

MEDIATION IN THE UNITED STATES ARMED FORCES

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I. INTRODUCTION

A. HISTORY OF ALTERNATE DISPUTE RESOLUTION IN THE MILITARY

The Armed Forces of the United States consists of approximately 2,000,000 military personnel and approximately 750,000 civilian personnel working in countries across the world.¹ With such a large network of individuals working closely together for the mission and purpose of protecting the people of the United States, there are bound to be disputes. With a large number of disputes, including those that are complex and thus, expensive to litigate, there is a need for those disputes to be settled quickly and efficiently. Therefore, in 1996, Congress passed the Administrative Dispute Resolution Act (ADRA).²

This statute “authorized the agencies’ use of ADR [Alternate Dispute Resolution] process to resolve disputes with the federal government and directed the convening of an interagency task force to facilitate and encourage the development and expansion of ADR programs.”³ Congress recognized that agency dispute-resolution proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and a decreased likelihood of achieving consensual resolution of

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¹ Statistics provided by www.usa.gov. Retrieved on 3/11/2013.

² Retrieved from www.adr.gov – *About ADR.Gov*, Retrieved on 3/11/2013.

³ *Id.*

disputes.⁴ Congress also found that alternative dispute resolution (ADR) procedures yield decisions that are faster, less expensive and less contentious than traditional agency dispute-resolution proceedings and that ADR can lead to more creative, efficient, and sensible outcomes.⁵

Shortly after the passage of the ADRA, the Department of the Navy and the Department of the Air Force began in full force the process of implementing and refining an ADR program to align their agencies practices with those prescribed in the ADRA. The Air Force used a policy directive to implement ADR into their dispute proceedings. Air Force Policy Directive (AFPD) 51-12 is designed to implement the ADRA of 1996 and to establish a program to comply with and implement the varied mandates to foster ADR in a manner that minimizes unnecessary duplication of effort within the Air Force.⁶ In 1999, the Navy developed the ADR program, designed to increase informal resolution of workplace grievances.⁷ It was also designed to enhance team building and communication between managers and employees.⁸ The Department of the Navy used Secretary of the Navy Instruction 5800.13A to implement their ADR program.⁹ Although each are independent departments, each have very similar objectives they expect to accomplish through the ADR programs. For example, the Navy and Air Force strive to 1) enhance the frequency and efficiency of workplace dispute resolution; 2) assist activities in securing or creating cost effective ADR techniques or local programs; 3) translate individual dispute resolution knowledge and skills into a corporate capability; and 4) Promote the use of ADR, and provide training in negotiation and ADR methods.¹⁰

⁴ See Congressional findings in Section 2 of Pub. L. No. 104-320, 110 Stat. 3870 (1996).

⁵ *THE AIR FORCE MATERIEL COMMAND ALTERNATIVE DISPUTE RESOLUTION (ADR) PLAN FOR WORKPLACE DISPUTES*, March 2002, at 1.

⁶ *THE AIR FORCE MATERIEL COMMAND ALTERNATIVE DISPUTE RESOLUTION (ADR) PLAN FOR WORKPLACE DISPUTES*, March 2002, at 1.

⁷ See www.adr.navy.mil/content/admission, retrieved on March 13, 2013.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* The Air Force Materiel Command – *Supra.*

The United States Army followed closely behind the initiatives of the Navy and the Air Force. On 22 June 2007, then-Acting Secretary of the Army Pete Geren issued the Army Alternative Dispute Resolution (ADR) policy encouraging the use of ADR as appropriate to resolve disputes as early as possible, as inexpensively as possible, and at the lowest organizational level.¹¹

II. HOW MEDIATION WORKS IN THE MILITARY

Mediation in a Military context is very similar to mediation used in the civilian context. Regardless of the department using the ADR program, the theme is similar throughout. For example, the Army's mission and purpose behind their ADR program states:

The primary focus of the ADR program is to establish and deliver ADR training programs for a variety of Army personnel and disciplines, both independently and in collaboration with other established DoD ADR programs. We have in place several training programs for leaders, attorneys, civilian personnel specialists, EEO officers, acquisition personnel, and Army civilian employees, to increase ADR awareness, teach good negotiation skills using an “interest-based” model, and train a cadre of Army mediators who can serve as third-party neutrals in a broad spectrum of disputes.¹²

The Air Force has a similar approach to that of the Army. The scope of the AFMC Plan incorporates opportunity for voluntary ADR of workplace disputes that arise in any context and involve any AFMC personnel, civilian or military.¹³ The scope of the Air Force ADR program provides that “ADR techniques should be available to assist in resolving matters raised within equal employment opportunity (EEO), Merit Systems Protection Board (MSPB), negotiated grievance procedure (NGP),

¹¹ http://ogc.hqda.pentagon.mil/ADR/ADR_Summary.aspx. Retrieved on March 13, 2013.

¹² *Id.*

¹³ The Air Force Materiel Command – *Supra. at 2.*

administrative grievance procedure (AGP), unfair labor practice charges (ULP's), military equal opportunity and treatment (EOT), and any other potential workplace disputes.”¹⁴

Training guidelines for mediators in the Air Force provide that [generally] “only those individuals appointed by Commanders to be mediators at each installation should receive mediator skills training.” “On a case-by-case basis, others may be nominated to receive such specific mediator skills training in order to enhance their contribution to the workplace dispute ADR program.”¹⁵ The Air Force faced an initial challenge that required the leadership to change the mindset of those within and without the Air Force who did not view ADR as a realistic alternative to litigation.¹⁶ To address this problem, the Air Force embarked on an intensive research effort, researching private and public sector legal communities for organizations that developed and implemented ADR programs.¹⁷ During this endeavor, the Air Force realized twin benefits of 1) an education about the best practices in the field, and 2) seeing concrete examples of ADR success stories.¹⁸ Further, the Air Force officials tagged with the implementation procedure, “met with the private sector, and senior representatives of the major aerospace contractors in particular, to solicit their participation in the program and commitment to the use of ADR in lieu of litigation.”¹⁹

Through the author’s email interview with Mr. Marc Van Nuys, U.S. Army Alternative Dispute Resolution Program Director in the Office of the General Counsel, Mr. Van Nuys stated that the Army’s two main areas of focus, using ADR, consist of grievances and EEO (discrimination) complaints, and contract disputes that arise between the Army and its suppliers.²⁰ Additionally, the Air Force and Navy greatly limit their use of ADR to areas of employment disputes and contract disputes, particularly in relation

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ <http://www.adr.gov/contracts/airforcesuc.htm>, N.D.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Email Interview with Mr. Marc Van Nuys on February 19, 2013.

to civilians and the armed forces divisions. In fact, Mr. Van Nuys commented that “the Army does not use mediation (at least not officially) to resolve purely military disputes (i.e., those in which the complaining party is a soldier).”²¹ Mr. Van Nuys followed this comment by saying “otherwise, mediation as practiced in Army disputes is functionally no different from mediation in most civilian disputes.”²²

Through the interview with Mr. Van Nuys, he informed the author that the Army is “almost exclusively using a form of facilitative mediation, based on Fisher and Ury’s ‘*Getting to Yes*’ method of interest-based negotiation.” The Army is using a standard 5-stage mediation model (Mediator’s opening remarks, followed by parties’ opening remarks, joint discussion and caucuses, and closure through agreement or impasse).²³ Mr. Van Nuys concluded that facilitative mediation is the preferred method of mediation in the Army and it is the type of mediation used to train new mediators.²⁴

Although mediation and ADR in general, has been generously accepted in the United States Armed Forces, there are areas where limitations on the use of ADR exist. Under the ADRA of 1996, Congress requires consideration of the following factors in deciding if a case is appropriate for ADR.²⁵ If any of the considerations listed below apply to an issue in controversy, use of ADR *may not* be appropriate:

1. A definitive and authoritative decision is needed as a precedent.
2. The matter involves significant issues of Government policy and ADR will not assist policy development.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See 5 U.S.C. § 572(b).

3. Maintaining established policy and avoiding variations in implementation is of special importance.
4. The matter significantly affects non-parties.
5. A full public record of the proceeding or resolution is important.
6. The agency must maintain continuing jurisdiction over the matter with the right to alter the resolution as circumstance demands.
7. In addition, allegations of fraud, waste, or abuse prohibit the use of ADR.²⁶

III. MEDIATION'S FUTURE IN THE ARMED FORCES

A. MEDIATION'S SUCCESS

The ADR program in the U.S. Armed Forces seems to be a success in all areas where it has been implemented. For example, the Air Force reports, "in fiscal year (FY) 92, the Air Force used ADR in 128 EEO complaints. In FY 95, ADR was attempted in over 770 EEO complaints with a full or partial settlement achieved in 78% of the reported cases. Similarly, the Air Forces' Air Mobility Command (AMC), "in FY 95, AMC reported successfully resolving 96% (73 of 76 cases) of the civilian disputes in which ADR use was attempted. In addition, AMC reports that a number of complex, long-running or contentious contract, labor, and environmental disputes were successfully resolved using ADR techniques."²⁷

Use of ADR also explains, in part, why the time required to settle formal EEO complaints declined from 329 days in FY 92 to 136 days in FY 95."²⁸ Throughout the federal government, employees and managers commonly view the traditional EEO

²⁶ *Id.*

²⁷ <http://www.adr.gov/contracts/airforcesuc.htm>, N.D.

²⁸ *Id.*

complaint system as unnecessarily cumbersome, tedious, and disruptive to the work environment.²⁹ In fact, the Department of the Navy (DON) implemented a pilot program aimed at helping to alleviate some of the problems experienced with the traditional EEO complaint system routinely used. After implementing this pilot program, using ADR methods, the DON saw the average cost of a case drop from \$40,000 to \$5800 per case.³⁰ Similarly, the Air Force saw that using ADR, “the transaction costs of processing a formal EEO complaint through the traditional process is estimated to be as low as \$2,000, if the case is resolved early, and as high as \$60,000, if the dispute is resolved by the EEOC.”³¹

ADR has also enjoyed great success in the contracts area. It has been used in almost 64 litigated cases with a 90% settlement rate.³² As in civilian business transactions, contract disputes can be expensive and overly complex. Therefore, when dealing with a government agency, the difference between a contract’s success and failure can mean longevity for a civilian business entity contracting with the government, or an abrupt end. For this reason, in the author’s research, each branch of the military has expressed concern over the quick and efficient settlement of contract dispute cases. Thus, the Air Force has stated, “because ADR is typically less adversarial than traditional litigation, ADR has helped to minimize negative impact on the long-term relationships between the Air Force and its contractors.”³³ Pleased with the success of mediation in contract disputes, the armed forces in general cite ADR with engendering far less negativity than traditional confrontational methods.³⁴

A wonderful example of ADR success within the Department of the Navy is the *Navy Ship Yard* case in Washington

²⁹ *THE DEPARTMENT OF THE NAVY'S EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT DISPUTE RESOLUTION PROCESS PILOT PROGRAM: A BOLD EXPERIMENT THAT DESERVES FURTHER EXPLORATION*. 169 Mil. L. Rev. 4 (2001). Retrieved from Hein Online.

³⁰ *Id.*

³¹ <http://www.adr.gov/contracts/airforcesuc.htm>, N.D.

³² *Id.*

³³ *Id.*

³⁴ *To Enhance the Operation of Government: The Reauthorization of the ADRA*. 1 Harv. Negot. L. Rev. 242 (1996). Retrieved from Hein Online.

D.C. that took place between July 2000 and January 2002.³⁵ The case highlighted a multiparty dispute involving the EPA and the U.S. Navy.³⁶ This case was ripe for potential cost savings of mediation over litigation and the potential benefits of cooperatively developed joint solutions.³⁷ Ultimately, the parties settled the four-year long dispute using mediation. The mediation agreement met the interests of the parties, saved \$1.2 Million in monitoring and compliance savings, and saved an estimated amount in the hundreds of thousands of dollars in litigation and disputed appeal costs.³⁸ The mediation costs were approximately \$103,400 and the dispute was settled in five months.³⁹

ADR has seen a great deal of success in the eyes of the Armed Services Board of Contract Appeals (ASBCA). This board is where most contract disputes are heard and they, as a board, are very pro-ADR.⁴⁰ In fact, the ASBCA will “bend over backwards” to accommodate litigants who want to engage in ADR, including making their services as subject-matter expert neutrals available free of charge.⁴¹ Here, where mediation is used, it tends to be highly evaluative and more structured than the informal facilitative mediation used in most non-contract cases.⁴² In the author’s research across all of the military departments mentioned in this paper, ADR is optional, allowing the complaining party the freedom to choose ADR or other dispute resolution options.

Going forward, the armed forces will look to expand the scope of ADR beyond civilian personnel and contract disputes.⁴³ Environmental controversies and tort claims, in particular, have enjoyed notable ADR successes in other federal agencies and the private sector. Finally, access to ADR information remains one of the biggest challenges.⁴⁴ Thus, the Air Force is working with the

³⁵ <http://www.adr.gov/civil-enf.htm>

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Email Interview with Mr. Marc Van Nuys on February 19, 2013.

⁴¹ *Id.*

⁴² *Id.*

⁴³ <http://www.adr.gov/contracts/airforcesuc.htm>, N.D.

⁴⁴ *Id.*

Navy and the Army to collect a list of “best practices” and compile them into a universal handbook.⁴⁵

B. GLOBAL USE OF MEDIATION – FOREIGN MILITARY PROGRAMS

Similar to work done in the United States to implement a cohesive and effective ADR program, the Australian Defense Organization (ADO) and the Australian Defense Forces (ADF) have undertaken an initiative to oversee the increased use of ADR to resolve disputes within the ADO and ADF. That ADF Directorate of Alternative Dispute Resolution has developed a comprehensive training program designed to inform the Defense community about the benefits of using alternative conflict management processes and provides training in the necessary skills to employees, managers and practitioners in alternative dispute resolution.⁴⁶

The ADO defines ADR as “a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop opinions, consider alternatives and reach consensual settlements that will accommodate their needs.” “Mediation is a process which emphasizes the participants' own responsibilities for making decisions that affect their lives.”⁴⁷ The ADO looks to use ADR in a broad spectrum of disputes and cite efficiency related reasons for implementing the program.⁴⁸ One of the challenges that have confronted ADR in the Australian jurisdictions has been that it has integrated itself into the current adversarial litigation process as an additional step. In other words, ADR has been used as a *concluding* step undertaken prior to trial or final hearing, but after many or all of the other steps in the normal litigation process.⁴⁹ This differs from the traditional approach we see in civilian practice, or even in a U.S. military application, where ADR is favored as an alternative to beginning the litigation process

⁴⁵ *Id.*

⁴⁶ Dr. Dominic Katter. *Alternate Dispute Resolution in the Military Context*. 28 U.N.S.W.L.J. 458 (2005) at 458. Retrieved from Hein Online.

⁴⁷ *Id.*

⁴⁸ *Id.* at 459.

⁴⁹ *Id.* at 461.

or as an alternative to litigation, after the early stages of litigation indicate the potential for a long road ahead.

Within the ADO as a whole, the employment of ADR techniques has been predominantly for the resolution of administrative grievances. However, the ADO has utilized ADR as a means of assisting Commanders at unit level and Managers to resolve complaints if they deem the circumstances suitable for its usage.⁵⁰ Thus, ADR is encouraged whenever a matter is particularly one of discrimination, harassment, sexual offenses and other unacceptable workplace and/or social behavior.⁵¹ There are exceptions to these areas however. For example if a matter warrants that it be referred to the Service Police, under the *Defense Force Discipline Act, 1982*, then such an investigation has precedent.⁵² Within the Australian Defense Organization, “ADR is often combined with professional counseling, in that disciplinary matters of course are often associated with personal social problems such as alcohol or drug dependency, marital break-up, over-work, stress or other problems.”⁵³ Further, differing from its U.S. counterpart, ADR is used in some criminal matters, but only rarely.⁵⁴

The ADO has set some limitations on the use of ADR. Certain members of the ADF, particularly non-legal officers, see ADR as a conflict with methods outlined in the *Defense Force Discipline Act, 1982*, thus challenging the discipline and morale standards of this Act.⁵⁵ Interestingly, the ADO cites an academic analysis that says, “there are collateral benefits in ADR in military criminal matters, in that the offender, with the human factors of their crime considered, is then able to deviate from the possibility of repeat offending and it will promote in the offender concepts of justice and fairness.”⁵⁶

⁵⁰ *Id.* at 463.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 464.

⁵⁴ *Id.*

⁵⁵ *Id.* at 465.

⁵⁶ *Id.*

In conclusion, the ADO feels that “ADR provides a mechanism whereby there is the opportunity to resolve disputes on terms which are 'positive' to the participant, or at least at the participant's discretion. In this regard, it has been stated that ADR results in many disputes being settled. Further, ADR directly benefits the ADO by resolving disputes quickly and on terms that are mutually agreeable to the parties.”⁵⁷

IV. CONCLUSION

Efficiency, cost-savings, and reduced adversarial proceedings seem to be the theme supporting the U.S. Armed Forces decision to implement an active and flourishing ADR program. Supported by the ADRA, the ADR program in the military seems to only have the ability to improve and expand to other applicable areas within a military context. Battlefield mediation is an interesting topic and unfortunately, not one the author came across in the course of research. However, as the use of ADR increases and more practitioners, both in the military and in a civilian role, continue forward, ADR will likely see a more consistent and broad use throughout the armed forces.

Mr. Marc Van Nuys provided a succinct summary of mediation in the Army and the author feels at liberty to quote him verbatim here. “*Mediation minimizes what happened in the past in favor of what’s going to happen in the future; it doesn’t decide who is right or wrong or assign blame; it doesn’t punish or vindicate anyone. In a sense, it goes against our notions of adversarial justice, [which is] why parties still have to be pushed into it once in awhile. Our job and goal, is to get as many people as we can to see the value of mediation as a business response to solve a business problem, even if the problem is dressed in legal clothing.*”⁵⁸

⁵⁷ *Id.* at 467.

⁵⁸ Email Interview with Mr. Marc Van Nuys on February 19, 2013.

