

ADMINISTRATIVE DIRECTIVE M-713-6
Alternate Dispute Resolution in Equal Employment Opportunity Complaints

1. SUBJECT: The National Endowment for the Humanities (NEH) Alternative Dispute Resolution Policy Statement
2. PURPOSE: This policy statement sets out the NEH's policy on Alternative Dispute Resolution
3. EFFECTIVE DATE: September 16, 2019
4. FREQUENTLY ASKED QUESTIONS (FAQs)

SUBJECT MATTER

1. Subject

The National Endowment for the Humanities (NEH) is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. When used properly, alternative dispute resolution (ADR) can provide faster, less expensive, less contentious, and more productive results in eliminating workplace discrimination.

The use of ADR is based in the statutes created and enforced by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act. The use of ADR is also predicated on the Administrative Dispute Resolution Act (ADRA), pursuant to which this policy is being adopted, Executive Orders 12778 and 12871, and the National Performance Review.

Bargaining unit staff are governed by the Collective Bargaining Agreement between the NEH and the American Federation of Government Employee's (AFGE) Local 3403.

2. Purpose

Any use of ADR under the NEH auspices will be governed by certain core principles. Above all, any NEH ADR program must further the agency's mission. It must also be fair, which requires voluntariness, neutrality, confidentiality, and enforceability.

A. Furthering the NEH's Mission

NEH has adopted an alternative dispute resolution (ADR) policy to give you, as an NEH employee, an option other than the traditional complaint procedure if you feel you have been discriminated or retaliated against because of your sex, race, color, religion, national origin, age, physical or mental disability, or genetic information.

B. Fairness

Fairness should be manifested throughout the NEH ADR proceedings by incorporating each of the core principles identified in this policy as well as by providing as much information about the ADR proceeding to the parties as soon as possible. Fairness thus requires that any NEH-sponsored program include the following elements:

1. Voluntariness

The NEH believes that parties must knowingly, willingly, and voluntarily enter into an ADR proceeding. Likewise, the parties have the right, voluntarily, to opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court. Under no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful and enforceable, and as long as both parties are informed of their rights and remedies under the applicable statutes.

2. Neutrality

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

The facilitator's duty to the parties is to be neutral and honest, and to act in good faith. Those who act as neutrals under EEOC auspices should possess a thorough knowledge of EEO law, and must be trained in mediation theory and techniques.

3. Confidentiality

Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties, NEH employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. To accomplish this purpose, the NEH will be guided by the nondisclosure provisions of Title VII and the confidentiality provisions of ADR which impose limitations on the disclosure of information. In order to encourage participation in the NEH sponsored ADR program, the NEH will include confidentiality provisions in its ADR program and will notify the parties to the dispute of the protection offered by confidentiality provisions.

In order to ensure confidentiality, those who serve as neutrals for the NEH should be precluded from performing any investigatory or enforcement function related to charges with which they may have been involved. The dispute resolution process must be insulated from the investigative and compliance process.

4. Enforceability

Any agreement reached during an ADR proceeding must be enforceable. An allegation that an ADR settlement agreement has been breached should be brought to the attention of the EEOC official. The NEH will review and investigate the allegation and determine whether it will utilize its authority and resources to seek enforcement of the agreement.

C. Training and Evaluation

The NEH sponsored ADR programs should include training and evaluation components. A successful ADR plan requires that the NEH will provide appropriate training and education on ADR to its own employees, persons protected under the applicable laws, and neutrals. In addition, an evaluation

component is essential to any ADR program in order to determine whether the program has achieved its goals, and how the program can be improved to be more efficient and achieve better results.

CONCLUSION

Through this Policy Statement, the NEH affirms its commitment to the use of ADR techniques for resolving disputes in all its activities, throughout its programs, including charge processing, litigation, federal sector EEO complaint processing, internal EEO complaint processing, labor management relations and contract obligations with the AFGE.

4. Frequently Asked Questions (FAQs)

1. What is ADR?

ADR is an alternative way to solve problems. Instead of pitting two sides against each other, ADR lets both sides work together to try to find the best solution. ADR is an alternative to filing an EEO complaint and to going through the formal EEO hearing process.

The government encourages all of its employees to use ADR and has passed laws and regulations requiring agencies to create ADR processes. If you are interested in reading the laws and regulations, click [here](#) or contact the Office of the General Counsel at gencounsel@neh.gov.

At the NEH, mediation is the method used for ADR.

2. What is mediation?

Mediation is a process through which you and the NEH work together with an outside mediator to try to resolve a problem. The mediator is neutral and trained in helping people resolve their differences. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

The mediator isn't a judge. However, the mediator is trained in listening and resolving conflicts and can make suggestions to try to resolve differences between you and the

NEH. If the mediation is successful, you and the NEH will sign an agreement that can be enforced by the Equal Employment Opportunity Commission (EEOC).

3. Can I use ADR for my problem?

It depends. If you feel you have been discriminated or retaliated against because of your sex, race, color, religion, national origin, age, physical or mental disability, or genetic information, then yes, ADR is an option for you.

Other issues (not pertaining to discrimination) are not subject to this form of ADR. For example, this policy does not apply to employee grievances. You'll find more information about what types of issues an employee can grieve as well as the process for addressing grievances in Administrative Directive P-771, or by clicking [here](#).

Why would I choose ADR?

ADR is typically faster and cheaper than litigation. The goal is for both sides to win. It's also confidential. What happens in the mediation room doesn't leave the room, unless the problem is solved and the solution is written down at the end of the ADR. In addition, you can also walk away from ADR at any time, for any reason. So can NEH.

4. When can I choose ADR and what do I give up?

You can choose ADR at any time before you actually start an EEO formal hearing. That means you can start before or after filing a complaint, after you've met with an attorney, or at any point until you walk in the door for a formal EEO hearing.

You don't give up any of your rights if you choose ADR, except that if you choose ADR before you file a formal complaint, you will not go through the typical pre-complaint counseling with your EEO counselor.

If you don't reach an agreement through ADR, you still have the option to file a formal complaint. Remember, you can start or stop ADR at any time for any reason.

Information on the traditional complaint process, including the formal EEO hearing, is available in Administrative Directive M-713-2, or [here](#).

5. What is the relationship between the ADR and EEO Complaint Processing Procedures?

Nothing said or done during attempts to resolve a matter through ADR proceedings may be made the subject of an EEO complaint. All concerns with the operation of the agency's ADR program should be resolved by contacting the administrator of the ADR program. If the agency's ADR program appears to conflict with the EEOC's complaint processing regulations and Administrative Directive M-713-2, individuals may write to: Director of Special Service Staff, U. S. Equal Employment Opportunity Commission, Office of Federal Operations, P.O. Box 77960, Washington, D.C. 20013.

6. How does choosing ADR affect the time I have to file a complaint?

Entering ADR is like hitting the pause button on the complaint process. Normally, you have 45 days from the time of the incident that you're upset about (or, if you are responding to a personnel action, from when the incident took effect) to contact an EEO Counselor. If you choose ADR during those 45 days, the clock stops.

For example, if something happens on July 1, you would have until August 14 (45 calendar days) to contact an EEO counselor. But if you pursue ADR on July 15, the clock would stop. If mediation helps you come to an agreement, then you are done. If it does not, the ADR ends and the clock starts again, and you still have 30 days to file your complaint.

7. How do I choose ADR?

ADR at NEH starts the same way any other complaint would start. You usually have 45 days from the time the incident occurred to talk to an EEO Counselor. This applies whether you choose ADR or the traditional process.

Once you talk to your EEO Counselor, he or she will tell you about your options, including ADR. The EEO Counselor will also give you some paperwork, including this policy statement, a list of your rights and responsibilities, and the EEO Counselor Checklist. You should read all of this material carefully and think about what you want to do.

Then you will have a choice. You can either start the traditional complaint process or you can start ADR. Either way, you will have to let your EEOC Counselor know in writing which option you are choosing. As explained above, you can always change your mind later. Information on the traditional complaint process can be found in Administrative Directive M-713-2, or by clicking [here](#).

8. Can I have someone help me in the ADR process?

Yes, you can have anyone as your representative, so long as that person does not have a conflict of interest. The person can be an attorney, though he or she does not have to be. If you're represented by a union, the person can be a union representative. You are not required to have a representative if you do not want one.

9. What happens after I choose ADR?

If you choose ADR, your EEO Counselor will gather some more information from you, including details about what happened and when it happened, to make sure you are eligible for ADR. The EEO Counselor will then turn that information over to the NEH ADR Coordinator.

The ADR Coordinator is the person who is responsible for running the ADR program. The Coordinator's job is to make sure the process runs smoothly. The Coordinator acts as an advocate for ADR but doesn't take sides in disputes. The Coordinator hires the mediators (NEH pays for them), and can explain the process.

10. How and when is the mediator chosen?

Once the ADR Coordinator receives notification that you have selected ADR, he or she will reach out to a mediation organization, such as the Federal Mediation and Conciliation Service (FMCS), and let the organization know that we need to hire a mediator. FMCS will then assign one of its mediators to work on the issue.

11. What happens when I get a mediator?

The ADR Coordinator will give your contact information, your representative's contact information, and the contact information for an NEH representative to the mediator, along with any other information NEH has which may help explain the situation. Then, the mediator will get in touch with you and NEH to layout the goals and ground rules.

Every mediation is different, but all mediations share some common principles. The mediator is not a judge and the final decision is not up to him or her. The mediator can tell you what they think of your situation, which does not represent the EEOC, and what might happen is not necessarily what would happen at a hearing or in court. The mediator will also estimate how much time the process may take and remind you that you and the NEH can walk away from the mediation at any time.

12. How does the mediation itself work?

That will be up to you, the mediator, and the person representing NEH. The mediation will be confidential and it can't be used against you in court, except in some very rare cases, and almost never without your consent. The mediator will explain these cases before you start.

The NEH representative will have the authority to agree to a resolution on behalf of the agency. The person won't be someone who is involved in the dispute and will typically be a senior manager.

13. What happens if we reach an agreement in mediation?

If you agree on a way to solve the issue, you and the NEH will sign what is called a settlement agreement. Every agreement is different, but all share a few things that each side agrees to do. NEH will adhere to what is agreed upon in the mediation. You will agree not to sue the NEH based on the complaint you mediated. You will both agree that the agreement can be enforced in court and the EEOC has authority to enforce the terms. You will both agree that the settlement agreement is a request to close the case and that the NEH does not admit to breaking any laws or rules. Also, if you raise an age discrimination complaint, you will agree you have been told about the particular legal issues that go with those complaints.

The mediator will give a signed copy of the agreement to the ADR Coordinator who will tell the EEO Counselor the issue is resolved. The EEO Counselor will issue a report saying the issue was resolved via ADR. The ADR Coordinator will also give a copy of the settlement agreement to the Deputy General Counsel, who doubles as the ADR Specialist. The General Counsel's Office will look it over to make sure it is legally sufficient.

14. What if the settlement agreement is not legally sufficient?

The mediators are trained to make sure they get to a legal agreement, but sometimes problems come up, legally, with the final agreement. There are also some cases where, because of the issues involved, certain aspects of the agreement may not be allowed. Such situations occur mainly with cases where the issues would establish a precedent that the NEH cannot set, change overall NEH policy, have a major effect on people who are not part of the dispute, or present the need for a full public record of the proceedings. You will be told before the mediation starts if any of those rules apply to your situation.

15. If the ADR Specialist rejects my settlement, what can I do?

The traditional complaint process is still available. Remember, you did not give up any rights when you started ADR. But, if the ADR Specialist rejects the settlement for technical reasons, it is against the law for you to file a grievance or an EEO complaint against the NEH for that reason.

16. What if we *do not* come to an agreement in mediation?

If you do not come to an agreement, then it is almost as if the ADR never happened. Everything you and the NEH said during the mediation is kept confidential. The EEO Counselor will get your case back and will make a note in the file that you tried ADR and that it did not work out. The EEO Counselor will give you a notice saying you have the right to file a formal complaint, the clock starts running again, and you can file a formal complaint and go through the hearing process if you wish.

17. What about all the notes that were taken during the mediation?

Everything will get destroyed unless there's a legal reason why it should not be destroyed – and you'll be told if anything will be kept.

18. Who does what within the ADR program?

As an employee, you will mainly deal with your EEO Counselor, who is responsible for talking to you at the beginning of the process, giving you information about ADR, and helping the ADR Coordinator.

The ADR Coordinator runs the program, is an advocate for the program (but not for either side in a mediation), makes sure this policy and the ADR procedures work smoothly, answers questions about ADR, and hires the mediators.

The ADR Specialist (the Deputy General Counsel) reviews the settlement agreements to make sure they are legally sufficient. He or she also works with the EEO staff and the ADR Coordinator to administer the ADR program, monitors and evaluates the program, and provides information about ADR techniques and procedures to the NEH staff.

The EEO Director is also part of the ADR program and designates the ADR Coordinator, enforces the policy, and makes sure the policy and ADR procedures are working.

Finally, there are you and all other NEH employees. Everyone – including managers and supervisors – is responsible for being aware of this policy and participating in the ADR process and cooperating with ADR activities if they are asked to do so.

20. How do I know NEH is running a good ADR program?

There are two ways to make sure the program works: evaluation and training. The NEH runs an ADR training program to make sure everyone knows their roles and responsibilities when it comes to ADR. The NEH will also run an evaluation process to make sure this policy is doing what it's supposed to do and keeps improving.

21. I have read this whole policy and I still have a question. Who do I talk to?

There are several people you can go to. The ADR Coordinator is the go-to person for any general questions about ADR. Your EEO Counselors know more about how ADR specifically applies to certain issues. And, when in doubt, you can always call the General Counsel's Office – someone there will be able to help you.

NEH ADR and EEO Contact Information:

EEO Director

Carlos Díaz-Rosillo; phone 202-606-8310; email CDiazrosillo@neh.gov

ADR Coordinator and EEO Specialist

Julia Nguyen; phone 202-606-8213; email jnguyen@neh.gov

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ADR Specialist

Lisette Voyatzis; 202-606-8322; email evoyatzis@neh.gov

Office of General Counsel

Phone 202-606-8322; email gencounsel@neh.gov

Signed:



9/16/19

Senior Deputy Chairman, National Endowment for the Humanities

Date

