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THE ADJUTANT GENERAL

NGAR-HRO-EEM

20 August 2021

MEMORANDUM FOR All Service Members and Employees Arkansas National Guard

SUBJECT: The Adjutant General's Policy 2021-21, Alternative Dispute Resolution (ADR)

1. References.

a. 29 CFR, Part 1614, Federal Sector Equal Employment Opportunity (EEO), dated 9 November 1999

b. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., as amended

c. Administrative Dispute Resolution Act of 1996, Pub. Law 104-320

d. Alternative Dispute Resolution Policy and Guidance, CNGBI, 9600.01

2. This memorandum supersedes The Adjutant General's Policy 2020-22, Alternative Dispute Resolution (ADR), dated 14 July 2020.

3. It is the policy of the Arkansas National Guard (NGAR) to maximize the use of the ADR process to resolve disputes as early, inexpensively, and expeditiously as possible. The ADR process will be managed at the lowest level. Used properly, alternative dispute resolution can provide faster, less expensive, less contentious and productive results in eliminating workplace discrimination.

4. There is not one ADR model that works for all situations. The NGAR's program is flexible enough to respond to the variety of situations and must be adapted to fit the specific need. Generally, the NGAR uses mediation or facilitation. The definitions of mediation and facilitation are:

a. The preferred ADR process for EEO complaints is mediation. Mediation is a structured proceeding in which disputing parties use a trained, neutral mediator to assist them in arriving at a mutually agreeable resolution. The neutral mediator guides the process and determines when to meet with both parties in a joint session or individually, establishes a tone to help parties engage in meaningful discussion, and creates a safe environment for discussion.

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b. The preferred ADR process for EO complaints is facilitation. Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (for example, resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved as the mediator in the substantive issues does. The facilitator focuses more on the communication processes involved in resolving a matter. In either case, the neutral may not impose a decision on the parties.

5. The ADR program must be available during the pre-complaint process and the formal complaint process. If the aggrieved and management agree to use ADR, the complaint process time period may be extended up to 90 days. If the ADR does not result in resolution, the State Equal Employment Manager will notify the EEO Counselor who will issue the Notice of Right to File a Discrimination Complaint as required by 29 C.F.R. 1614.105(d). Note that if ADR is made available in a particular case, it can be attempted at any point during the complaint process.

6. The ADR proceedings are most successful where a neutral or impartial third party with no stake in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. There are trained neutral parties available to assist through either of the ADR procedures mentioned above. If there is no neutral party available locally, there are others assigned to various NGAR elements that can assist. In the event there are no neutral parties available within NGAR resources, contract neutral parties can be made available by the National Guard Bureau ADR office.

7. In some cases, ADR may not be appropriate because of the nature of a particular dispute. Each EO and EEO case will be evaluated to ensure it is appropriate for resolution using the ADR process. Complaints that require a formal written decision to determine precedent in a given case or that could affect the outcome of other similar, but unrelated, cases is an example of a case that is not appropriate for ADR. Cases involving potential criminal involvement such as fraud, waste, abuse, are usually not appropriate for ADR. The NGAR does not exclude cases from consideration for ADR simply because of the type of EO and EEO bases (e.g. race, color, religion, sex, age, national origin, disability, genetic information, or reprisal) alleged.

8. The decision to use ADR for a particular case is voluntary. Management and the aggrieved/complainant must both agree to use ADR. Once the ADR proceeding has begun, it can be terminated by either party at any time. If the ADR process is terminated during the informal pre-complaint stage, complainants will be advised of the right to file a formal complaint. A decision to use ADR does not obligate either party to settle the complaint or to agree to any particular terms of settlement.

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9. Employees have the right to representation of their choice. An employee's right to have a representative remains in effect during the ADR process. EO and EEO officials are not eligible to represent aggrieved individuals/complainants in the ADR process. The process must be fair to both parties and provide an opportunity for individuals to be heard and to develop options for resolution. Neither party can be forced to agree to any terms or outcomes if they are not satisfactory to them.

10. The NGAR is committed to providing ADR proceedings that reflect confidentiality, neutrality, and enforceability. Confidentiality applies to ADR proceedings with regard to joint discussions between the parties where the neutral is providing information to either party, and with regard to private discussions (caucuses) held by the neutral with a respective party. Neutrality is a cornerstone of the ADR program. Neutral parties used by NGAR are required to practice the highest standards of integrity and ethics in conducting ADR proceedings.

11. The NGAR will make accessible an individual with settlement authority. No responsible management official or agency official directly involved in the case will serve as the person with settlement authority. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes. Any resulting settlement agreement will, upon approval by appropriate NGAR officials, be binding on both you and the agency.

12. An allegation that an ADR settlement agreement has been breached must be brought to the attention of the State Equal Employment Manager (SEEM). The responsible party will then review and investigate the allegation and determine if resources to seek enforcement of the agreement will be utilized.

13. The Arkansas National Guard will make every effort to comply with all requirements of the ADR process, to include training down to the manager and first line supervisor. An evaluation process will be used to determine the ADR process' effectiveness, identify deficiencies, and implement corrective actions.

14. Point of contact for the EAP is the State Equal Employment Manager, 501-212-4231 or DSN 962-4231.



KENDALL W. PENN
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