

**PRE-MEDIATION ADVICE FOR COMMANDERS
AND AGENCY MANAGEMENT REPRESENTATIVES**

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Over the past year you've no doubt read and heard a great deal about the many benefits of mediation and the Agency's overwhelming support of Alternative Dispute Resolution and the RESOLVE Programs. You probably also know that the basic elements of mediation are to identify the interests of the parties and, if possible, develop a mutual agreement that both parties can accept.

Now you've been called to serve as the Agency's Management Representative at an upcoming mediation and you may not be clear on exactly what you can and should do to prepare yourself for the mediation. The most productive and successful mediations for the Agency begin long before the parties sit down to bargain. Here are some tips on what you can do that may make the entire mediation process more effective, productive, and satisfactory for all parties concerned.

First, you need to eliminate any mindset you might have that mediation is an adversarial proceeding. Neither party has a burden of proof to establish in mediation, as you would in a formal EEO or MSPB case, and there is no determination of fault or blame. The goal of mediation is to identify the issues, explore settlement solutions, and preserve or mend the working relationship. Keep in mind that the Complainant feels strongly that he/she has been wronged by the Agency, and has sought some kind of relief by contacting the EEO Office. The Complainant has agreed to mediate in an attempt to resolve the complaint at the early informal stage. You have been named to serve as the Agency's Management Representative because you have the power and authority to explore options to resolve an issue in dispute without costly litigation.

Second, you need to learn all you can on **why** there is a dispute. The EEO Office will provide you with a copy of the RESOLVE EEO Pre-Complaint Intake Form. The form will outline the nature and date of the dispute, the type(s) of discrimination alleged, and the issues identified for mediation. You may need to make some confidential inquiries to your managers to obtain a better understanding of the Complaint. You'll have a distinct advantage if you know the facts and underlying issues of the complaint before the mediation.

Third, take time to analyze the case. Remember to focus on the issues and interests important to management, not the personalities of the parties involved. Think about the strengths and weaknesses of the government's actions or position. Is this a case that management can settle by making some minor concessions? What are the risks and benefits? Are there other employees in that work area with similar complaints? Think about the strengths and weaknesses of the Complainant's case. Put yourself in the Complainant's shoes and think about what would make you whole if you were in this

person's situation. The key is to explore all possible options for resolving the complaint. It might not be just reassignment, money, or elimination of an adverse action. There may be other intangibles or types of compensation that can be offered. But consider the impact on the activity. Remember that you will have to implement and live with any agreement reached. Again clarify management's interests (wants, needs, fears, and concerns.) Identify possible standards (Union agreements, precedents, prior practice, and accepted principles.) Plan a strategy. **Think about what you want, why you want it, and what you are willing to give in return.** Be creative. The time spent in planning will pay plenty of dividends during the mediation process. Planning helps you make concessions, compromises, and justify your interests as negotiations proceed. Planning prevents accepting a bad deal because you were unaware of the alternatives or the ramifications involved.

Fourth, make sure you can implement the possible solutions. Talk in advance with Personnel, Legal, higher level managers, or depot/DDC Command, if necessary. Make this a team effort. Perhaps you're considering separating the Complainant and the manager for a cooling off period. Can the employee be temporarily reassigned? Are there any vacancies? Might another employee "swap" jobs for a while? Will another manager be willing to have the employee transfer in to their area? Will there be seniority or union issues? Can an adverse action be rescinded or mitigated? Could the settlement agreement serve as memorialization of the first offense, and any subsequent act of misconduct be considered the second offense? If we have exposure and a monetary settlement is being considered, what are the limitations? Remember that Settlement Agreements are confidential. Can you implement the resolution with a minimum of disruption to your organization? The bottom line here is make sure you can do it before you offer it.

If the mediation deals with a performance-based action, you'll need to review the employee's performance standards, critical elements, performance appraisals, production reports, samples of the employee's work product that substantiate the unacceptable performance, documentation concerning any efforts your managers made to assist the employee (counseling/training), and documentation establishing that the employee was afforded the opportunity to demonstrate acceptable performance but did not do so. For misconduct cases, review any correspondence regarding the incident, counseling records, and the employee's comments on the Form 8. Learn more about the employee, specific instances of poor performance or misconduct, and the justification for the action taken. Look at the discipline imposed or action taken for acts of poor performance or misconduct of other subordinate employees. Is management consistent? Is there an animus? If you were the manager and were faced with the employee's nonperformance or misconduct, would you have handled the situation the same way?

Finally, when you're in mediation, listen very hard to what the Complainant has to say. Shed any assumptions about what you think the issues are and what you think they want. Turn off the part of your brain that wants to engage in a silent rebuttal every time the Complainant speaks, and instead, listen to what they are saying. It may be emotional. It may not be pleasant. It may take a several hours (be sure to have your

calendar clear.) Be logical, reasonable, persistent, and patient. Let the mediator work their tools and open the lines of communication and negotiation. You may be surprised that all many Complainants want is to have someone from higher management listen to them as they explain issues from their perspective. If you have considered the suggestions made above, you'll know the facts, be prepared to discuss the issues, defend management's actions if warranted, and offer possible solutions. The mediation will flow, and will likely be very productive. You may be surprised of the strong liaison, trust, and credibility you establish with the Complainant from the mediation session. Some of the strongest advocates we have of mediation in DLA are former Complainants – not because they got what they wanted, but because a member of management cared to listen to them and helped them develop a mutually satisfactory resolution.

Give these suggestions a try. They may make all the difference in your success as an effective Management Representative. If you have any questions, comments, or concerns, please contact a member of the DDC Office of Counsel at DSN 977-6310 or 462-9262.