



CHIEF NATIONAL GUARD BUREAU MANUAL

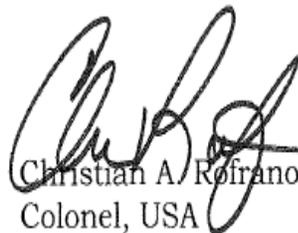
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ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

References: See Enclosure E.

1. Purpose. This manual establishes procedural guidance for the the National Guard (NG) Alternative Dispute Resolution (ADR) Program in accordance with (IAW) reference a.
2. Cancellation. None.
3. Applicability. This manual applies to all elements of the NG.
4. Procedures. See Enclosure A through D.
5. Summary of Changes. None.
6. Releasability. This manual is approved for public release; distribution is unlimited. Copies are available through <<http://www.ngbpd.c.ngb.army.mil>>.
7. Effective Date. This manual is effective upon publication and must be reissued, cancelled, or certified as current every five years.



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Enclosures:

- A -- Alternative Dispute Resolution Procedures in Workplace Disputes
- B -- Appointment, Qualifications, and Standards of National Guard Mediators
- C -- Confidentiality
- D -- Alternative Dispute Resolution Program Performance Measurements and Quality Assurance
- E -- References
- GL -- Glossary

ENCLOSURE A

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES IN WORKPLACE
DISPUTES

1. Disputes Eligible for ADR. All eligible disputes are presumed to be appropriate for ADR unless one or more of the criteria in paragraph 4 are found to exist. Disputes eligible for ADR may be written or oral.

a. Oral disputes are presumed to be appropriate for ADR and are not to be screened before offering ADR unless the dispute is summarized in writing and a determination is made that ADR is not appropriate. Oral disputes will be documented for data collection purposes.

b. States retain the right to decide whether a particular dispute is appropriate for resolution by ADR before offering ADR. This determination is final and not subject to appeal or further review however, an Agency may reconsider a determination at any time during the processing of the dispute.

c. Examples of disputes eligible for ADR include the following:

(1) Employee grievances filed under a negotiated grievance procedure that provides for ADR.

(2) Grievances filed by employees not subject to a negotiated grievance procedure that is otherwise authorized by law or policy; for example, a grievance filed as part of the Administrative Grievance System.

(3) Civilian equal employment opportunity (EEO) discrimination pre-complaints and formal complaints.

(4) Military equal opportunity (MEO) complaints. For disputes involving military members exclusively, eligibility for ADR is a matter of command discretion.

(5) Disciplinary actions subject to statutory or regulatory appeal procedures such as a letter of reprimand.

(6) Labor-management disputes, including Unfair Labor Practice allegations, negotiability appeals, bargaining impasses, and union or management grievances filed under a negotiated procedure that provides for ADR.

(7) Other disputes not specifically listed, on a case-by-case basis.

2. State ADR Plan. Each State will maintain an ADR plan as part of its dispute resolution procedures. Dispute procedures subject to collective bargaining obligations may be incorporated into separate agreements negotiated with appropriate unions. Approved plans must be submitted through the State ADR Manager to the Office of the National Guard Bureau Chief Counsel (NGB-JA) to the Litigation and Employment Law Division (NGB-JA/LEL). At a minimum, the plan must include:

- a. ADR Procedures.
- b. A statement of the State's policy requiring managerial and supervisory good faith participation in ADR.
- c. Procedures for determining which disputes are eligible for ADR.
- d. The default ADR process to be employed, for example, mediation, and peer review.
- e. The source of third-party Neutrals. If the plan calls for using local employees as collateral duty Neutrals, it will also specify the methods for selecting, training, and managing the roster of those individuals.
- f. The office or position responsible for ADR data collection and reporting.

3. Management Participation in ADR Proceedings. Commanders are encouraged to adopt local policies emphasizing the requirement that managers and supervisors participate in good faith in an ADR process once a dispute is determined to be appropriate for ADR. Good faith participation does not require any party or authorized representative of a party to settle or agree to terms that are unacceptable or unenforceable.

4. ADR Case Non-Selection Criteria. All workplace disputes initiated in writing and filed with a NG activity pursuant to an established grievance, complaint or appeal process or entered into an electronic case management or tracking system, such as the system used to manage EEO complaints, will be screened for non-selection using the criteria below. Each dispute will be reviewed individually or by using case screening guidelines that have been specifically reviewed and approved by NGB-JA/LEL. If ADR is offered to the employee or disputant, it will be unconditional. However, an offer will not be made until screening has been completed. Screening criteria are:

- a. Statutory basis for not using ADR. IAW reference b:
 - (1) An Agency is not required to use ADR if any of the following circumstances exist:

- (a) A definitive decision in the matter is needed.
- (b) The matter involves significant issues of government policy that cannot be resolved without additional proceedings.
- (c) The need to maintain an established government policy, requiring consistent results.
- (d) The matter significantly affects non-parties.
- (e) The need for the development of a full public record.
- (f) The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition in light of changed circumstances.

(2) Under criteria enumerated in reference b, the following types of disputes are considered inappropriate for ADR:

- (a) Disputes presenting significant legal issues of first impression, for which a precedential decision is required or desired. When citing this provision, identify the issue(s) requiring a decision.
- (b) Disputes presenting non-severable allegations of misconduct punishable under the authority of reference c for military personnel performing duty under reference d, State code of military justice for military personnel performing duty under reference e or State active duty orders, State or Federal criminal laws, or the final authority of The Adjutant General (TAG) pursuant to section 709 of reference e.
- (c) Military personnel quality force actions, such as involuntary administrative separations, denials of reenlistment, resignations, promotion propriety actions, and officer grade determinations.
- (d) Complaints under the authority of Article 138 of reference c, or the State equivalent.
- (e) Civilian position classification appeals.
- (f) Disputes involving allegations of fraud, waste and abuse, or other improper conduct within the jurisdiction of the Inspector General (IG) complaint system.

b. Non-Statutory Bases for not Using ADR. The following types of disputes may be inappropriate for ADR, depending on the surrounding circumstances, even if they do not meet the statutory prohibition criteria. A finding that ADR

is inappropriate under this provision will specifically describe the circumstances upon which it is based.

(1) Disputes in litigation that can be resolved through an expedited legal determination disposing of the matter, such as a motion to dismiss or summary judgment.

(2) Disputes in which there is substantial evidence that the claimant initiated the action to harass or intimidate, or is otherwise flagrantly abusing the process.

(3) Any other dispute in which one or more articulable circumstance exists to justify not offering ADR. A judgment that a claim will fail for lack of evidence is not, by itself, an articulable basis for finding ADR inappropriate to resolve the claim.

c. Authorized Agency Officials. The commander or designee will make the final determination in any case where authorized agency officials disagree about the suitability of ADR to resolve a dispute.

5. Participants in ADR Proceedings. Participants in dispute ADR proceedings consist of mediators, neutrals and parties. For training purposes, and with the parties' consent, co-mediators and mediation mentors may participate during all stages of the proceedings, including private caucuses.

a. Subject to local bargaining agreements, parties may appear alone or with one or more representatives of their choice. Representatives may or may not be attorneys. A Neutral will have the authority to set reasonable limits on the number of representatives and the need for full and effective communication between the parties and Neutral.

b. The person representing management in an ADR proceeding will have sufficient authority to act on behalf of the State NG to settle the issue(s) in controversy, or have immediate access to those who do have such authority. Military customs and courtesies, and civil decorum will be maintained depending on the setting, and the mediator has the authority to suspend or terminate the mediation based upon party misconduct.

6. ADR Agreement and Selection of a Neutral.

a. Agreements to Engage in ADR. Parties agreeing to use mediation or some other ADR procedure to resolve a dispute evidenced by a written claim or complaint will execute a written agreement, in advance, before the proceeding. The agreement will contain the time, date, and location of the proceeding (if available at the time the agreement is executed) and the Neutral's name and

telephone number, plus a description of the essential features of mediation or other procedure offered.

b. Selection of Neutrals. State ADR plans will prescribe the method for selecting a Neutral. Neutrals may be designated by the State ADR Manager or selected by the parties from a list of alternatives provided by the State ADR Manager. If a suitable Neutral cannot be obtained from local resources, the NG ADR Program Office can provide ADR support. The organization where the dispute arose is normally responsible for all costs associated with ADR, to include travel and associated costs of the Neutral.

7. Convening, Conducting, and Facilitating ADR Proceedings.

a. Convening ADR Proceedings. Once the mediator or other Neutral is selected, the State ADR Manager will convene the proceeding by arranging for its place, date and time. Unrelated disputes involving multiple parties will not be combined into a single ADR proceeding.

(1) A single proceeding to resolve multiple disputes involving the same parties, or one dispute involving multiple participants, such as an organizational facilitation, is permitted.

(2) ADR proceedings should be convened as soon as practical after the parties agree to use ADR, normally within 15 calendar days, but no later than 45 calendar days after the agreement to use ADR, unless the parties consent in writing to extend this period.

b. Conducting ADR Proceedings. The State ADR Manager will ensure:

(1) Suitable facilities are made available to conduct the proceeding at a neutral location outside the organization in which the dispute arose.

(2) Reasonable accommodation of persons with disabilities who are parties to or otherwise participating in the session, to include, but not limited to, physical accessibility to meeting facilities, translators, and services for the hearing or vision impaired.

(3) Translators and others who will be present while the proceeding is in session, including private caucuses, are nonparty participants. If the State ADR Manager determines that a neutral location is not reasonably available or cannot provide reasonable accommodation, other suitable facilities will be selected.

c. Facilitating ADR Proceedings. Mediation of a NG workplace dispute will follow the facilitative mediation model. In the event that a different procedure

is agreed to by the parties and approved by the ADR Manager, alternate methods of ADR may be employed.

(1) Locations where facilitation takes place must provide sufficient meeting space and privacy to accommodate parties during joint sessions or any private caucus.

(2) Neutrals will have access to a telephone, computer with internet access, and other equipment as necessary to facilitate contact with ADR support providers.

8. Quality of the Process. Mediation will be conducted in a manner that promotes diligence, timeliness, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect. The mediator will:

a. Work with parties to control the number of people participating in the mediation to ensure good behavior in a full and open discussion.

b. Not knowingly misrepresent any material fact or circumstance during the course of mediation, or conduct a proceeding and label it as mediation to gain the protection of rules, statutes or other governing authorities pertaining to mediation.

c. Not convert mediation into a non-mediation process, or a facilitative mediation into an evaluative or transformative mediation without the informed consent of the parties and the prior authorization of the State ADR Manager. A mediator who assumes a dispute resolution role that requires a greater degree of subject matter expertise, such as early neutral evaluation, will have sufficient expertise to meet the standard of competence or withdraw from the mediation.

d. Withdraw from and terminate a mediation that is being used to contradict NG or Department of Defense (DoD) policies or to further criminal conduct. Depending on the circumstances, and notwithstanding confidentiality, the mediator may be required to report the events leading up to his or her withdrawal and termination.

e. Assure self-determination of parties during mediation by exploring the circumstances, behavior and potential accommodations or adjustments to correct the condition. A party may not possess the requisite self-determination if the party has trouble understanding the process, issues, or options for settlement; or has difficulty participating in the mediation; or otherwise acts in a manner which raises a reasonable question whether the party has the requisite capacity to comprehend the proceedings and to participate freely therein.

f. Postpone, withdraw from, or terminate the mediation when a participant's conduct jeopardizes the mediation process. A mediator must withdraw from the mediation if the mediator believes their conduct may jeopardize the mediation.

9. Reaching Settlement. Neutrals will assist parties in drafting a settlement agreement describing the terms and conditions of their settlement if parties are able to settle one or more issues in their case.

a. Settlement agreements are subject to review and approval by a State JA or the NGB-JA servicing attorney to ensure legal and regulatory compliance. Only an NGB-JA servicing attorney may approve a settlement agreement in disputes in which NGB-JA/LEL has representational responsibility.

b. Parties will seek guidance on the enforceability of proposed terms before signing a settlement agreement; therefore, all issues concerning the legal sufficiency and regulatory compliance of any term or condition will be resolved before the agreement becomes final.

c. Any agreement reached or order issued pursuant to a dispute resolution proceeding may be disclosed under reference b. For example, an agreement to mediate a dispute or a settlement agreement reached as a result of that mediation is not protected from disclosure under reference b. However, disclosure or other uses of such an agreement may be restricted by the terms of the agreement itself or by other measures. Allegations of breach of a settlement agreement will be handled according to procedures established for the type of workplace dispute.

10. Impasse. ADR proceedings should be terminated when parties fail to resolve an issue and a Neutral determines that further proceedings would be futile. Prior to termination of an ADR process, the mediator will caucus to determine if the impasse can be overcome. However, parties should be advised of other remedies and processes available to them if ADR fails to resolve the dispute as long as applicable time limits are met.

ENCLOSURE B

APPOINTMENT, QUALIFICATIONS, AND STANDARDS
OF NATIONAL GUARD MEDIATORS

1. Recruitment of Mediators and Term of Service.

a. States will recruit, train and maintain a roster of mediators, collateral-duty or full-time (or a mixture of the two) to maintain each mediator's proficiency. Commanders and their designees have discretion to determine the appropriate number and mix of mediators to serve the organization's requirements. However, the ratio of collateral-duty mediators to mediation opportunities should afford each mediator at least one mediation opportunity per calendar quarter.

b. States that do not have a history of significant workplace dispute activity may, in lieu of maintaining a roster of internal mediators, obtain mediators or other third-party Neutrals from other sources, including other NG organizations, other agencies within and outside the DoD; Federal agency shared Neutral programs, or private sector (contract) mediators. The State ADR Manager or designee may contact the Directorate of Manpower and Personnel, Office of Complaints Management and Adjudication, Equal Opportunity Specialist, ADR (NG-J1-CMAD/ADR) or NGB-JA/LEL directly for assistance in obtaining mediators.

c. Individuals who receive NG-provided mediation training will be expected to be available for mediation duties, following appropriate on-the-job training. Exceptions may be made for individuals who receive mediation training in order to manage an ADR program or provide ADR support to attorneys, and other personnel involved in ADR case screening. No set period of service is required, but 24 months following completion of training is recommended. Supervisors of collateral-duty mediators will allow them time away from the workplace as reasonably necessary to perform their mediator duties, subject to the regulatory limitation on collateral duty time.

d. NG mediators on active rosters will undergo a minimum of eight hours of mediation refresher training per year, including at least one hour each of training in standards of conduct, confidentiality, and drafting settlement agreements. State ADR Managers are responsible for ensuring their collateral-duty mediators receive annual refresher training.

e. Appointment of Mediators. The commander, or designee, appoints collateral-duty mediators in writing. Reappointments, or appointments for periods longer than recommended, are authorized. Once appointed, mediators will receive their specific case assignments from the State ADR Manager.

f. Minimum Qualifications for Collateral-Duty Mediators, EEO Complaint Mediations and Certification of NG Mediators. NG mediators may obtain certification at three different levels of proficiency: (Level I (Basic); Level II (Intermediate); Level III (Advanced)), based on education, training and experience. The Deputy Dispute Resolution Specialist (DDRS) is the certification authority for all levels. Completion of the Mediation Certification Course at the Defense Equal Opportunity Management Institute qualifies as a Level I certification, and need only be verified by the DDRS. Certification at any level is voluntary. Certification is not required to mediate or otherwise serve as a third party Neutral in a NG dispute, except as follows.

(1) NG mediators who evaluates another mediator for the purposes of that individual meeting basic qualification standards or obtaining Level I (Basic) certification will be certified at Level II (Intermediate) or higher.

(2) NG mediators traveling on NG ADR Program funds to conduct mediation will be certified at Level II (Intermediate) or higher.

(3) For EEO complaint mediations, collateral-duty mediators will also comply with Federal agency EEO complaint procedures contained in references f and g. In addition, they will have working knowledge of the Federal anti-discrimination laws contained in references h through l. The mediator will also have a basic understanding of the various theories of unlawful discrimination and the available remedies in EEO cases. ADR Managers will ensure that individuals assigned to mediate EEO complaints have the proper training or qualifications to perform such duties including any candidate who is a State Equal Employment Manager from a neighboring State or Neutral from another agency.

(4) See Figure 1 below for levels of certification.

LEVEL I
1. Must complete the Mediation Certification Course at the Defense Equal Opportunity Management Institute or a comparable basic mediation training program consisting of at least 32 hours of combined classroom instruction and role-play exercises. Mediation training received by entities outside the NG will have been taught the facilitative mediation model.
2. Must co-mediate in three or more Federal workplace disputes in which the mediator is observed and evaluated by an experienced lead mediator.
3. Must be evaluated by a Level II Mediator or higher for purpose of qualifying to meet the basic mediation qualification standards.
4. Must be appointed as a mediator by the commander or designee.
5. Must attend or make up all the yearly refresher training before advancing to level II.
LEVEL II
1. Must complete all requirements of the Level I Mediator.
2. Must mediate at least 20 cases with a 60% resolution rate.
3. Must attend at least two additional ADR classes provided by entities outside the NG mediation program.
4. Must not have missed the minimum eight hours yearly refresher training, including at least one hour each of training in standards of conduct, confidentiality, and drafting settlement agreements
LEVEL III
1. Must complete all requirements of the Level II Mediator.
2. Must attend at least four additional ADR classes provided by entities outside the NG Mediation program.
3. Must successfully mediate over 40 cases with at least a 70% resolution rate.
4. Must not miss more than two yearly refresher courses provided by the NGB.
5. Must publish a 5 to 10 page document on the topic of Mediation.
6. Must assist with or teach at least two ADR classes.

Figure 1. Levels of Certification

2. Standards of Conduct for Mediators and other Neutrals. State ADR Program Managers will ensure that all mediators assigned to workplace disputes under their oversight (including outside mediators) observe these standards of ethical conduct below. NG mediators who violate one or more of these standards may be relieved of mediation duties and decertified under the NG Mediator Certification Program. Standards for conduct are as follows:

a. Self-Determination. Mediators will conduct mediation on the principle of party self-determination. Parties may make voluntary, un-coerced decisions based on process and outcome to exercise self-determination at any stage of mediation, including selection of the mediator. Mediators will not undermine party self-determination for any reasons such as higher settlement rates, self-interest, or outside pressures.

b. Impartiality. Mediators will decline to serve as a mediator if he or she cannot conduct a proceeding free from favoritism, bias or prejudice. If, at any time a mediator is unable to conduct mediation in this manner, the mediator must withdraw from the mediation. If, at any time, parties determine the mediator is other than neutral, they may request suspension of the ADR pending appointment of another Neutral.

(1) Mediators may not act with partiality or prejudice based on a participant's personal characteristics, background, values, beliefs, performance at the mediation, or for any other reason.

(2) Mediators will neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality, or that is inconsistent with the mediator's ethical obligations IAW reference m or applicable Federal statutes and regulations governing ethical conduct of Federal employees.

c. Conflicts of Interest. Mediators will avoid involvement with the subject matter of the dispute or from any relationship between the Neutral and any participant in the mediation, whether past or present, personal or professional, that reasonably raises a question of the mediator's impartiality.

(1) Mediators must disclose, as soon as possible, even after he or she has accepted a mediation assignment, all actual and potential conflicts of interests that are reasonably known to the mediator or could reasonably be seen as raising a question about the mediator's impartiality. The mediator must disclose all conflicts of interests in writing to the parties as soon as possible. After disclosure, if all parties agree, the mediator may proceed with the mediation.

(2) If a conflict of interest can reasonably be viewed as undermining the integrity of the mediation or violating the quality of the process, the mediator

will withdraw from the proceeding or decline to proceed regardless of the expressed desire or agreement of the parties to the contrary.

(3) Mediators may not mediate an EEO complaint if the mediator:

(a) Previously investigated or counseled the complainant with respect to the same or a related complaint.

(b) Might be expected to work the complaint at some point in the future.

(4) Mediators may not advise, counsel, or represent any party in any future proceeding with respect to the subject matter of the mediation, or offer advice, guidance or counsel to any official responsible for approving a settlement of the dispute that was the subject matter of the mediation over which the mediator presided.

(5) A collateral-duty NG mediator will not accept a mediation that would conflict with his or her regularly assigned duties.

d. Competence. If a mediator, before or during the course of a mediation, determines that he or she cannot conduct the proceeding competently, the mediator will discuss the determination with the State ADR Manager and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance. The State ADR Manager is responsible for ensuring that collateral-duty mediators are provided sufficient training and mediation experience to meet this standard.

e. Confidentiality. Mediators in NG workplace dispute mediations will comply with the confidentiality provisions of reference b, if applicable, and Enclosure C.

ENCLOSURE C

CONFIDENTIALITY

1. Criteria for Confidentiality Protection. Confidentiality protection for certain “dispute resolution communications” made in the course of ADR proceedings may be provide protection under reference b. However, reference b does not grant “dispute resolution communications” in MEO complaints or any other purely military personnel matter. In such cases, the scope of confidentiality with respect to communications that would otherwise meet the threshold criteria is entirely a matter of command discretion or NG regulatory policy. The threshold criteria to protect oral and written communication as confidential is only honored when communication is made:

a. During participation in the dispute resolution proceeding by specified parties, for example, the time period between the appointment or designation of a Neutral and the termination of the proceeding, either by an executed settlement agreement or an impasse declared by the Neutral.

b. Or prepared specifically for the purposes of the dispute resolution proceeding and not discoverable before the proceeding begins.

c. By a party to the Neutral “in confidence,” or generated by the Neutral and provided to the parties in confidence.

2. Neutrals. For purposes of the application of confidentiality protection, the term “Neutral” includes ADR intake officials and other personnel whose assigned duties include taking information in confidence from a party for the purpose of determining whether to use an alternative means of dispute resolution to resolve issues in controversy, and other personnel while engaged in the support of ADR proceedings.

3. Mediators. Mediators will maintain the confidentiality of all information obtained during the mediation, unless otherwise agreed to by the parties, or the disclosure is required by applicable law or policy, including the confidentiality provisions of reference b, if applicable.

a. Mediators will not communicate information about how the parties acted during the proceeding or what they said, unless disclosure is authorized or required by law to any non-participant. In all cases, the mediator may report whether the parties appeared as scheduled, whether or not the parties reached resolution, and the terms of that resolution as reflected in the settlement agreement.

b. Mediators who meet with Parties separately in private session (caucus) will not convey directly or indirectly to any other person, any information that

was obtained during the private session without the consent of the party who disclosed the information.

c. Mediators will advise parties before making their opening statement of information indicating fraud, waste and abuse, criminal misconduct, or threats of violence that may be subject to disclosure, notwithstanding confidentiality. Mediators will consult the ADR Manager and take appropriate action prior to disclosing, outside the ADR proceeding, any dispute resolution communication that may indicate fraud, waste and abuse, criminal misconduct, or threat of violence.

4. Application of Confidentiality Protection to Specific Communications.

Dispute resolution communications that meet the threshold criteria are treated as confidential and can be disclosed only if an exception is applicable to the disclosing person.

a. Exceptions Applicable to the Neutral. Notwithstanding confidentiality, the Neutral may disclose a dispute resolution communication if:

(1) All parties consent to the disclosure in writing and, if the communication was provided by a nonparty participant. That participant will consent to the disclosure in writing.

(2) The communication has already been made public.

(3) The communication is required by statute to be made public, for example, in response to a Congressional subpoena. However, the Neutral should make such communication public only if no other person is reasonably available to disclose the communication.

(4) A court determines the communication will be disclosed to prevent a “manifest injustice,” help establish a violation of law, or prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the loss of confidentiality.

b. Exceptions Applicable to a Party. Notwithstanding confidentiality, a party may disclose dispute resolution communication if:

(1) The communication was made by the party seeking disclosure.

(2) All parties and the Neutral consent to disclosure in writing and, if the communication was provided by a nonparty participant. That participant will consent to the disclosure in writing;

(3) The communication has already been made public.

(4) The communication is required by statute to be made public; for example, in response to a Congressional subpoena.

(5) A court determines the communication will be disclosed to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the loss of confidentiality.

(6) The communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding, or to the enforcement of such an agreement or award.

(7) Except for communications generated by the Neutral and provided to the parties in confidence, the communication was made available to all parties in the proceeding. Communications generated by the Neutral to the parties during joint sessions are protected as confidential; communications between the parties themselves are not confidential. This exception would apply to communications made by a party during joint sessions in which all other parties are present, but would not apply to communications made by the Neutral to the parties during joint sessions.

c. Other Exceptions to Confidentiality.

(1) Information that is otherwise discoverable remains discoverable. Merely because the information was presented in the course of a dispute resolution proceeding does not make it confidential.

(2) Dispute resolution communications may be used to resolve a subsequent dispute between a party and a Neutral, but the disclosures shall be limited to only those necessary to resolve such dispute.

(3) Information that is gathered and disclosed for research or educational purposes in cooperation with other agencies, governmental entities, or ADR programs as long as the parties and specific issues in controversy are not identifiable.

5. Understanding of the Parties. An agreement to enter into an ADR proceeding should include an explanation of the confidentiality provisions applicable to the proceeding. The State ADR Manager will explain the confidentiality provisions and secure an acknowledgment that each party understands the protections afforded. The ADR Manager will also explain to ADR support personnel their confidentiality. Finally, the Neutral conducting the session will explain the confidentiality provisions during opening remarks, and affirmatively establish that the parties understand the provisions.

6. Waiver of Objection to Disclosure by the Neutral 45-Day Limitation.

Reference b requires a Neutral to make reasonable efforts to notify the parties and any affected nonparties of the demand, if the Neutral receives a discovery request or is otherwise compelled by legal process to disclose a dispute resolution communication (including an administrative demand for disclosure asserting as its basis a statutory or other legal right to the communication).

a. Any objection to disclosure is waived if not made within 45 calendar days after notice of the demand for disclosure. Therefore, whenever a Neutral receives a demand to disclose a dispute resolution communication, it is essential that the Neutral immediately notify the State ADR Manager, who will assist the Neutral in providing notice of the demand to the parties and any affected nonparty participant.

b. The State ADR Manager will also notify the State full-time JA or other point of contact in the State servicing legal office, which will coordinate the demand with the servicing NGB-JA attorney, if applicable, and with NGB-JA/LEL. Under no circumstances should the Neutral disclose a communication made during ADR proceedings without first obtaining a legal determination that disclosure is authorized or required.

7. Remedy for Violation of Confidentiality Protection. A dispute resolution communication that is disclosed in violation of reference b or this manual is not admissible in any proceeding relating to the issues in controversy. However, it may be admissible in a proceeding that does not cover the same issues.

8. Freedom of Information Act (FOIA). Before processing a FOIA request for disclosure of a dispute resolution communication, first determine whether the communication is an agency record subject to FOIA. If it is, and qualifies for confidentiality protection, use FOIA exemption 3 (information prohibited from disclosure by another statute) as the basis for withholding. Also, a dispute resolution communication that is confidential under reference b is exempt from disclosure under references n and o.

9. Other Protections Available. Even if a dispute resolution communication is not protected by reference b as confidential, other limitations on disclosure or further use of the communication may be available. Practitioners should consider Rule 408 of reference p, reference q, or separate contractual provisions between the parties to limit disclosure, if such provisions are authorized for inclusion in settlement agreements.

ENCLOSURE D

ADR PROGRAM PERFORMANCE MEASUREMENTS AND QUALITY
ASSURANCE

1. ADR Performance Metrics. Data to measure ADR performance will be collected and reported. State ADR Managers will ensure that measurements are not used to improperly induce parties to select ADR over other dispute resolution options or settle a dispute against their wishes. State programs may establish additional measurement and reporting requirements, but will, at a minimum, collect and report specified data for the preceding fiscal year, through command channels, to NGB-JA.

a. Reporting Procedures. Data pertaining to ADR offer, acceptance, resolution, non-ADR early resolution attempt, and ADR timeliness rates will be maintained and reported IAW the reporting procedures established for each of the following categories:

- (1) Agency administrative grievances.
- (2) Grievances filed under a collective bargaining agreement to negotiate grievance procedure.
- (3) Merit Systems Protection Board appeals.
- (4) EEO complaints (informal pre-complaints and formal complaints).
- (5) MEO complaints.
- (6) ULP allegations and charges.
- (7) Other disputes not meeting the definitions of the foregoing disputes, for which a remedy or resolution is available.

b. ADR Offer and Acceptance Rates. Activities will track and report the total number of offers of ADR to employees during the reporting period, and the number of offers accepted by employees and, if applicable, management.

(1) Offer Rate. The offer rate measures the percentage of total disputes, by category, in which an unconditional offer of ADR is made to the complaining employee. This percentage is obtained by dividing the number of unconditional offers of ADR made to employees by the total number of disputes in each category during the applicable reporting period, and multiplying the result by 100. The goal for this metric is to unconditionally offer ADR in at least 75 percent of eligible disputes.

(2) Acceptance Rate. The acceptance rate measures the percentage of ADR offers accepted into ADR. This percentage is obtained by dividing the number of offers of ADR accepted by disputants by the total number of offers of ADR made during the applicable reporting period, and multiplying the result by 100. The goal for this metric is acceptance of at least 50 percent of ADR offers.

c. ADR Resolution Rates. ADR resolution rates measure the effectiveness of ADR to resolve disputes by comparing the number of resolutions. For example, settlements or unconditional withdrawals using ADR in comparison with the number of disputes in which ADR was accepted, and then expressing the result as a percentage. This metric is obtained by dividing the total number of disputes resolved using ADR by the total number of disputes accepted into ADR during the reporting period, and multiplying the result by 100. The goal for this metric is to resolve at least 70 percent of the disputes in which ADR is employed. Although this measure is useful at a macro level for gauging the overall effectiveness of an ADR program at promoting early resolution of disputes, ADR Managers will ensure it is not used in individual cases to pressure parties into settlements to which they would otherwise not agree.

d. Non-ADR Early Resolution Rates. Non-ADR resolution rates measure the use and effectiveness of other early dispute resolution activities (including collaborative dispute resolution processes) that do not use a qualified third-party Neutral (and therefore do not qualify as ADR), but do resolve the dispute early and informally, thus furthering NG policy favoring early informal resolution of most disputes. These metric tracks the percentage of total disputes in which an early resolution technique was employed, and the percentage of such cases resolved (settled or dispute unconditionally withdrawn). The key to non-ADR early resolutions is the use of a facilitative interest-based technique at an informal stage of the dispute resolution process. For purposes of this metric, only the following four activities will be tracked and reported. Compliance with the union's representational rights, if applicable, is assumed for each activity.

(1) MEO complaints and informal EEO pre-complaints in the traditional counseling process (instead of ADR) in which the counselor facilitates an interest-based discussion between the complainant and the management official to resolve the complaint.

(2) Meetings between the employee and management to resolve a grievance filed under the agency or negotiated grievance procedures in which a non-neutral third party participates to facilitate an agreement between the parties. This third party may be management, such as an Employee Relations specialist, or labor, such as a union steward.

(3) Attempts by an EEO investigator to facilitate settlement between the parties immediately prior to conducting the investigation required IAW section 106 of reference f.

(4) Bilateral negotiations between the parties to a workplace dispute in which the negotiators expressly agree to use a structured, interest-based negotiation approach to resolve issues in controversy.

e. ADR Timeliness Rate. This metric measures the average period, in calendar days, between the initiation of an ADR proceeding and termination of that ADR proceeding. An ADR proceeding is initiated on the date an unconditional offer is made to the employee, and terminates on the date a settlement agreement is approved or an impasse is declared. Reporting activities will track and report the cumulative number of calendar days attributable to ADR proceedings in each dispute category that were completed during the reporting period. The total number of days is divided by the number of completed proceedings. The goal is an average of 45 calendar days or less for each dispute category, and for the total of all reported disputes.

f. Customer Satisfaction. This metric measures the overall satisfaction of parties in the ADR process and the performance of the Neutral as expressed in the voluntary questionnaire, Mediator/Facilitator Evaluation, at Figure 2. The goal is to achieve an overall rating of "Satisfied" or better for the ADR process employed from at least 80 percent of the respondents, and an overall rating of "Good" or better for the Neutral from at least 80 percent of the respondents. State ADR Managers will exercise due diligence in obtaining customer satisfaction feedback from ADR participants as soon as the process is completed.

2. Annual ADR Report. Within 30 days prior to the end of each fiscal year, NGB-JA will issue an ADR data call to the ADR Manager of each State and installation ADR Managers, as appropriate. Respondents will collect and report ADR data from the previous fiscal year and give it to their State ADR Manager and to NGB-JA. The report will be submitted to NGB-JA NLT 01 October. The data will include the metrics described; however, specific format and additional content of the report will be specified by NGB-JA in the data call. Reports will not contain information that identify the parties involved in ADR proceedings; the specific issues in controversy; if it requires disclosure of any dispute resolution communications; or the outcome of any dispute other than whether it was resolved or not.

3. Complaints about Mediation Services.

a. Mediators or other Neutrals. Complaints about mediators or other Neutrals should be directed to the State ADR Manager. After consulting with

the State full-time JA or designee, the State ADR Manager will decide whether corrective action is necessary and, if so, what action should be taken.

(1) For example, a new mediation conference with a different mediator may be offered if it is determined the mediator's conduct materially affected the outcome of the mediation to the detriment of one or both parties.

(2) If a substantiated complaint or series of complaints establishes one or more breaches of mediator standards of conduct or other misconduct sufficient to warrant relieving the mediator of further mediation duties, the State ADR Manager and State full-time JA may individually or jointly recommend such action to the commander or designee.

(3) Substantiated violation of one or more standards of conduct is also a basis for decertification. The decision on the recommendation will be final.

b. Third Part Neutrals. Complaints about third-party Neutrals under contract should be directed through the State ADR Manager to the NG ADR Program Office and NGB-JA. Complaints will clearly document the facts and circumstances surrounding the incident and request a specific remedy. Action taken will depend on the facts of each case.

4. Records.

a. ADR program files. ADR program files are considered Federal, not State, records and are subject to release considerations contained in reference o.

b. ADR case files. If ADR files pertain to a dispute in which there is an official dispute file, such as an EEO complaint or employee grievance, they become part of the official dispute file and their retention and disposition are governed by the schedules applicable to such files. Thus, for example, a written settlement agreement resulting from an ADR proceeding in an EEO complaint becomes part of the EEO complaint file and its retention and disposition are governed by the schedule applicable to EEO records. If there is no official dispute file, these records are treated as ADR case files.

c. Personal notes. Personal notes that are not made part of the record are not considered agency records.

NATIONAL GUARD BUREAU MEDIATOR / FACILITATOR EVALUATION FORM <small>The proponent agency is OFFICE NGB-JA. The prescribing regulation is CNGBM 0402.01</small>					
ADR INFORMATION					
DATE PARTIES AGREED TO USE ADR:			TIME ADR STARTED:		
ADR NUMBER:					
DATE ADR COMPLETED:			TIME ADR STARTED:		
NEUTRAL(S):					
1. What was your role in this case? <input type="checkbox"/> Employee <input type="checkbox"/> Union <input type="checkbox"/> Agency <input type="checkbox"/> Other <i>(Please Specify)</i>					
2. How would you compare the amount of time taken to resolve this case using the ADR process compared with what you believe would have been required if a formal resolution had been used to resolve this dispute? ADR was: <input type="checkbox"/> Significantly faster <input type="checkbox"/> Somewhat faster <input type="checkbox"/> Same amount of time <input type="checkbox"/> Somewhat slower <input type="checkbox"/> Significantly slower					
3. The following questions concern your experience with the ADR process. Please tell us how satisfied you were with each of the following features of the process. <i>(For each feature, check the column corresponding to your opinion).</i>					
FEATURE	VERY SATISFIED	SATISFIED	NEUTRAL	DISSATISFIED	VERY DISSATISFIED
a. Amount of information you received about the process.	<input type="checkbox"/>				
b. Amount of control you had over the process.	<input type="checkbox"/>				
c. Opportunity to present your side of the dispute.	<input type="checkbox"/>				
d. Fairness of the process.	<input type="checkbox"/>				
e. Overall outcome of the process.	<input type="checkbox"/>				
f. Speed with which the dispute was resolved.	<input type="checkbox"/>				
g. Outcome of the process compared to what you expected it to be before it took place.	<input type="checkbox"/>				
h. Overall, how satisfied were you with the ADR process.	<input type="checkbox"/>				
4. The facilitator / Mediator evaluation. <i>(For each feature, check the column corresponding to your opinion).</i>					
THE MEDIATOR / FACILITATOR	EXCELLENT	GOOD	AVERAGE	FAIR	POOR
a. Explained the mediation / facilitation process.	<input type="checkbox"/>				
b. Provided useful information.	<input type="checkbox"/>				
c. Was a good Listener.	<input type="checkbox"/>				
d. Allowed me to talk about issues that were important to me.	<input type="checkbox"/>				
e. Was respectful.	<input type="checkbox"/>				
<i>(Continued on page 2)</i>					

Figure 2. Mediator/Facilitator Evaluation

4. The facilitator / Mediator evaluation. *(continued)*.

THE MEDIATOR / FACILITATOR	EXCELLENT	GOOD	AVERAGE	FAIR	POOR
f. Helped clarify issues.	<input type="checkbox"/>				
g. Encouraged us to come up with our own solutions.	<input type="checkbox"/>				
h. Was neutral.	<input type="checkbox"/>				
i. Wrote our agreement clearly and accurately.	<input type="checkbox"/>				
j. Informed me that i could consult with an attorney.	<input type="checkbox"/>				

5. Outcome of the Mediation / Facilitation *(Please check one)*: Full Settlement Partial Settlement Did Not Settle

6. Would you recommend this process? Yes No

7. Please enter any additional comments below.

Page 2 of 2

Figure 2. Mediator/Facilitator Evaluation

ENCLOSURE E

REFERENCES

- a. CNGB Instruction 0402.01, 24 July 2015, “National Guard Alternative Dispute Resolution”
- b. Title 5 U.S.C. §§ 571 through 584, “Administrative Dispute Resolution Act of 1996”
- c. Title 10 U.S.C. §§ 801 through 946, “Uniform Code of Military Justice”
- d. Title 10, U.S.C., “Armed Forces,” as amended.
- e. Title 32, U.S.C., “National Guard,” as amended.
- f. Part 1614 of Title 29, Code of Federal Regulations, “Federal Sector Equal Employment Opportunity”
- g. EEOC Management Directive 110, 09 November 1999, “Federal Sector Equal Employment Opportunity”
- h. 42 U.S.C. § 2000e–16, “Title VII of the Civil Rights Act of 1964,” as amended.
- i. 29 U.S.C. § 791 and 794a, “Rehabilitation Act of 1973,” as amended.
- j. 42 U.S.C. §§ 12101 through 12213, “American With Disabilities Act of 1990,” as amended.
- k. 29 U.S.C. § 633a, “Age Discrimination in Employment Act of 1967,” as amended.
- l. 29 U.S.C. § 206 (d), “Equal Pay Act of 1963,” as amended.
- m. DoD Directive 5500.07R , 17 November 2011, “The Joint Ethics Regulation (JER),” as amended.
- n. 5 U.S.C. § 552, “Freedom of Information Act”
- o. DoD Directive 5400.7, 02 January 2008, “DoD Freedom of Information Act (FOIA) Program”
- p. Federal Rules of Evidence 408, 26 April 2011 (eff. 01 December 2014), “Compromise Offers and Negotiations”

q. 5 U.S.C. § 552a, "Privacy Act"

GLOSSARY

PART I. ACRONYMS

ADR	Alternative Dispute Resolution
CMAD-ADR	Office of Complaints Management and Adjudication, Alternative Dispute Resolution section
DDRS	Deputy Dispute Resolution Specialist
DoD	Department of Defense
EEO	Equal Employment Opportunity
EO	Equal Opportunity
FOIA	Freedom of Information Act
IAW	In accordance with
IG	Inspector General
JA	Judge Advocate
MEO	Military Equal Opportunity
NG	National Guard
NG-J1-ADR	Manpower and Personnel Alternate Dispute Resolution Office
NG-J1-CMAD	Office of Complaints Management and Adjudication
NGB-JA	Office of the National Guard Bureau Chief Counsel
NGB-JA/LEL	Litigation and Employment Law Division
NLT	Not later than
TAG	The Adjutant General

PART II. DEFINITIONS

Alternative Dispute Resolution case files -- Records that document Alternative Dispute Resolution proceedings in specific disputes, such as intake forms, Alternative Dispute Resolution agreements, settlement agreements or other documentation of the disposition of the case, written evaluations of the process or the Neutral, and any other documentation or correspondence relating to the Alternative Dispute Resolution proceeding.

Alternative Dispute Resolution program files -- Files generated in connection with Alternative Dispute Resolution program management, such as correspondence, statutes, regulations, policy documents, letters of appointment, program evaluations, reports, statistical analyses, mediator certification files, and other records relating to the overall program.

Alternative Dispute Resolution Stakeholder -- An organization or individual with an official interest in the initiation, processing, and resolution of one or more disputes.

Agency -- Each authority of the government of the United States, whether or not it is within or subject to review by another authority, but does not include:

(A) the Congress; (B) the courts of the United States; (C) the governments of the States, Territories or possessions of the United States; (D) the Commonwealth of Puerto Rico and the Government of the District of Columbia; or (E) the National Guard of the 54 States, Territories, the Commonwealth of Puerto Rico and the District of Columbia.

Alternative Dispute Resolution -- Any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trial, arbitration, and the use of ombuds, or any combination of the above.

Arbitration -- The process wherein parties' mutually select a neutral third party or an arbitrator, to decide the issue in controversy after hearing witnesses, considering other items of evidence, and listening to the arguments of each side.

Confidentiality -- The protection from voluntary or compulsory disclosure, afforded by the Administrative Dispute Resolution Act of 1996, to certain dispute resolution communications given in confidence for the purposes of a dispute resolution proceeding.

Discovery -- Compulsory disclosure, at a party's request, of information that relates to the dispute.

Dispute -- Any formal or informal claim or issue in controversy that arises out of an existing or prospective relationship between the National Guard and its civilian employees, applicants for employment or military members, which otherwise materially affects conditions of employment, or a contractual dispute between the National Guard and a contractor, potential contractor, or a dispute between the National Guard and environmental protection agencies or nongovernmental organizations, for which a remedial process is authorized by law, regulation, or policy.

Dispute resolution communication -- Any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the Neutral, parties, or nonparty participant, except a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitration award reached as a result of a dispute resolution proceeding.

Dispute resolution proceeding -- Any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a Neutral is appointed and specified parties participate.

Early Neutral Evaluation -- A structured process in which the parties seek the assistance of a subject matter expert to review the dispute and to provide an

assessment of the likely outcome of the dispute based on the facts as found or as agreed to by the parties.

Evaluative mediation -- A process modeled on settlement conferences held by judges in which the evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting the likely outcome of the dispute based on the facts as found or as agreed to by the parties. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness.

Facilitation -- An unstructured and flexible process in which a trained third party Neutral (not necessarily a mediator) assists the parties to resolve issues in controversy by using interest-based negotiation techniques.

Fact-finding -- A relatively informal process in which a neutral third party examines the evidence to determine the facts giving rise to the dispute, in order to assist the parties in negotiating a resolution.

In confidence -- Information provided with the expressed intent of the source that it not be disclosed.

Manifest injustice -- An error in a trial court that is direct, obvious, and observable, such as an admission that is involuntary or is based upon an agreement that the opposing party rescinds.

Mediation -- A structured process using interest-based negotiation techniques in which the parties seek the assistance of a qualified mediator to help them in resolving their issue in controversy by using joint and separate confidential (option of the parties) caucuses between each party and the mediator.

Neutral -- An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

Personal notes -- Notes taken by the Neutral, parties, or their representatives during a dispute resolution proceeding, that are not made part of the record.

Self-determination -- The act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.

State Alternative Dispute Resolution Manager -- An individual appointed or designated at the State level to promote the use of Alternative Dispute Resolution processes for resolving disputes, to facilitate the development and implementation of the State's Alternative Dispute Resolution plan, and to provide oversight of the organization's disputes Alternative Dispute Resolution program.