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**Going Beyond the Norm: The Case for Incorporating Evaluative Mediation  
into Department of Defense Employment Discrimination Complaints**

By

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A Paper Submitted to the Faculty  
In Partial Fulfillment of the Graduation Requirements

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March 2017

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## **Abstract**

Alternative Dispute Resolution is a vital tool being used by the Department of Defense (DoD) as a means to resolve workplace disputes. The DoD uses the facilitative model of mediation to resolve these disputes and it is a proven, effective resource in satisfactorily resolving DoD workplace conflicts. Facilitative mediation relies solely on the individual parties coming up with solutions to resolve the dispute and does not evaluate the actual merits of a complaint. This can be problematic when an employee has filed a workplace complaint based on illegal discrimination with the Equal Opportunity Office. Evaluative mediation involves having a mediator with expertise in labor and employment law evaluate the complaint's strengths and weaknesses and help the parties reach resolution based on this evaluation. The Equal Employment Opportunity Commission provides settlement judges who use evaluative mediation techniques but this is only after a case has gone formal and is in the advanced stages of litigation. Sometimes this can be almost 1-2 years after the alleged discriminatory action took place due to the length of time it takes a case to get assigned a judge. This paper proposes that DoD policy and guidance be modified to allow for early stage evaluative mediation by a qualified mediator in select EO complaints either by contracted or internal mediators. This will provide the DoD a broader spectrum of dispute resolution options and potentially greater cost savings than those already provided by using the facilitative model.

# **Going Beyond the Norm: The Case for Incorporating Evaluative Mediation into Department of Defense Employment Discrimination Complaints**

**By Maj Thomas McNab<sup>1</sup>**

## **Introduction**

Alternative Dispute Resolution (ADR) is a vital tool used by the Department of Defense (DoD) as a means to resolve workplace disputes. Currently, almost all DoD agencies primarily use the facilitative model of mediation to resolve these disputes. The facilitative model has proven to be an effective resource in satisfactorily resolving workplace conflict for the DoD.<sup>2</sup>

Facilitative mediation relies solely on the individual parties coming up with solutions to resolve the dispute and does not evaluate the actual merits of a complaint. This can be problematic when an employee has filed a complex workplace complaint based on illegal discrimination with the Equal Opportunity (EO) Office. The facilitative mediator's role is to protect the process, not evaluate the merits of a complaint. Alternatively, evaluative mediation involves having a mediator with expertise in labor and employment law to not only facilitate the process, but to also evaluate the complaint's strengths and weaknesses and help the parties reach resolution based on this evaluation. Currently, DoD agencies do not internally use this style of mediation. With only the facilitative model of mediation available, the system has little flexibility. If the average EO complaint is not resolved at the early stages via ADR, there can be significant costs to the government in personnel as well as investigative and litigation expenses.

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<sup>2</sup> See 2016 Report on Significant Developments in Federal Alternative Dispute Resolution, attachment 6 (January 9, 2017).

Expanding the tools available in ADR may facilitate more resolutions in both number and quality.

Currently, for cases that are not solved early in the complaint process, The Equal Employment Opportunity Commission (EEOC) provides independent settlement judges who use evaluative mediation techniques. However, this occurs only after a case has gone formal and is in the advanced stages of litigation. Sometimes it may be almost 1-2 years after the alleged discriminatory action took place due to the time it takes for the agency to complete its internal investigation of the complaint compounded by the backlog of EEOC cases. At this point and time there may be a disincentive for the parties to settle because of the time and costs already invested in the process.

This paper proposes DoD ADR policy and guidance be modified to allow for early stage evaluative mediation in select EO complaints either by contracted or internal mediators. This will provide DoD a broader spectrum of dispute resolution options and potentially greater cost savings than those already provided by relying on only the facilitative model. In exploring this thesis, this paper first provides an overview of the EO complaint process. Next, it looks at DoD's use of ADR in EO complaints. Finally, it discusses the facilitative and evaluative models and suggests how DoD policy should be modified to allow for the use of evaluative mediation in limited circumstances.

### **Overview of the Equal Opportunity Complaint Process**

If a DoD civilian employee<sup>3</sup> feels they have been discriminated against based on a protected category in the workplace, they can contact their local Equal Employment Opportunity (EO) office

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<sup>3</sup> This paper focuses solely on complaints by civilian employees. Military personnel have a separate complaint process governed under different directives.

to discuss their concerns. The EEOC enforces five federal laws that prohibit employment discrimination against applicants for federal employment, current federal employees, or former federal employees: Title VII of the Civil Rights Act of 1964, as amended (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the Equal Pay Act of 1963 (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the Age Discrimination in Employment Act of 1967, as amended (prohibiting discrimination against persons age 40 or older); Sections 501 and 505 of the Rehabilitation Act of 1973, as amended (prohibiting discrimination on the basis of disability); and Title II of the Genetic Information on discrimination Act of 2008 (prohibiting discrimination based on genetic information).<sup>4</sup>

Title 29, Part 1614 of the CFR contains regulatory guidance for the processing of EO complaints. The EEOC provides additional details to the complaint process in Management Directive 110 (MD-110). 29 C.F.R. § 1614.102(a) establishes the duty of federal agencies to maintain EEO programs in a manner consistent with the EEOC's mandatory directives.<sup>5</sup> Each

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<sup>4</sup> See Management Directive 110 (EEOC 2015). Available at: <https://www.eeoc.gov/federal/directives/md110.cfm>

<sup>5</sup> This section specifically states: (a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall: (1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation; (2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives; (3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions; (4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age, disability, or genetic information, and solicit their recruitment assistance on a continuing basis; (5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program; (6) Take appropriate disciplinary action against employees who engage in discriminatory practices; (7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency; (8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program; (9) Provide recognition to employees, supervisors, managers and units demonstrating superior

military department has created additional service specific guidance addressing the EO complaint process and general EO topics consistent with MD-110.<sup>6</sup>

MD-110 Chapters 2 and 5<sup>7</sup> contain the regulatory guidelines for federal agency processing of informal and formal complaints (summarized below). For a civilian discrimination complaint to be appropriately processed by any DoD EO office, an employee must contact the local EO office within 45 days of the alleged action or date of action. The 45-day clock begins when the employee knows or should have known when the alleged discriminatory action took place.<sup>8</sup> Typically, each military installation will have an office on site. Once the employee contacts the office, a trained counselor conducts an intake informing the employee (also referred to as complainant) of their rights in writing, seek specific basic information about the complaint, and discuss potential ADR options.

Once the employee makes the initial complaint, they have the option to either participate in ADR or the informal complaint counseling process. If the employee chooses the informal complaint counseling process, the EO office has 30 days to conduct an informal, limited inquiry and explore possible resolutions to the complaint. Generally, the counselor seeks resolution at the lowest level possible. If the complaint is not resolved in the 30-day period, a final interview

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accomplishment in equal employment opportunity; (10) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort; (11) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities; (12) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and (13) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

<sup>6</sup> See Air Force Instruction (AFI) 36-2706, *Equal Opportunity Program, Military and Civilian* (Updated Feb 2017); Army Regulation (AR) 600-690, *Equal Opportunity Discrimination Complaints* (2004); Department of Navy Discrimination Complaints Manual (2003).

<sup>7</sup> MD 110 Chapters 2 and 5 are available at: <https://www.eeoc.gov/federal/directives/md110.cfm>.

<sup>8</sup> 29 CFR § 1614 allows the 45-day timeline to be extended. Each service regulation provides specific guidance on extension of the timeline.

is conducted, closing out the informal complaint. If the employee agrees, the counseling process can be voluntarily extended by up to 60 days while the parties continue to attempt resolution. During the final interview, the employee is informed they have 15 days to formally file a complaint. Additionally, the counselor does not make any indication as to whether or not they believe the complaint has merit. Once the final interview occurs, no further counseling takes place.

If the employee chooses to file a formal complaint within the 15-day period, the EO office where they filed the original complaint will send the employee an acknowledgement letter. The letter provides the date on which the employee contacted the office to file the formal complaint. After the acknowledgement letter is sent to the employee, the Agency sends the employee an additional “acceptance” letter informing them what claims have been accepted for investigation and if any claims have been dismissed along with the basis for dismissal. If the Agency accepts the claim for investigation, they have 180 days from the date the employee files the formal complaint to complete the investigation of the claims. Within the DoD, formal EO complaints are investigated by the Investigations and Resolution Division (IRD).<sup>9</sup>

Once the IRD receives the complaint file, they conduct an intake where they collect documentation and then conduct an investigation. The investigation includes witness interviews, document collection, and report writing. At the end of the process, a Report of Investigation (ROI) is compiled and sent to the originating EO office who then removes privacy protected information.<sup>10</sup> The EO office subsequently provides the ROI to the employee. In certain

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<sup>9</sup> See Department of Defense Instruction (DODI) 1400.25, Volume 1614, *DoD Civilian Personnel Management System: Investigation of Equal Employment Opportunity Complaints* (2015).

<sup>10</sup> Protected information can include social security numbers, date of birth, and other personally identifiable information protected under federal privacy laws.

circumstances, the 180-day requirement may be extended, but not beyond 360 days from the date the initial complaint was filed.

After the employee receives the ROI, they may elect either an EEOC hearing with an administrative judge or a Final Agency Decision (FAD), written by the Agency, based on the record. This election must be made within 30 days of receiving the ROI. FADs must be issued 60 days after the initial 30-day receipt period. If the employee requests a hearing with the EEOC, the judge has 180 days to conduct a hearing and issue a decision regarding the complaint. This period may be extended if the judge determines good cause exists for an extension. Upon receipt of the judge's order, the Agency has 40 days to respond. The employee has the option to appeal the final decision and then the EEOC will issue a decision on the appeal. If the employee is dissatisfied with this decision, they may then file a civil action in US district court. Recent analysis of formal complaint processing in the DoD through the entire administrative process (from time of complaint filing to final decision) places the average time for final conclusion at 529 days.<sup>11</sup> Figures 1 and 2 are visual depictions from the Air Force and the Navy of entire administrative EEOC process.

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<sup>11</sup> 2014 Secretary of the Air Force ADR Program Report, (27 February 2015). Anecdotally, I was assigned as a litigation attorney at a prior assignment where I represented the Air Force before the EEOC. I was assigned a formal EO complaint in 2008. The case was not resolved through ADR and had a hearing before an EEOC judge in 2010. The judge issued their final decision in 2011 over three years after the initial complaint was filed.

**Figure 1: Air Force Flow Chart**

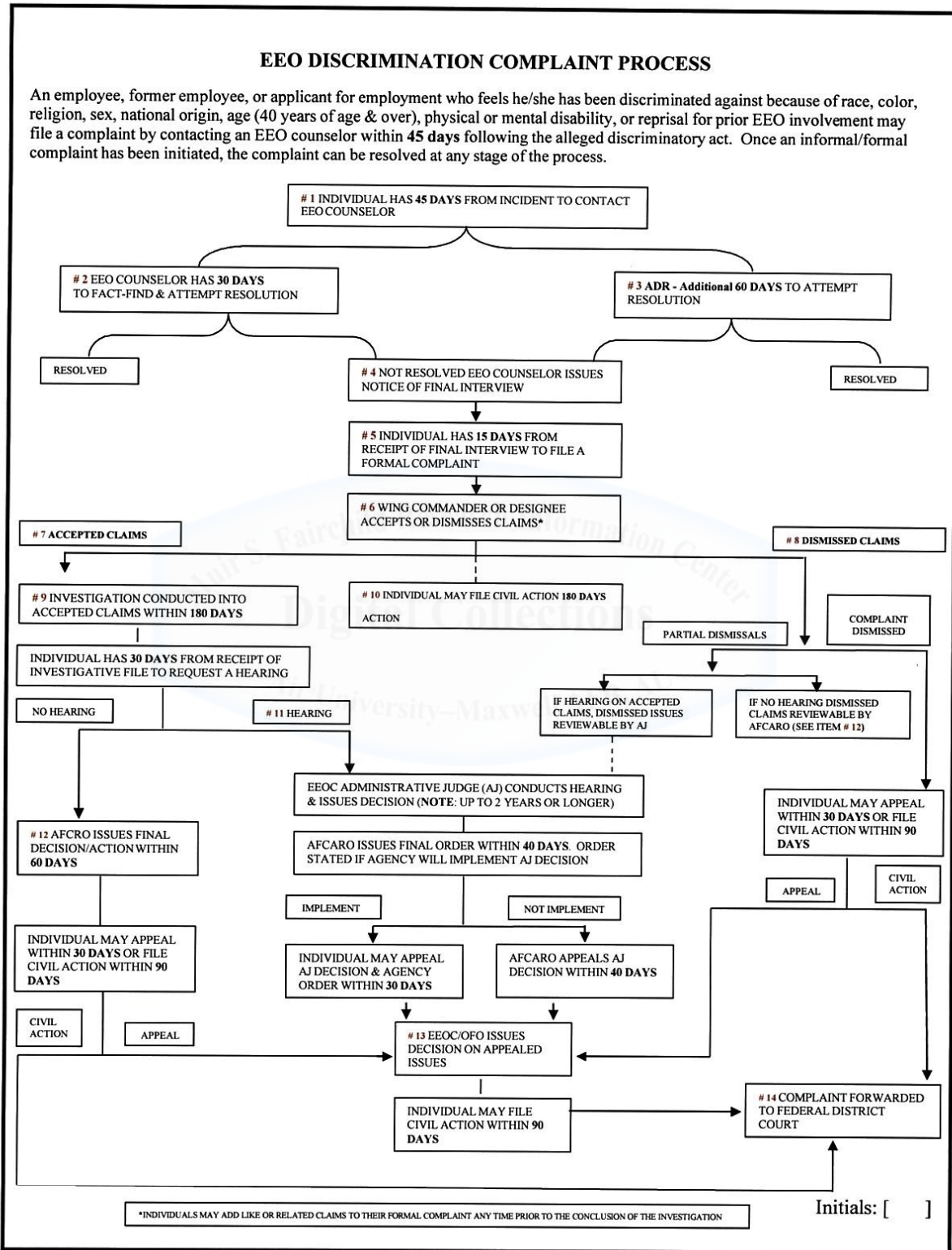
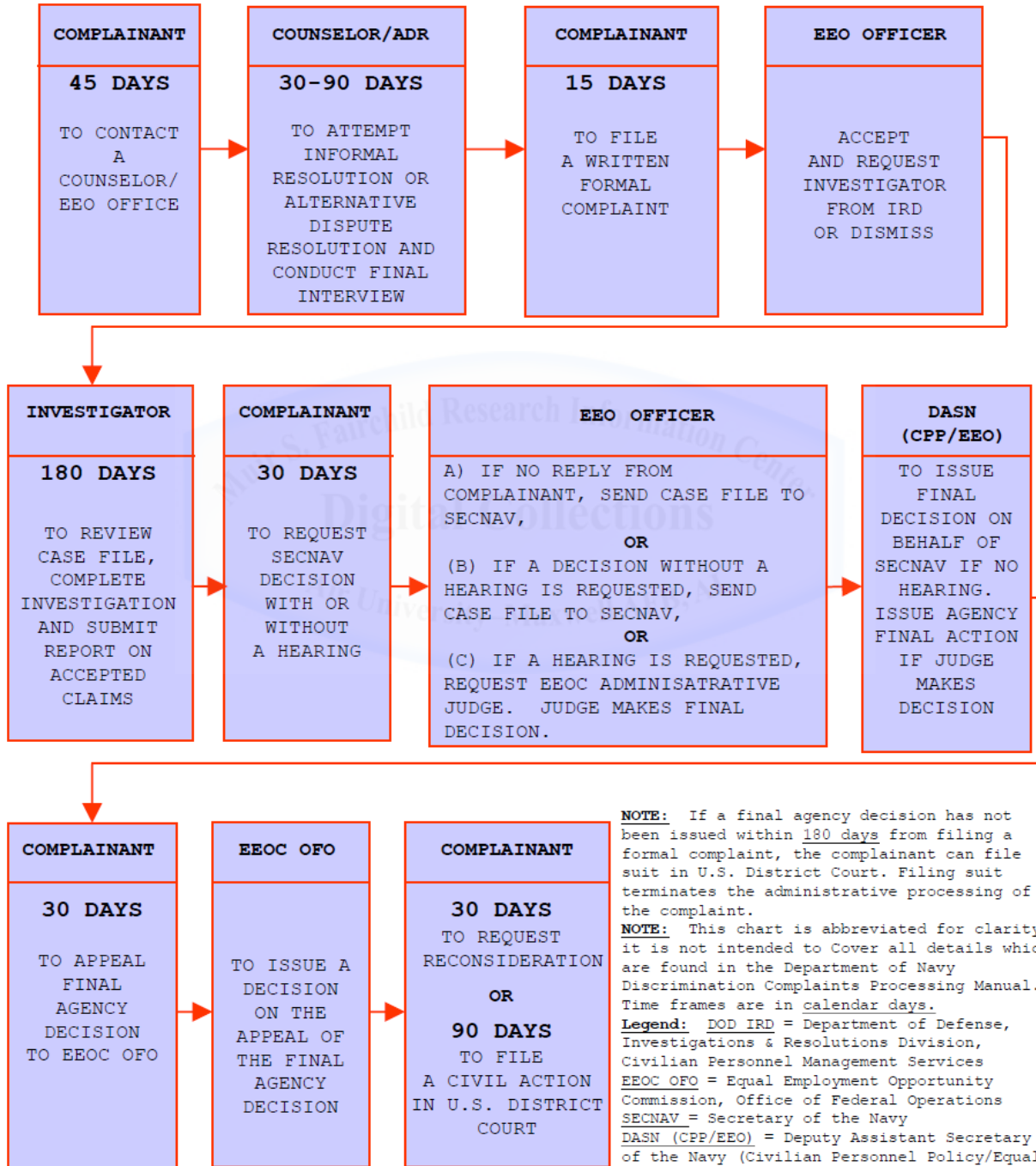


Figure 2: Navy Flow Chart

## EEO COMPLAINT PROCESS



TO CONTACT THE APPROPRIATE EEO OFFICE, SEE "POINTS OF CONTACT".

6 June 2008

Although the average length of time a complaint takes for resolution through the entire EEOC administrative process is 529 days,<sup>12</sup> that number is greatly reduced if resolved through early ADR. Cases resolved through ADR procedures at the informal stage average 44 days to resolution,<sup>13</sup> a significant difference of 485 days. The following section will look at ADR in EO complaints.

### **Overview of ADR in DoD EO Complaints**

As stated previously, when an employee initially contacts the EO office, the counselor will inquire whether or not the employee is interested in attempting to resolve the complaint through ADR. The EEOC encourages agencies to resolve complaints of employment discrimination as early in the process as possible.<sup>14</sup> If the employee is interested, a decision is made by the Agency whether or not to offer ADR. If ADR is offered, it takes place as soon as possible.

Although there are several forms of ADR, including arbitration, settlement conferences, as well as mediation, the DoD primarily uses mediation to resolve employment discrimination complaints handled by the EO office.<sup>15</sup> Mediation generally requires at least two parties in conflict. Each party may or may not have representation with them at the table (including union reps for bargaining unit employees). In facilitative mediation, the mediator, a neutral third party,

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<sup>12</sup> It should be noted that On August 17, 2016, the EEOC approved an Air Force proposal for a test project to expedite the processing of discrimination complaints. This project, CORE (Compressed, Orderly, Rapid, and Equitable), was previously authorized by the Department of Defense under the 2001 National Defense Authorization Act and successfully tested by the Air Force from 2005 to 2007. Now renewed under the direct auspices of the EEOC, CORE offers employees of the Air Force and applicants for employment a voluntary alternative for processing formal EEO complaints. The CORE test opened on October 1, 2016, and will continue for two fiscal years. CORE currently allocates 127 days to resolve a complaint but there is not sufficient data to determine if it's speeding up case processing as of yet.

<sup>13</sup> 2014 Air Force ADR Program Report, *supra* n. 11.

<sup>14</sup> See 29 C.F.R. § 1614.603.

<sup>15</sup> See 2016 Report on Significant Developments in Federal Alternative Dispute Resolution, *supra* n.3 at 3.

presides over the mediation. The mediator is the impartial catalyst that helps the parties in conflict constructively address and potentially resolve their dispute.<sup>16</sup> The Administrative Dispute Resolution Act of 1996 states a mediator is a “permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.”<sup>17</sup> Although there are three primary models of mediation: facilitative, transformative, and evaluative, the DoD currently only uses the facilitative model of mediation.<sup>18</sup> Although an effective model of mediation, transformative mediation will not be discussed as it does not necessarily seek to address the complaint that brought on the dispute.<sup>19</sup> Therefore the focus of this paper will be on the facilitative and evaluative models of mediation. However, prior to discussing those two models of mediation, it is important to overview the DoD’s general mediation process.

### **General Overview of the Mediation Process in DoD EO Mediations**

Once the parties agree to a date and time for the mediation, the military installation’s ADR program manager sends them an agreement to mediate.<sup>20</sup> The agreement to mediate covers

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<sup>16</sup> Carrie Menkel, Lela Porter Love & Andrea Schneider, *Mediation Practice, Policy and Ethics*, 91 (Aspen 2006).

<sup>17</sup> See 5 U.S.C. § 573(a) from the Administrative Dispute Resolution Act of 1996.

<sup>18</sup> See 2016 Report on Significant Developments in Federal Alternative Dispute Resolution, *supra* n.3.

<sup>19</sup> See Army Mediation Handbook (2015), 35. Available at:

<http://ogc.hqda.pentagon.mil/ADR/Documents/Army%20Mediation%20Handbook%202015%20FINAL.pdf>. The Army Handbook states, “The transformative mediator focuses on the downward trajectory conflict has on the parties’ interpersonal relationship. It seeks to reverse this trajectory by empowering each individual (the “empowerment shift”) and recognizing the other’s needs, interests, values, and points of view (the “recognition shift”). The overarching goal of transformative mediation is to foster a fundamental improvement, or transformation, of the parties’ relationship and the overall environment in which they interact. This form of mediation is less structured and more free-flowing than evaluative or facilitative mediation, and can be particularly effective in addressing and repairing deeply engrained or long-standing issues that go beyond the immediate dispute.”

<sup>20</sup> See The Air Force Mediation Compendium (2012), 21. Available at:

<http://www.adr.af.mil/Portals/82/documents/AFD-121115-026.pdf?ver=2016-08-01-121806-170>

such things as confidentiality, rights of the parties, and what the parties can expect, including location, start time and duration. Most mediators will require the parties sign the agreement before beginning the actual mediation. Generally, in an employment discrimination complaint, the parties at the table include the individual who filed the complaint and the responsible management official who is responding to the complaint.<sup>21</sup> Each side should have someone at the table, or immediately reachable, with the authority to settle the complaint should they reach an agreement.

To begin the mediation, the mediator usually makes an opening statement. At this time, the mediator covers ground rules for the mediation, the process they will follow, confidentiality, and settlement agreements. The mediation itself will generally continue with each party's opening statement, joint discussion and caucus as required, and finally, closure.<sup>22</sup>

During each party's opening statement, each side has an uninterrupted opportunity to lay out their position and history of what got them there. The complainant, as the party who raised the issue, will make his or her opening statement first. Management (also referred to as the respondent) then has the opportunity to respond or make their own opening statement. The opening statement is an opportunity for the mediator to identify each party's potential underlying interests that may help them subsequently generate options for resolution. Upon conclusion of each opening statement, the mediator may also summarize each party's statements, giving them the opportunity to make any clarifications.

After each side has made an opening statement, the mediator may lead the parties into a joint discussion. This is the first opportunity during the mediation for the parties to directly

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<sup>21</sup> The employee can be represented by an attorney, or non-attorney if they so choose. Additionally, management may choose to have an attorney present along with any technical experts needed, such as human resources, on standby.

<sup>22</sup> Air Force Mediation Compendium, *supra* n. 20 at 27.

interact with each other. During these joint discussions, the mediator may help the parties clarify issues and interests, but it is really a time for the parties to work through the issues together and generate options for resolution. This is a chance for each side to help shape a potential future working relationship. Since conflict may arise during this time or the parties may reach an impasse, the mediator may need to caucus with each party.

There is no set time, or even requirement, for a caucus to occur. Rather, a mediator may caucus with either side as the need arises. Anything discussed during caucus is confidential, unless the party agrees to its disclosure.<sup>23</sup> During a caucus, the party and the mediator may discuss settlement options or the mediator may help the party think through their legitimate options. There should be no inference made, either positive or negative, by either party regarding the number or length of each caucus. A caucus will be as long as the mediator or the parties feels necessary to fully explore the issues. After a caucus, the mediator will often bring the parties back together for further joint discussion, which can lead to closure of the mediation.

Once the parties reach either a settlement agreement or an unsolvable impasse, the mediator will close the mediation by, respectively, having the parties sign a settlement agreement or, in the case of an impasse, the mediator signs a declaration of impasse. If the parties reach resolution, the mediator will help them memorialize the agreement in writing. The mediator will likely encourage the parties to be as specific as possible when drafting the settlement to avoid future confusion regarding the agreement.<sup>24</sup> When reviewed and signed by all required parties, the settlement agreement becomes a legally binding document.

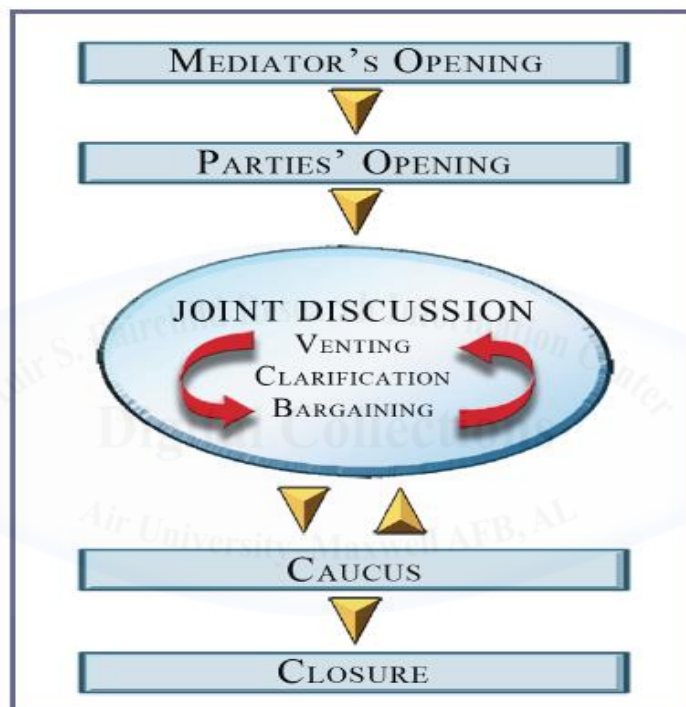
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<sup>23</sup> See 5 U.S.C. § 574(b) (1) (1996). See also as an example AFI 51-1201 paragraph 4.8.5.2. It should be noted there are limits on confidentiality. AFI 51-1201 paragraph 4.8.5.3 states "Information indicating fraud, waste and abuse, criminal misconduct, or threats of violence may be subject to disclosure, notwithstanding confidentiality." The parties are usually told this during mediator's opening statement.

<sup>24</sup> Settlement agreements should use SMART principles (Specific, Measurable, Attainable, Realistic, and Timely).

Parties should expect a mediation to last up to 8 hours and need to plan accordingly. Additionally, a settlement agreement may need to undergo a legal review to become final, which may take an additional day or two. Taking all things into consideration, mediation is a relatively short process to resolve a complaint. Figure 3 depicts the typical flow of an EO complaint mediation.

**Figure 3: Mediation Process**<sup>25</sup>



### Facilitative v. Evaluative Models of Mediation

#### *The Facilitative Model*

As stated previously, the DoD uses the facilitative model of mediation to help resolve EO complaints.<sup>26</sup> The facilitative model of mediation helps break through the walls of workplace disputes through active listening and sharing emotions.<sup>27</sup> Using this model, the mediator helps

<sup>25</sup> Excerpted from the Air Force Mediation Compendium, *supra* n. 20 at 9.

<sup>26</sup> Army Mediation Handbook, *supra* n. 19 at 33. See also Air Force Mediation Compendium, *supra* n. 20 at 5.

<sup>27</sup> See generally Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, 4 Pepp. Disp. Resol. L.J. 279, 283 (2004). Brown explains that facilitative mediation is based on two "guiding principles": [T]hat

guide the conversation between the parties, and assists them in understanding the underlying basis for the dispute, encouraging them to explore the reasons that led to the conflict.<sup>28</sup> As a true facilitator, the mediator is primarily responsible to guide the discussion so that the parties can break through the walls created by the conflict and enhance their communication to work towards possible solutions.<sup>29</sup> The mediator creates a bridge of trust between the parties until the parties do not need to rely on the mediator and can rely on each other for the future relationship.

To help the parties work through their conflict, mediators using the facilitative model of mediation primarily use interest-based problem solving techniques, often referred to as interest-based negotiation (IBN).<sup>30</sup> Interest-based problem solving is often preferred in mediation because, in most instances, there will be a continuing relationship between the parties and IBN aims to preserve or improve such a relationship.<sup>31</sup> Using IBN techniques, the mediator helps the parties: 1) separate the people from the problem, 2) focus on interests not positions, and 3) help the parties invent options for mutual gain.<sup>32</sup>

When a broader range of interests are considered, a broader array of possible outcomes can be created, with the potential for finding an outcome that is more satisfactory to both parties than any solution imposed by a third party based only on the parties' legal rights. By focusing on

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(1) of self-determination of the parties with respect to the resolution of their disputes; and (2) that of the neutral third party facilitator who facilitates communication among the parties, promotes understanding of the issues, focuses the parties on their interests and seeks creative problem-solving, including creative solutions outside the legal normative box, in order to enable the parties to reach their own agreements and resolutions to their problems.

<sup>28</sup> Rebecca J. Weinstein, *Mediation in the Workplace: A Guide for Training, Practice, and Administration*, 24 (Praeger 2001).

<sup>29</sup> *Id.*

<sup>30</sup> See generally Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes* (Penguin 1991). It should be noted here that *Getting to Yes* is not written specifically for mediation.

<sup>31</sup> Air Force Mediation Compendium, *supra* n. 20 at 33.

<sup>32</sup> Fisher, Ury, Patton, *supra* n. 30 at 15. Fisher and Ury define a position as something you have decided upon (the what that brings you to the table), whereas an interest is what caused you to so decide (the why). *Id.* at 41.

their underlying needs and interests, the parties may create a unique solution which is most appropriate for their situation.<sup>33</sup>

The EEOC recognizes the value of the interest-based approach to dispute resolution in reducing the number of formal discrimination complaints. A 1996 EEOC study found:

“ . . . there may be a sizable number of disputes in the 1614 [the section that covers the complaint process] process which may not involve discrimination issues at all. They reflect, rather, basic communications problems in the workplace. Such issues may be brought into the EEO process as a result of a perception that there is no other forum available to air general workplace concerns. There is little question that these types of issues would be especially conducive to resolution through an interest-based approach.”<sup>34</sup>

Additionally, EEOC Studies have consistently shown remarkably positive feedback from participants in the mediation process.<sup>35</sup>

#### *Evaluative Mediation*

Professor Leonard Riskin states, "the mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity."<sup>36</sup> The evaluative mediator focuses on helping the parties understand the strengths and weaknesses of their case by providing assessment, prediction, and direction.<sup>37</sup> In the case of an EO complaint, the mediator should be someone with expertise in the laws involving workplace discrimination, knowledge of DoD

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<sup>33</sup> Brown, *supra* n. 27 at 290.

<sup>34</sup> ADR Study, U.S. Equal Employment Opportunity Commission, Office of Federal Operations, Oct. 1996.

<sup>35</sup> See Patrick McDermott, Ruth Obar, Anita Jose, and Mollie Bowers, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (2000). Available at: <https://www.eeoc.gov/eeoc/mediation/report/index.html>

<sup>36</sup> Leonard R. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 24 (1996).

<sup>37</sup> *Id.* at 44.

civilian personnel laws, policies, and directives as well as experience before the EEOC or similar administrative forums.

Evaluative mediators will usually ask the parties to make more formal opening statements when presenting their case, in contrast to facilitative mediators, and then conduct one or more caucuses to meet privately with the parties to the complaint.<sup>38</sup> The mediator focuses on collecting facts, identifying issues, and analyzing the parties' legal arguments to develop a sense of the complaint's likely outcome.<sup>39</sup> To move the parties towards resolution, the mediator will judiciously share this evaluation with each side at strategic moments, usually during a caucus.<sup>40</sup> The mediator might also make formal or informal recommendations on resolution based on their evaluation of the likely outcome. This will often include a cost-benefit analysis of settling the case via mediation versus pursuing resolution through other legal proceedings. This often may include an explanation that once the parties leave the mediation, control of the outcome may be taken out of their hands and left to a third party.

The evaluative model also tends to involve a more directive mediator, one who may not hesitate to push the parties to achieve settlement.<sup>41</sup> Attorneys representing employees in EO complaints may appreciate this approach because it helps them influence clients with unrealistic expectations and bridge final gaps to reach a realistic resolution.<sup>42</sup>

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<sup>38</sup> Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker, and Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 Harv. Negotiation L. Rev. 1, 12 (2009).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

### *Disadvantages of Evaluative Mediation*

Disadvantages to the evaluative mediation model include the limited ability for an evaluator to accurately predict the outcome of a case.<sup>43</sup> Additionally, the tendency for the parties to take a more positional approach in an evaluative mediation may tend to deter compromise and settlement.<sup>44</sup> Another disadvantage may be the inability of an evaluative mediator to find alternative principled basis for settlement when the traditional "legal" basis for a proposed settlement is rejected by the parties.<sup>45</sup> Furthermore, there is a view expressed among a number of lawyers that while senior mediators and former judges could offer expertise and authority in an evaluative mediation, they were often ineffective at facilitating dialogue and compromise among parties.<sup>46</sup>

In addition to the procedural differences between facilitative and evaluative mediation, there are structural issues to consider. The majority of mediators within the DoD are collateral duty mediators trained exclusively on the facilitative model.<sup>47</sup> Structurally, the DoD would likely need to provide training for a group of internal attorneys with experience and expertise in EEOC litigation and labor and employment laws or utilize a pool of contracted mediators with the requisite expertise. The agencies within the DoD would also need to change existing policies to allow for the use of the evaluation model in limited circumstances on a case-by-case basis. This would also require allocation of funds for either contract mediators or the travel of internally qualified mediators.

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<sup>43</sup> Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. Disp. Resol. 241, 286-287 (2002).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 2014 Air Force ADR Report, *supra* n. 11.

### *Circumstances for Evaluative Mediation*

From a policy perspective, not every case will be appropriate for evaluative mediation. Cases where it may be appropriate include, but aren't limited to, complex cases where an employee was non-selected for promotion, some hostile work environment claims, or cases involving disability accommodations. For example, I mediated<sup>48</sup> a complaint for an agency several years ago where the employee had applied for an internal promotion for a professional position. The employee had solid credentials and was one of three employees chosen to interview. The interview was conducted by a three-person panel and each panelist rated the employee as the number two candidate. The employee was convinced they should have been selected and the only reason they could not have been was because of a discriminatory basis. Management was convinced the process was sound but was willing to listen to the employee and explore some resolution. However, the employee was convinced they should have been promoted and would not settle for anything less than the promotion.

As a facilitative mediator, I was prevented from evaluating the basis for non-selection. The case was not resolved through mediation and continued through the administrative process. Two years later the EEOC upheld the agency's non-selection. Had the evaluative mediation been available, I may have been able to provide a reality check for the employee and help the parties craft a reasonable resolution that met each side's needs. However, prior to using evaluative mediation, the agency should make an appropriate determination that the circumstances warrant its use. The most appropriate office to make the determination is each Agency's general counsel

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<sup>48</sup> Mediations are generally confidential. However, AFI 51-1201 paragraph 5.3.2.3.3 allows information from dispute resolution proceedings to be gathered and disclosed for research or educational purposes as long as the parties and specific issues in controversy are not identifiable.

office. Upon referral from an installation's EO office, the Agency's general counsel office should evaluate the complexity of the case, mediator availability, and appropriateness of evaluative mediation before making the final recommendation to use it in the given case.

### **Conclusion: The Potential Value of Adding Evaluative Mediation**

The value of mediation is instantly recognizable when comparing the costs, time, and money of traditional dispute resolution through legal proceedings to ADR. Recent analysis shows the average number of days to close an EO formal complaint without the benefit of ADR (e.g., settlements, final agency decisions, decisions after administrative hearings, etc.) is 529 days.<sup>49</sup> However, the average number of days for an EO office to close a case through ADR settlements is 44,<sup>50</sup> a difference of 485 days! Although the case processing time is greatly reduced through ADR, only about 50% of cases appropriate for ADR actually get mediated due to party reluctance or case complexities.<sup>51</sup> Supplementing the facilitative model with evaluative mediation may be a way to catch some of the other 50% of cases that aren't being mediated at the early stages. Even if only 20% of the cases that are not using the facilitative model ended up using the evaluative model as an alternative, significant savings could result. For example, the Air Force estimates cost of litigation through the full federal administrative process is \$24,088.<sup>52</sup> If an Agency were to resolve an additional 15 cases per year through evaluative mediation it would save \$361,320 in litigation costs. Therefore, if each of the four branches of the military

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<sup>49</sup> 2014 Air Force ADR Program Report, *supra* n. 11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* For example, in 2015 the Air Force identified 593 cases as being appropriate for ADR with mediation being actually attempted in 302 of those cases. See 2015 Secretary of the Air Force ADR Program Report, (22 February 2016).

<sup>52</sup> *Id.* It should be noted that this cost does not factor in the additional cost of the actual investigation, which can be between \$4 and \$10,000. Additionally, if the Complainant prevails at a hearing they may be entitled to damages and attorney fees, which significantly increases the cost to the Air Force.

resolve an additional 15 complaints per year, the DoD could save over \$1.4 million in litigation costs. It should also be noted that during extended litigation periods, the parties are most likely still interacting in the workplace, which may have a detrimental impact on morale. Therefore, there is both a significant cost benefit to early resolution through mediation as well as potential morale and productivity benefits. Because of the potential costs savings, DoD agencies should consider a 2-3 year trial period for evaluative mediation. This would require making at least three trained mediators available to mediate cases determined appropriate by the respective general counsel offices. If successful, at the end of the trial period, Agency decision makers would have the option to make the policy change a permanent option available in EO complaints.

The facilitative model of mediation is an effective tool for the DoD in resolving EO complaints early in the process. Although not a perfect solution, supplementing the facilitative model with evaluation in limited circumstances may be a way to resolve some complex complaints that are not being mediated early in the process that can result in significant time and cost savings.