



# DIRECTIVE

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**Subject: ALTERNATIVE DISPUTE RESOLUTION PROGRAM**

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**Number: D-622**

**Approved:**

**Review:**

**Certified:**

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**Responsible Office: Office of the General Counsel**

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1. PURPOSE. This Directive delineates the policy by which the Defense Nuclear Facilities Safety Board (Agency) utilizes Alternative Dispute Resolution (ADR) to resolve workplace conflicts and disputes, contractual disputes, and other disputes that arise during the course of Agency operations. This Directive also establishes a framework for encouraging the expanded use of ADR and encourages the appropriate use of ADR techniques to resolve conflicts.
2. CANCELLATION. AP 232.1, *Alternative Dispute Resolution Program*, dated April 1, 2005.
3. APPLICABILITY. This Directive applies to all current Agency employees.
4. EXEMPTIONS. None.
5. POLICY.
  - A. The Board is committed to the appropriate use of ADR for resolving conflicts and disputes in a more timely, less costly, and less adversarial manner than litigation or administrative adjudication. Agency offices should use ADR techniques as an alternative to litigation or formal administrative proceedings, whenever appropriate.
  - B. It is Board policy to encourage its employees to use ADR to help resolve disputes as early as feasible, to the maximum extent practicable, in an appropriate and cost-effective manner, and at the lowest organizational level. ADR will be conducted in accordance with the principles outlined in Attachment A, *ADR Core Principles*.
  - C. Disputes where Agency employees should consider the use of ADR include but are not limited to:
    - i. Contract disputes with private sector companies.
    - ii. Litigation brought by or against the Agency.
    - iii. Employment discrimination complaints.
    - iv. Other workplace disputes.

- D. The decision to use ADR to resolve disputes requires informed judgment.
- i. Employees should weigh the following factors in determining whether ADR is appropriate for a particular conflict: the employee's working relationships, his or her interest in retaining control over the process, the need to resolve the conflict quickly, and the need for neutral involvement.
  - ii. Additional factors the Parties and the Dispute Resolution Specialist (DRS) should consider in deciding whether to use ADR are contained in Attachment B, *ADR Considerations*.
  - iii. Some disputes are typically not appropriate for ADR, including criminal actions, insider threats, and security related issues. The Agency should exercise caution before entering into an ADR process in any of these areas.
  - iv. The final decision to use ADR always rests with the Parties involved.
- E. The Agency will consider using ADR in the precomplaint and formal complaint stage of equal employment opportunity (EEO) complaints.
- i. ADR proceedings in employment discrimination complaints will be conducted according to the following principles:
    - (1) Voluntariness: the Parties knowingly and willingly enter into ADR, can end the proceeding at any time, and retain the ability to re-enter the traditional EEO complaint process.
    - (2) Neutrality: the ADR proceeding is impartial and not controlled by either Party. The Neutral must not have a stake in the outcome of the proceeding.
    - (3) Confidentiality: the neutral and Parties must maintain confidentiality of proceedings. Records or communications generated as part of the ADR proceeding may not be made a part of the EEO complaint record.
    - (4) Enforceability: any agreement resulting from an ADR proceeding must be signed by both parties. No agreement having a material effect on the Agency staffing plan may be made without the consent of the Board.<sup>1</sup> The Equal Employment Opportunity

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<sup>1</sup> Actions having a material effect on the Agency staffing plan include but are not limited to: increasing the number of agency staff, shifting full time employee (FTE) positions from one administrative unit to another, and changing the location of an FTE position to a Department of Energy site. The Agency staffing plan is revised annually by the Board and should be reviewed by the parties to ensure the agreement does not have a material effect on any provision within the current plan. If in doubt, the consent of the Board shall be obtained.

Commission enforces any agreement meeting the requirements in 29 C.F.R. § 1614.504.

- ii. While the decision to offer ADR in any particular EEO complaint is up to the Agency's discretion, the Agency will not decline to offer ADR in any particular case because of the discriminatory basis involved (e.g., race, color, religion, national origin).
- iii. The Agency will make reasonable efforts to voluntarily settle EEO complaints as early as possible and throughout any ADR process.

6. REQUIREMENTS.

- A. The Agency shall establish and maintain an ADR program.
- B. The ADR program shall be available to resolve internal and external disputes, as appropriate.
- C. The ADR program's efficacy shall be evaluated on a yearly basis.
- D. The Dispute Resolution Specialist shall be responsible for implementing, managing, and reporting on the ADR program.

7. RESPONSIBILITIES.

- A. The Chairman shall designate a senior official within the Office of the General Counsel to be the DRS, or delegate this responsibility to the General Counsel.
- B. The Chairman shall annually evaluate the report from the DRS and direct any needed program changes to the General Counsel.
- C. The General Counsel shall supervise and direct the ADR program.
- D. The General Manager shall decide whether to offer ADR in any case in which the Agency is a party.
- E. More detailed responsibilities for the DRS, Office Directors, Supervisors, Employees, and Neutrals are described in OP-622.1, *Alternative Dispute Resolution Procedures*, which supplements this Directive.

8. CONTROLS AND MEASURES. The DRS shall annually evaluate the efficacy of the ADR program and report his or her findings to the Chairman.

9. REFERENCES.

- A. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

- B. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).
- C. Administrative Procedure Act § 2, 5 U.S.C. § 551 (2012).
- D. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 7, 1996).
- E. Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (Oct. 27, 1995).
- F. 29 C.F.R. §§ 1614.102(b)(2), .105(f), .108(b), .504, .603 (2015).
- G. Memorandum on Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking, 1 Pub. Papers 663 (May 1, 1998).
- H. Board, D-111.1, *Equal Employment Opportunity Program* (2007).
- I. Board, AD-32-1, *Disciplinary and Adverse Actions* (1992).
- J. Board, D-151.3, *Employee Grievances* (2012).
- K. Board, OP-622.1, *Alternative Dispute Resolution Procedures* (2016).
- L. U.S. Equal Employment Opportunity Commission, Management Directive 110, Chapter 3, Alternative Dispute Resolution (2015).
- M. Interagency Alternative Dispute Resolution Working Group, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators* (2006).

## 10. DEFINITIONS.

- A. Alternative Dispute Resolution (ADR). Any procedure, excluding litigation and grievance, that is used to resolve issues in controversy, including, but not limited to conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, ombuds, or any combination thereof.
- B. 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 that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.
- C. Dispute Resolution Specialist (DRS). A senior official designated by the General Counsel who is responsible for developing and implementing the Agency's ADR policy and program. The DRS shall be trained in the theory and practice of negotiation and mediation.

- D. Employee. All individuals currently employed by the Agency and contract employees with whom the Agency has an employer-employee relationship. Whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance.
- E. In Confidence. With respect to information, this means that the information is provided (A) with the expressed intent of the source that it not be disclosed; or (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.
- F. Issue in Controversy. An issue which is material to a decision concerning a Agency administrative matter and with which there is disagreement: (1) between the Agency and persons who would be substantially affected by the decision; or (2) between persons who would be substantially affected by the decision.
- G. Neutral. An individual who, with respect to an Issue in Controversy, functions specifically to aid the Parties in resolving the controversy.
- H. Party. For a proceeding with named parties, a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes; and, for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding.
11. CONTACT. Address questions concerning this Directive to the Office of the General Counsel.

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Joyce L. Connery, Chairman

**ATTACHMENT A  
ADR CORE PRINCIPLES**

**Fairness:** The ADR Program must be fair to the participants, both in perception and reality. Fairness should be manifested throughout ADR proceedings by, at a minimum: providing as much information about the ADR procedures to the parties as soon as possible; providing the right to be represented throughout the proceedings; and providing an opportunity to obtain such assistance as necessary to any party who is not represented.

**Confidentiality:** All ADR processes should assure confidentiality consistent with the provisions in the Administrative Dispute Resolution Act of 1996. Outside of the ADR proceeding, neutrals should not discuss confidential communications, comment on the merits of the case, proceed outside of the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask mediators to reveal confidential communications. For implementation and reporting purposes, the details of a final agreement can be disseminated to specific offices with a need to have that information.

**Neutrality:** Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. For example, they should not also serve as counselors or investigators in that particular matter. Participants in mediation should have the right to reject a specific mediator and have another selected who is acceptable to the parties.

**Preservation of Rights:** Participants in mediation should retain their rights to other means of dispute resolution, such as formal complain processes or litigation, to have their dispute resolved if a mutually acceptable resolution is not achieved in mediation.

**Self-determination:** ADR processes should provide participants an opportunity to make informed, un-coerced, and voluntary decisions.

**Voluntariness:** Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be provided with appropriate information to decide whether to use ADR. Such information should be provided on the Agency website and given to participants prior to any decision to enter an ADR proceeding.

**Representation:** All parties to a dispute have the right to be accompanied by a representative of their choice and at their own expense.

**Timing:** The use of ADR should be encouraged at the earliest possible time and at the lowest possible level in the organization.

**Ethics:** Mediators should follow applicable professional requirements and guidelines.

**ATTACHMENT B  
ADR CONSIDERATIONS**

A decision to use ADR may be made before or after a dispute arises. Several factors should be considered in making that decision. Some factors may favor the use of ADR while others may weigh against its use. Although not intended to be an exhaustive list of factors, the Agency has determined that ADR may be helpful in resolving a particular dispute where one or more of the following factors are present:

1. *Identifiable Parties.* There is an identifiable group of individuals with interests (the parties) so that all foreseeable interests can be represented.
2. *Good Faith.* The parties are willing to participate in good faith.
3. *Communication.* The parties are interested in seeking agreement, but poor communication or personality conflicts between the parties adversely affect negotiations.
4. *Continuing Relationship.* A continuing relationship between the parties is important and desirable.
5. *Issues in Controversy.* There are issues that are agreed to be ripe for a negotiated solution.
6. *Unrealistic View of the Issues.* The parties' demands or views of the issues are unrealistic. A discussion of the situation with a neutral party may increase the parties' understanding and result in more realistic alternatives and options.
7. *Sufficient Areas of Compromise.* There are sufficient areas of compromise to make ADR worthwhile.
8. *Expectation of Agreement.* The parties expect to eventually agree, most likely before engaging in other formal resolution processes.
9. *Timing.* There is sufficient time to negotiate, and ADR will not unreasonably delay the outcome of the issue in controversy. ADR will most likely result in an earlier resolution of the issue in controversy than other formal processes.
10. *Resources.* The parties have adequate resources and are willing to commit them to the process.

There are also factors that suggest that ADR should not be used. The Administrative Dispute Resolution Act provides factors that suggest that ADR may be inappropriate or may not be productive in a particular dispute resolution proceeding. These factors are as follows:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent;

2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the Agency;
3. Maintaining established policies is of special importance so that variations among individual decisions are not increased, and an ADR proceeding would not likely reach consistent results among individual decisions;
4. The matter significantly affects persons or organizations who are not parties to the proceeding;
5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record; and
6. The Agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances, and an ADR proceeding would interfere with fulfilling that requirement.



**AFFIRMATION OF BOARD VOTING RECORD**

**SUBJECT: Alternative Dispute Resolution Program**

**Doc Control#2016-300-040**

The Board, with Board Member(s), Joyce L. Connery, Jessie H. Roberson, Sean Sullivan, Daniel J. Santos, Bruce Hamilton *approving*, Board Member(s) none *disapproving*, Board Member(s) none *abstaining*, and Board Member none recusing, have voted to approve the above document on December 12, 2016.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING*	COMMENT	DATE
Joyce L. Connery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	12/08/16
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	12/09/16
Sean Sullivan	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	12/09/16
Daniel J. Santos	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	12/12/16
Bruce Hamilton	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	12/08/16

\*Reason for Not Participating:

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.

  
 Assistant Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

cc: Board Members  
 OGC  
 OGM Records Officer  
 OTD

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Joyce L. Connery

**SUBJECT:** Alternative Dispute Resolution Program

**Doc Control#2016-300-040**

**Approved**  **Disapproved**  **Abstain**

**Recusal – Not Participating**

**COMMENTS:** **Below**  **Attached**  **None**

  
\_\_\_\_\_  
**Joyce L. Connery**

**Date**

Dec 8, 2016

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Jessie H. Roberson

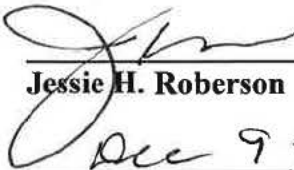

**SUBJECT:** Alternative Dispute Resolution Program

**Doc Control#2016-300-040**

**Approved**  **Disapproved**  **Abstain**

**Recusal - Not Participating**

**COMMENTS:** **Below**  **Attached**  **None**

  
\_\_\_\_\_  
**Jessie H. Roberson**  
  
\_\_\_\_\_  
**Date**

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM: Sean Sullivan**

**SUBJECT: Alternative Dispute Resolution Program**

**Doc Control#2016-300-040**

Approved   X                        Disapproved                             Abstain       

Recusal – Not Participating       

COMMENTS:      Below             Attached             None   X  



**Sean Sullivan**

12/9/16  
**Date**

**Shelby Qualls**

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**From:** Daniel J. Santos  
**Sent:** Monday, December 12, 2016 9:01 AM  
**To:** Dana Hienz; Shelby Qualls  
**Subject:** RE: Notational Vote: Doc#2016-300-040 Alternative Dispute Resolution Program Blue Folder

Approved.

**From:** Dana Hienz  
**Sent:** Thursday, December 08, 2016 3:44 PM  
**To:** Bruce Hamilton [REDACTED]; Daniel J. Santos [REDACTED]; Jessie Roberson [REDACTED]; Joyce Connery [REDACTED]; Sean Sullivan [REDACTED]  
**Cc:** Lotus Smith [REDACTED]; Shelby Qualls [REDACTED]; Donita Vines [REDACTED]; Dana Hienz [REDACTED]; Nora Khalil [REDACTED]  
**Subject:** Notational Vote: Doc#2016-300-040 Alternative Dispute Resolution Program Blue Folder

This email is an electronic record of Notational Vote. Voting ballot will follow shortly. Also, accepting electronic votes.

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD  
NOTATIONAL VOTE RESPONSE SHEET**

**FROM: Members of the Board**  
**SUBJECT: Alternative Dispute Resolution Program Blue Folder**

**DOC# 2016-300-040**

The approved amendment Doc#2016-300-040A has been incorporated in the final version. An RLSO is also attached to reflect changes made.

**Approved** \_\_\_\_\_  
**Disapproved** \_\_\_\_\_  
**Abstain** \_\_\_\_\_  
**Recusal – Not Participating** \_\_\_\_\_

**COMMENTS:**

**Below** \_\_\_\_\_  
**Attached** \_\_\_\_\_  
**None** \_\_\_\_\_

*Dana M. Hienz*  
Executive Office Assistant  
Office of the Chairman

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM: Bruce Hamilton**

**SUBJECT: Alternative Dispute Resolution Program**

**Doc Control#2016-300-040**

**Approved**  **Disapproved**  **Abstain**   
**Recusal – Not Participating**

**COMMENTS:** **Below**  **Attached**  **None**

  
**Bruce Hamilton**  
8 DEC 2016  
**Date**