status*

A member of the Roster who continues to meet the criteria for listing on the Roster may request that he or she be put in an inactive status on a temporary basis because of ill health, vacation, schedule, or other reasons. If the inactive status lasts longer than two (2) years, the mediator will then be removed from the Roster.

## **Responsibility of the Mediator to the Process**

### *Confidentiality*

Confidentiality is the cornerstone of mediation and assures that participants to a dispute have a safe place in which to work toward a negotiated agreement. Every person engaged in the CFEB ADR program is required to protect the confidentiality of the process and the participants involved. Because information revealed in mediation is intended to be confidential, except as otherwise stated under the ADR Act of 1996, the success of the process may depend upon this confidentiality. Before beginning the mediation, mediators should inform and gain consent from participants by having the parties to the mediation sign the Consent to Mediate Form.

Information received by the mediator(s) in confidence, in private session, caucus or in joint session with the parties is confidential and should not be revealed to parties outside the negotiation. Information received in caucus is not to be revealed in joint

session without receiving prior permission from the party or person from whom the information was received. All written information unless it is necessary, will be destroyed when the mediation process is complete.

The only recognized exception to the confidentiality rule is when the mediators learn of or discovers a threat of physical abuse, learn that the disputant is threatening to harm themselves or others, or in a case where the mediator discovers that a crime will be committed. In these instances the mediator is obligated to report the issue to the appropriate authorities.

### *Impartiality*

For purposes of the CFEB Program, impartiality is defined as a freedom from bias or favoritism either in work or action. Mediators will maintain impartiality toward participants and work to avoid creating a perceived or real conflict of interest. Therefore, the CFEB will not assign mediators from the same agency as the parties to the mediation. The mediator must disclose any affiliations or potential conflicts of interest or issues of impartiality he/she may have with any participant and, if so, must obtain consent of the participants to continue as mediator. The mediator shall withdraw from the mediation at any time if the mediator believes he/she cannot maintain impartiality or if he/she believes an apparent or potential conflict of interest would be deemed likely to affect the integrity of the mediation services.

### *Informed Consent*

Mediators will inform participants about the nature of the mediation process, procedures, and the role of the mediator. Written consent via Consent to Mediate Form (Appendix 8, Tab 5) of the parties must be obtained prior to commencement of the mediation.

*Self-Determination*

Self-determination is a fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement. Any party may withdraw from mediation at any time.

*Competence*

A mediator shall mediate only when the mediator has the necessary qualifications to effectively understand and mediate the dispute. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself/himself as available to serve as a mediator gives the parties and the public the expectation that he/she has the competence to mediate effectively.

*Quality of the Process*

A mediator shall conduct the mediation fairly, diligently and in a manner consistent with the principle of self-determination by the parties. A mediator shall work to ensure a quality process and to encourage mutual respect concerning the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate the mediation.

## Role and Conduct of Mediators

CFEB Mediators will:

- ♦ Adhere to the Ethical Standards in Appendix I of this manual
- ♦ Conduct themselves with diligence and shall not seek to advance their own interests.
- ♦ Seek to provide participants with a full opportunity to express their interests.
- ♦ Be impartial facilitators of a neutral process, and will not make or influence decisions.
- ♦ Not engage in any non-mediator roles or activities regarding the matter in dispute.
- ♦ Not make promises of specific results.
- ♦ Refrain from serving in disputes in which they believe their lack of sufficient knowledge about the subject matter would inhibit or detract from the mediation and resolution of the dispute.

## APPENDIX 1

### Ethical Standards

***The ADR Program is an activity of the Executive Branch of the Federal Government and its federal-employee mediators provide services as a collateral work duty. These mediators are, thus, subject to the Standards of Ethical Conduct for Employees of the Executive Branch, promulgated by the U.S. Office of Government Ethics. 5 C.F.R. Part 2635.***

To promote uniformity of practice and one culture in the ADR Program, these standards of ethical conduct will apply to all ADR Program mediators, regardless of their employment status with the Federal Government, when they are representing the Program in any matter.

In addition to the Standards of Ethical Conduct for Employees of the Executive Branch, ADR Program mediators are expected to comply with the following standards:

A mediator will disclose all actual and potential conflicts of interest reasonably known to that mediator. If all parties agree to mediate after being informed of the conflicts, the mediator may proceed with the mediation. If at any time the mediator believes the actual or potential conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator will avoid the appearance of having a conflict of interest at all times. A mediator will not subsequently establish a professional or personal relationship with any party in a related matter or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process.

A mediator will not solicit business contacts for personal gain during ADR Program mediations or while representing the CFEB ADR Program on other matters.

Mediators will conduct mediations in an impartial manner. The concept of impartiality is central to the mediation process. If at any time the mediator is unable to conduct mediation in an impartial manner, the mediator is obligated to withdraw. A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties.

A mediator will promote self-determination in mediation. Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the

ability of the parties to reach a voluntary, non-coerced agreement. Any party may withdraw from mediation at any time. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties will be given the opportunity to consider all proposed options.

A mediator will meet the reasonable expectations of all parties, and will abide by the agreement to mediate, with regard to confidentiality. A mediator will not disclose any matter that a party considers confidential unless given permission by that party, unless the mediator is otherwise required to disclose by law or other public policy. A mediator will discuss with a party the confidential nature of a private session or caucus before undertaking the session or caucus.

A mediator will not communicate information about how the parties acted in mediation, the merits of the case, or settlement offers, other than as part of the CFEB ADR Program debriefing with the ADR Program Manager.

A mediator will provide timely, honest and thoughtful feedback to a co-mediator during each debriefing session and subsequently to the Program Manager.

## **APPENDIX 2**

### **ADR Act of 1996**

Part I. Administrative Dispute Resolution Act of 1996  
 Public Law 104-320  
 104th Congress

### *An Act*

To reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Dispute Resolution Act of 1996"

#### SEC. 2. AMENDMENT TO DEFINITIONS.

Section 571 of title 5, United States Code, is amended--

(1) in paragraph (3)--

(A) by striking , " in lieu of an adjudication as defined in section 51(7) of this title,";

(B) by striking "settlement negotiations,"; and

(C) by striking " and arbitration" and inserting "arbitration, and use of ombuds"; and

(2) in paragraph (8)--

(A) in subparagraph (B) by striking "decision," and inserting "decision;"; and

(B) by striking the matter following subparagraph (B).

#### SEC. 3. AMENDMENTS TO CONFIDENTIALITY PROVISIONS

(a) Limitation of Confidentiality Application to Communication.-- Subsections (a) and (b) of section 574 of title 5, United States Code, are each amended in the matter before paragraph (1) by striking " any information concerning".

(b) Dispute Resolution Communication.--Section 574(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding."

(c) Alternative Confidentiality Procedures.--Section 574(d) of title 5, United States Code, is amended--

(1) by inserting "(1)" after "(d)"; and

(2) by adding at the end thereof the following new paragraph:

"(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section."

[[Page 110 STAT. 3871]]

(d) Exemption From Disclosure by Statute.--Section 574 of title 5, United States Code, is amended by amending subsection (j) to read as follows:

"(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3)."

#### SEC. 4. AMENDMENT TO REFLECT THE CLOSURE OF THE ADMINISTRATIVE CONFERENCE.

(a) Promotion of Administrative Dispute Resolutions.--Section 3(a)(1) of the Administrative Dispute Resolution Act (5 U.S.C. 571 note; Public Law 101-552; 104 Stat. 2736) is amended to read as follows:

"(1) consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and"

(b) Compilation of Information.--

(1) In general.--Section 582 of title 5, United States Code, is repealed.

(2) Technical and conforming amendment.--The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 582.

(c) Federal Mediation and Conciliation Service.--Section 203(f) of the Labor Management Relations Act, 1947 (29 U.S.C. 173(f)) is amended by striking "the Administrative Conference of the United States and other agencies" and inserting "the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code,".

#### SEC. 5. AMENDMENTS TO SUPPORT SERVICES PROVISION.

Section 583 of title 5, United States Code, is amended by inserting "State, local, and tribal governments," after "other Federal agencies,".

#### SEC. 6. AMENDMENTS TO THE CONTRACT DISPUTES ACT.

Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) is amended--

(1) in subsection (d) by striking the second sentence and inserting: "The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or as otherwise required by law."; and (2) in subsection (e) by striking the first sentence.

## SEC. 7. AMENDMENTS ON ACQUIRING NEUTRALS.

(a) Expedited Hiring of Neutrals.--

(1) Competitive requirements in defense agency contracts.--Section 2304(c)(3)(C) of title 10, United States Code, is amended by striking "agency, or" and inserting "agency, or to procure the services of an expert or neutral for use".

(2) Competitive requirements in federal contracts.--Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by striking "agency, or" and inserting "agency, or to procure the services of an expert or neutral for use".

[[Page 110 STAT. 3872]]

(b) References to the Administrative Conference of the United States.--Section 573 of title 5, United States Code, is amended--(1) by striking subsection (c) and inserting the following: "(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall--"(1) encourage and facilitate agency use of alternative means of dispute resolution; and "(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis."; and (2) in subsection (e) by striking "on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual".

## SEC. 8. ARBITRATION AWARDS AND JUDICIAL REVIEW.

(a) Arbitration Awards.--Section 580 of title 5, United States Code, is amended--(1) by striking subsections (c), (f), and (g); and (2) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively. (b) Judicial Awards.--Section 581(d) of title 5, United States Code, is amended--(1) by striking "(1)" after "(b)"; and (2) by striking paragraph (2). (c) Authorization of Arbitration.--Section 575 of title 5, United States Code, is amended--(1) in subsection (a)(2), by striking "Any" and inserting "The"; (2) in subsection (a)(2), by adding at the end the following: "Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes."; (3) in subsection (b)--(A) by striking "may offer to use arbitration for the resolution of issues in controversy, if" and inserting "shall not offer to use arbitration for the resolution of issues in controversy unless"; and (B) by striking in paragraph (1) "has authority" and inserting "would otherwise have authority"; and (4) by adding at the end the following:

"(c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration."

**SEC. 9. PERMANENT AUTHORIZATION OF THE ALTERNATIVE DISPUTE RESOLUTION; PROVISIONS OF TITLE 5, UNITED STATES CODE.**

The Administrative Dispute Resolution Act (Public Law 101-552; 104 Stat. 2747; 5 U.S.C. 571 note) is amended by striking section 11.

[[Page 110 STAT. 3873]]

**SEC. 10. AUTHORIZATION OF APPROPRIATIONS.**

(a) In General.--Subchapter IV of title 5, United States Code, is amended by adding at the end thereof the following new section:

"Sec. 584. Authorization of appropriations

"There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter."

(b) Technical and Conforming Amendment.--The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 583 the following:

"584. Authorization of appropriations."

**SEC. 11. REAUTHORIZATION OF NEGOTIATED RULEMAKING ACT OF 1990.**

(a) Permanent Reauthorization.--Section 5 of the Negotiated Rulemaking Act of 1990 (Public Law 101-648; 5 U.S.C. 561 note) is repealed.

(b) Closure of Administrative Conference.--(1) In general.--Section 569 of title 5, United States Code, is amended--(A) by amending the section heading to read as follows:

"Sec. 569. Encouraging negotiated rulemaking"; and

(B) by striking subsections (a) through (g) and inserting the following:

"(a) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of negotiated rulemaking. An agency that is considering, planning, or conducting a negotiated rulemaking may consult with such agency or committee for information and assistance.

"(b) To carry out the purposes of this subchapter, an agency planning or conducting a negotiated rulemaking may accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal if that agency's acceptance and use of such gifts, devises, or bequests do not create a conflict of interest. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the head of such agency. Property= accepted pursuant to this section, and the proceeds thereof,

shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests."

(2) Technical and conforming amendment.--The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 569 and inserting the following:

"569. Encouraging negotiated rulemaking."

(c) Expedited Hiring of Convenors and Facilitators.--(1) Defense agency contracts.--Section 2304(c)(3)(C) of title 10, United States Code, is amended by inserting "or negotiated rulemaking" after "alternative dispute resolution". (2) Federal contracts.--Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by inserting "or negotiated rulemaking" after "alternative dispute resolution".

(d) Authorization of Appropriations.--

[[Page 110 STAT. 3874]]

(1) In general.--Subchapter III of title 5, United States Code, is amended by adding at the end thereof the following new section:

"Sec. 570a. Authorization of appropriations

"There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter."

(2) Technical and conforming amendment.--The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 570 the following:

"570a. Authorization of appropriations."

(e) Negotiated Rulemaking Committees.--The Director of the Office of Management and Budget shall--

(1) within 180 days of the date of the enactment of this Act, take appropriate action to expedite the establishment of negotiated rulemaking committees and committees established to resolve disputes under the Administrative Dispute Resolution Act, including, with respect to negotiated rulemaking committees, eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) and providing public notice of such committee under section 564 of title 5, United States Code; and

(2) within one year of the date of the enactment of this Act, submit recommendations to Congress for any necessary legislative changes.

## SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS AND THE DISTRICT COURTS OF THE UNITED STATES: BID PROTESTS.

(a) Bid Protests.--Section 1491 of title 28, United States Code, is amended--(1) by redesignating subsection (b) as subsection (c); (2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

"(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

"(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

"(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

[[Page 110 STAT. 3875]]

"(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."

(b) Effective Date.--This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date.

(c) Study.--No earlier than two years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

(d) Sunset.--The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001, unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.

(e) Savings Provisions.--

(1) Orders.--A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) Proceedings and applications.--(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and

payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

[[Page 110 STAT. 3876]]

(f) Nonexclusivity of GAO Remedies.--In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking "a court of the United States or" in the first sentence.

## APPENDIX 3

### ADR Resources & Websites

This appendix contains selected web sites that provide miscellaneous resource information about the use of ADR in the resolution of workplace disputes. Some sites describe working Federal agency ADR programs. These sites are maintained by associations, government agencies, non-profit organizations, and others. This listing is not exhaustive and does not indicate endorsement by the CFEB of ADR services that might be offered by that site.

#### GOVERNMENT AGENCIES

Department of Air Force

<http://www.adr.af.mil>

Describes Air Force ADR program wide range of ADR resources.

Department of Education

[http://www.ed.gov/databases/ERIC\\_Digests/ed338791.html](http://www.ed.gov/databases/ERIC_Digests/ed338791.html)

Provides information on educational resources and guidelines on dealing with conflict resolution within educational institutions.

Equal Employment Opportunity Commission

<http://www.eeoc.gov>

Provides information about the use of ADR in the EEO complaint/appeal process.

Federal Labor Relations Authority

<http://www.flra.gov>

Provides information about the use of ADR in FLRA appellate matters.

Federal Mediation and Conciliation Service

<http://www.fmcs.gov/internet/>

Discusses ADR services offered.

Department of Labor

<http://www.dol.gov/dol/asp/public/programs/adr/main.htm>

Provides overview of DOL's ADR Activities and DOL's ADR Policy.

## Department of Navy

<http://www.adr.navy.mil/>

Describes Navy's ADR program and ADR initiatives, and successful tips and techniques.

## Merit Systems Protection Board

<http://www.mspb.gov>

Provides information about agency's appellate jurisdiction case processing and the agency's latest ADR initiatives.

## Office of Personnel Management

<http://www.opm.gov/er>

Contains OPM's *ADR Resource Guide* and describes the Management Development Centers' ADR training offerings.

## Office of Special Counsel (OSC)

<http://www.osc.gov>

Provides information about prohibited personnel practices, Hatch Act, and other disputes within the agency's jurisdiction.

## Department of Veterans Affairs

<http://www.va.gov/adr/ocgdir.htm>

Describes DVA's policy concerning the use of ADR.

## ASSOCIATIONS, NONPROFITS, AND OTHERS

## American Arbitration Association

<http://www.adr.org/>

Provides a list of AAA periodicals that address latest ADR developments.

## American Bar Association (Section of Dispute Resolution)

<http://www.abanet.org/dispute/home.html>

Provides information on ABA ADR initiatives, including the *Dispute Resolution Magazine* and links to other ADR sites.

## Justice Center of Atlanta

<http://www.justicecenter.org>

Provides information about ADR services provided.

Law Journal EXTRA

<http://www.ljextra.com/practice/arbitration/index.html>

Includes links to articles on ADR.

Mediation Information and Resource Center

<http://www.mediate.com>

Provides a list of mediator resources and mediation information.

National Institute for Dispute Resolution (NIDR)

<http://www.crenet.org/index.htm>

Contains a compilation of ADR training courses and conferences.

## APPENDIX 4

### Glossary of Terms

**Agency Processes:** Mechanisms already in place to deal with workplace disputes in Federal agencies, such as the Equal Employment Opportunity (EEO) process, Union contract provisions and agency grievance procedures.

**Alternative Dispute Resolution (ADR):** A wide range of problem-solving procedures, which use neutral third parties to resolve disputes, as an alternative to *Agency Processes* or to formal, adversarial methods, like litigation. Examples are mediation, facilitation, conciliation, negotiation, and arbitration.

**Caucus:** A private meeting held by members of a negotiating team or between a mediator and client to determine strategies that will make joint session negotiations more productive.

**CFEB ADR Program Manager:** Staff member of the CFEB who manages the day-to-day administration of the CFEB ADR Program.

**Co-mediation:** A mediation performed with two mediators collaborating on the process. The lead mediator tends to be the more senior practitioner and is responsible to the CFEB ADR Program for the case administration. The second mediator may be a newly trained mediator who needs more experience to become a lead mediator.

**Confidentiality:** The process of protecting or restricting access to information or providing confidence that information will be kept secret. Confidentiality is essential to all ADR proceedings.

**Conflict:** An expressed competition between two or more parties who have perceived or actual incompatible goals

**Enforceability:** The ability to enforce the mediation agreement. A stated provision in the Core Principles of ADR requires that participants to the dispute understand that the signed mediation agreement is an enforceable and binding document.

**Fairness:** Also a Core Principle of ADR, stated as “Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the ADR proceeding by, at a

minimum: providing as much information about the ADR proceeding to the parties as soon as possible; providing the right to be represented throughout the ADR proceeding; and providing an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented.”

**Flexibility:** Requirement of the Core Principles of ADR that an agency ADR program be flexible enough to respond to the variety of situations individual agencies face. Because agencies have different missions and cultures, they have flexibility in designing their ADR programs and must exercise flexibility in implementing the ADR program. Flexibility allows agencies to adapt to changing circumstances.

**Impasse:** A situation from which there is no escape. Situation in negotiations where neither party is willing to compromise; parties are unwilling to move forward. Synonymous with stalemate.

**Interest-based:** A negotiation process that attempts to satisfy as many interests or needs as possible for all parties to the dispute.

**Intervention:** To come between parties, or enter into a dispute or the affairs of another.

**Mediation:** A voluntary, confidential process whereby a trained neutral third party assists the parties in finding a mutually acceptable solution in a manner different from traditional litigation; for example, the rules of evidence do not apply, no testimony is taken, and the mediator does not decide the dispute.

**Mediation Training:** Specialized training to prepare to serve as a third-party neutral in the mediation process and tools to use in mediation.

**Mutually Acceptable:** Satisfactory to the needs and expectations of all parties involved in a dispute.

**Negotiate:** To confer, discuss, or bargain to reach agreement on a subject of common concern to the parties.

**Negotiated agreement:** The outcome of the mediation, which is written up as the Mediation Agreement.

**Neutral:** An individual, who does not have a stake in the issues or outcome of a dispute, and who functions specifically to aid the parties in resolving it. The ADRA

defines a neutral as "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).

**Party:** A person who will be significantly affected by the outcome and who participates in the ADR proceeding.

**Positions:** Contrasted to interests in mediation. Positions are already framed solutions brought into the negotiation by a party to a dispute.

**Point of Contact (aka Agency Point of Contact, POC):** Assigned Federal staff who serves as the ADR Program coordinator for an agency.

**Self-Determination:** Self-determination is a fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement. Any party may withdraw from mediation at any time.

**Settlement Agreement:** A legally binding written agreement signed by all parties, containing a mutually acceptable solution to a dispute.

**Shared Neutral:** Term used to denote a trained volunteer mediator and Federal employee who serves on a cadre of mediators that is a shared resource across numerous Federal agencies.

## APPENDIX 5

### Frequently Asked Questions

**Q.** *How do I know if mediation is right for my dispute?*

**A.** Not every employee grievance or dispute is a good candidate for mediation, but many are. Here are some quick tests to help identify if a conflict may be a good one to mediate:

Parties are not quite at an impasse but are communicating destructively or have stopped communicating with each other directly: the parties in dispute have to work together and are willing to try to work out an agreement.

Parties lack a joint solution to a problem(s): The parties have tried multiple courses of action to improve the situation, but there are no agreed upon “fix.” A mediator may help those engaged in the problem develop other mutually beneficial approaches and agreements. Through mediation, the parties may be able to identify their bigger or shared interests and shift out of positional thinking about the dispute.

Relationships are strained, emotions are high on the issues and there is little trust among the parties or cultures: Mediation often helps individuals to identify the behavior and treatment experienced during the conflict that has caused them to lose trust.

Confidentiality is important and parties may want to entrust a mediator: Mediation is a confidential process that is protected by the ADRA, the Federal law that authorizes ADR assistance. Except for circumstances where a crime or personal harm threatened, the information shared in mediation is protected from the Freedom of Information Act (FOIA) and cannot be called up or used against the parties in dispute.

A systematic process is needed for parties to relate better and focus on complex issues: The mediation process is designed to help people untangle the components of a conflict and address the identified issues in a methodical and mutually beneficial manner.

**Q. *How long does mediation take?***

- A.** It depends on the issue and the parties to the dispute, but generally CFEB assisted mediations take eight hours. Administratively, mediation often resolves issues in less time than formal grievance processes or informal EEO counseling.

**Q. *Who is the mediator and for whom do they work?***

- A.** The CFEB assigned mediators will be a Federal employee who has been trained as and who has experience in mediation. To keep the mediation neutral the mediator assigned will come from a different Federal agency and has no relationship with the individuals involved or the dispute. The mediator works strictly “for the process” while conducting the mediation. Their purpose and role is to assure that the participants at the table have the best assistance to help them participate fully in the mediation process. They do not decide and they do not render judgment in the dispute.

**Q. *Is mediation legally binding?***

- A.** Though the mediation itself is not a legally binding process, the agreement created by the participants during the mediation is legally binding. Ideally, this agreement is also seen as morally binding to the signees so that they have ownership in the success of the agreement and do not feel compelled to pursue added legal recourse.

**Q. *If I go to mediation with an EEO complaint, and the issue is not resolved – then what happens?***

- A.** If you are unable to resolve an EEO dispute in mediation, you will still be able to file a formal complaint with the EEOC within 15 days after notice is provided to you of your right to do so. If the mediation is scheduled pre-complaint and the mediation process does not result in an agreement in the 90 day processing period, you will still have the right to file a formal complaint.

**Q. Does mediation really work?**

- A.** Yes, it often does. We do not have recent statistics for the CFEB ADR Program, but the Los Angeles FEB shared neutrals program estimates that over 80% of the mediations performed in their program (SNAP, or Shared Neutrals in ADR Program) resulted in a negotiated agreement. Additional benefits described by participants to mediation include: better understanding of the facts of the situation, more comfort with the other person and a willingness to work on the relationship, better communication skills, and the ability to separate emotion from information.

**Q. What if I do not feel comfortable in the mediation or it does not feel like it is working?**

- A.** Mediation is a voluntary process and participants are able to end the mediation at any time. The mediation setting is designed to create a safe-space where you and the other party in the dispute can have a confidential and hopefully, very frank conversation. If for any reason you do not feel safe in the process, you should tell the mediators and they will work with you to address your concerns.

## **APPENDIX 6**

### **Mediation Forms List**

All CFEB ADR Forms listed below are found on the  
ADR Program page of the CFEB Website

[WWW.COLORADO.FEB.GOV](http://WWW.COLORADO.FEB.GOV)

- 1) Agency Agreement to Participate
- 2) Mediator Application & Agreement
- 3) Agency Mediation Request
- 4) Consent to Mediate
- 5) Settlement Agreement
- 6) Mediation Report
- 7) Participant Mediation Evaluation
- 8) Annual Mediator Training and Activity Report
- 9) Opening Script

## APPENDIX 7

### Opening Script

**Introduce yourself and the parties.** How would you like to be addressed?

**Introduce Mediators-in-Training** and explain their role.

**Inform** the parties that you will spend a few minutes describing the process and expectations. Thank them for their attention. Encourage them to ask questions.

**Commend** parties for their decision to use mediation.

#### Conflict check

- ♦ Disclose to parties if you know any of them and how you know them
- ♦ Disclose if you have mediated for the CFEB before
- ♦ If you do have a previous connection and believe you can serve impartially, let everyone know that and ask for their permission to continue

**Remind** parties that mediation is a voluntary process.

- ♦ Are parties here voluntarily?
- ♦ Are all parties that are required to reach an agreement present?
- ♦ What, if any, formal complaints, grievances, etc. are pending?

#### Explain mediation confidentiality and privilege

- ♦ Everything discussed in the mediation is confidential, except for the bulleted list in the consent to mediate form (SMC 4.04.075C). (E.g. you will not go back to work and share what was said in the mediation with your co-workers.)
- ♦ Unless agreed otherwise, mediation communications are privileged, meaning they are protected from use as evidence in other formal settings. (E.g., administrative or judicial proceedings) except for the bulleted list in the consent to mediate form. (E.g. If this issue is not resolved here, and it turns into a formal complaint, you would not be able to quote what the other party said in this mediation.)
- ♦ Mediators cannot be required to testify
- ♦ All mediator notes will be destroyed

**Exceptions to confidentiality:**

- ♦ Either see the consent to mediate for a full list of the exceptions or explain you will go over the exceptions to mediation when you go over the agreement to mediate

**Describe role of the mediator:**

- ♦ Impartial facilitator, not an advocate or judge
- ♦ Coach in helping parties arrive at their own solutions

**Describe role of parties:**

- ♦ To mediate in good faith
- ♦ Work collaboratively with the mediator(s) and the other parties to this mediation
- ♦ Share any information that will help the other party understand your perspective and reach a good agreement
- ♦ Keep an open mind
- ♦ Consider a range of options beyond the idea that you have brought with you today. (In personality disputes, this last one is often articulated as “are you willing to hear the impact your behavior has on the other person?”)
- ♦ To listen carefully to each other, speak one at a time and use language that will make it easier for the other person to listen to your point of view.
- ♦ Do we have your commitment to mediate in good faith?

**Explain the process:**

- ♦ Client Opening Statements, Mediator Feedback and Client Response periods
- ♦ Emphasize uninterrupted time to speak
- ♦ Developing a list of items to discuss (an agenda)
- ♦ Exploring issues and interests or concerns
- ♦ Private meetings with each party (caucus) Explain confidentiality and use. Anyone can request
- ♦ Mediation agreement, forms, and that their agreement may be enforceable under contract law and may be admissible in legal proceedings

**Any Time Constraints?**

**Any Special Needs?**

### **Any Questions?**

#### **Settlement Agreement:**

- ♦ Read aloud to all participants. Allow parties time to read and respond to any draft agreement prior to signing
- ♦ Have all sign the original
- ♦ Distribute photocopies to all parties, Agency POC and the EEO Office

#### **Determine party to begin.**