In reply refer to: 08

September 13, 2022

VIA: **(Delivery Method)**

**Director (00)**

Department of Veterans Affairs

govcdm\_stationname

govcdm\_facilityaddress govcdm\_facilityaddress2

govcdm\_facilitycity, govcdm\_facilitystate govcdm\_facilityzip

**SUBJECT: ADR Prior to the Investigative Stage in the EEO Complaint of firstname lastname, Case No. govcdm\_name, Filed govcdm\_dateformalcomplaintfiled.**

**DO NOT ISSUE this letter if facility refused ADR during counseling for legitimate reason.**

Dear **(Director)**:

1. A formal equal employment opportunity (EEO) complaint case no. govcdm\_name filed by firstname lastname is pending assignment to an Investigator. The Equal Employment Opportunity Commission (EEOC) encourages agencies to promote early resolution of complaints of discrimination. At this stage in the process, the Investigator can assist you and Complainant in negotiating a settlement to the complaint. The Investigator will advise management of Complainant’s requested remedy. If management is interested in presenting an offer to Complainant for consideration, the Investigator can facilitate those discussions.

2. Alternatively, you and Complainant could participate in Alternative Dispute Resolution (ADR) prior to the investigation of this complaint. ADR can yield intangible benefits such as improved morale and productivity, reduction in future disputes, repaired relationships, improved customer service, and renewed employee trust. The ADR process used at the Department of Veterans Affairs to address EEO complaints is mediation. The mediation process is flexible and allows you and Complainant to maintain control of the outcome of the complaint versus waiting for a third party to render a decision on the merits of the case. The Investigator assigned to this complaint will contact you or your designee to explore interest in trying to resolve the complaint through the mediation process. If you and Complainant are willing to engage in mediation, the Investigator will refer the request to the ORMDI ADR Program Manager/Facility ADR Coordinator to obtain mediators and schedule the session.

3. Participation in mediation does not diminish Complainant’s right to continue to pursue the complaint under the discrimination complaint process if resolution efforts are unsuccessful. If both parties are interested in pursuing resolution, we will hold the investigation in abeyance for no less than 30 calendar days and no more than 90 calendar days from the date of the Investigator’s contact. We hope this will allow time for the parties involved to fashion their own resolution through the use of mediation or other ADR techniques. If a resolution is not reached, the Investigator will conduct the investigation in accordance with EEOC regulations. If management is interested in pursuing mediation, attached is a document which offers guidance on how to prepare for the process.

4. Please forward the information sheet enclosed with this letter to the appropriate management official(s) for this complaint. If you have any questions or require additional information, please contact firstname lastname, ORMDI Case Manager at address1\_telephone1andinternalemailaddress. **You are *strongly encouraged* to use email to submit your correspondence and/or documents to ORMDI.**

Sincerely,

firstname lastname

District Manager

Enclosure: Mediation Program Information for Managers

cc: EEO Program Manager and email

**Introduction**

The U.S. Equal Employment Opportunity Commission (EEOC) requires the use of Alternative Dispute Resolution (ADR) to resolve workplace disputes at the lowest possible level. The Department of Veterans Affairs (VA) has elected mediation, the most widely used ADR method, as the process for attempting to resolve EEO-related disputes. You are being asked to participate as the Agency's management and/or settlement official in the mediation process, and you may not be clear on exactly what you can and should do to prepare yourself for the mediation. The most productive and successful mediations begin long before the parties sit down to mediate. Here are some tips on what you can do in preparation for mediation that may make the entire process more effective, productive, and satisfactory for all parties concerned.

**Mediation is Not an Adversarial Proceeding**

During the mediation, neither party has a burden of proof, as you would in the hearing of a formal EEO or Merit Systems Protection Board (MSPB) case, and there is no determination of fault or blame. Therefore, you do not have to argue the Agency’s defense of the case or present evidence during the mediation. The goal of mediation is to identify the issues, explore options for resolution, and preserve or mend the working relationship. Keep in mind that the Aggrieved Person/Complainant feels strongly that (s)he has been wronged by the Agency and has sought some form of relief by contacting the Office of Resolution Management. The Aggrieved Person/Complainant is considering mediation in an attempt to resolve the complaint at the earliest possible stage and prior to a final decision on the merits of the case.

**Get the Background Prior to the Mediation**

You should allow the mediation to bring to light all of the factors that came about in generating the dispute. You will receive some information and documentation, when available, regarding the issues in dispute. However, prior to the mediation, you should have an outline of the nature and date of the dispute, the type of discrimination alleged, and the issues identified for mediation. You may need to make some confidential inquiries to your managers to obtain a better understanding of the complaint. You will have a distinct advantage if you know the facts and underlying issues of the complaint before the mediation.

**Risk Benefit Analysis**

Prior to the mediation, please take time to analyze the case. Remember to focus on the issues and interests important to management, not the personalities of the parties involved. Think about the strengths and weaknesses of the government's actions or position. Consider the impact to the organization to go through a protracted complaints process, investigation, hearing, and possible appeals. Is this a case that management can assist in reducing the conflict by providing clarification regarding actions taken? Is there a business case that can be made in resolving this matter? What are the risks and benefits? Are there other employees in that work area with similar complaints? Think about the strengths and weaknesses of the Aggrieved Person’s/Complainant's case.

**Creative Solutions**

Put yourself in the Aggrieved Person’s/Complainant's shoes and think about what would satisfy you if you were in this person's situation. The key to a successful outcome in mediation is to explore all possible options for resolving the complaint. A creative resolution may not be limited to reassignment, money, or elimination of an adverse action. There may be other intangibles or creative non-monetary remedies that can be proposed. Remember that you will have to implement and live with any agreement reached and that a successful resolution requires collaboration from both parties. Clarify management's interests (wants, needs, fears, and concerns.) Identify possible standards (Union agreements, precedents, prior practice, and accepted principles). Plan a strategy. Think about what you want, why you want it, and what you are willing to give in return. Be creative. The time spent in planning will result in concrete dividends during the mediation process. Planning helps you make overtures, compromises, and justify your interests as negotiations proceed. Planning prevents accepting an unfavorable outcome because you were unaware of the alternatives or the ramifications involved.

**Think About Implementation**

Make sure you can implement the possible solutions. Talk in advance with the Facility Director, Regional Counsel, EEO Manager, Human Resources, or other officials, if necessary. Make this a team effort. Perhaps you are considering separating the Aggrieved Person/Complainant and the manager for a cooling off period. Can the employee be temporarily reassigned? Are there any vacancies? Might another employee "swap" jobs for a while? Will another manager be willing to have the employee transfer into their area? Will there be seniority or union issues? Can an adverse action be rescinded or mitigated? If there is exposure and a monetary resolution is being considered, what are the limitations? Can you implement the resolution with a minimum amount of disruption to your organization? The bottom line here is to make sure you can do it before you offer it.

If the mediation deals with a performance-based action, you will need to review the employee's performance standards, critical elements, performance appraisals, production reports, samples of the employee's work product that substantiate the unacceptable performance, documentation concerning any efforts your managers made to assist the employee (counseling/training), and documentation establishing that the employee was afforded the opportunity to demonstrate acceptable performance but did not do so. For misconduct cases, review any correspondence regarding the incident, counseling records, and the employee's comments regarding the misconduct. Learn more about the employee, specific instances of poor performance or misconduct, and the justification for the action taken. Look at the discipline imposed or action taken for acts of poor performance or misconduct of other subordinate employees. Is management consistent? Is there a bias? If you were the manager and were faced with the employee's nonperformance or misconduct, would you have handled the situation the same way?

**Active Listening**

When you are in mediation, listen very hard to what the Aggrieved Person/Complainant has to say. Set-aside any assumptions you may have about what you think the issues are, and what you think they want. It may be emotional. It may not be pleasant. It may take several hours (be sure to have your calendar clear.) Be logical, reasonable, persistent, and patient. Let the mediator(s) use their tools and open the lines of communication and negotiation. You may be surprised that all many Aggrieved Persons/Complainants want is to have someone from higher management listen to them as they explain issues from their perspective. If you have considered the suggestions made above, you'll know the facts, be prepared to discuss the issues, defend management's actions if warranted, and offer possible solutions, the mediation will flow, and will likely be very productive. You may be surprised by the trust, credibility, and strong connection you establish with the Aggrieved Person/Complainant from the mediation session. Some of the strongest advocates we have for mediation are former Aggrieved Persons/Complainants - not because they got what they wanted but because a member of management cared to listen to them and helped them develop a mutually satisfactory resolution.

Give these suggestions a try. They may make all the difference in your success as an effective management/settlement official. If you have any questions, comments, or concerns, please contact your facility ADR Coordinator or EEO Program Manager. Thank you for your time and participation in this process.