

ADR LAW NOTES



Legal Developments, Issues and Other Matters of Interest Concerning Alternative Dispute Resolution

DLA ADR Homepage at:

<http://www.dscc.dla.mil/offices/legal/adr/adr.html> or www.dla.mil/dg/Links.asp

Defense Logistics Agency ADR Practice Group

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THE TRIALS AND TRIBULATIONS OF A TRAVELING MEDIATOR

I have been very fortunate to travel to a number of DDC and DLA locations to mediate cases, but admittedly, have encountered some unusual logistical challenges “on the road.” I’ve learned that pre-mediation planning is essential, and if Plan A does not work, sometimes you need to go to Plan B or Plan C.

My biggest problem has always been preparing settlement agreements while on the road. I used to tug along a laptop, but many times encountered connectivity and printing problems. I then put the boilerplate agreements on thumb drives, CD’s and disks, and requested that a computer and printer are available in the mediation room. Now that thumb drives, CD’s and disks are prohibited by DOD, I coordinate with the IT folks at the destination to insure they can get me into Outlook to open my mail via my CAC card. I then attach a copy of the boilerplate agreement and send it to myself by email. Upon arrival, I’m able to open up my email, then open the document in Microsoft Word, and complete the terms of the agreement.

Seems like a pretty easy solution, but it’s not always a perfect world. I travelled to DDWG (Warner Robins AFB) recently for mediation. I thought I had everything under control. I had contacted the parties involved and sent them pre-mediation guidance. I coordinated with the management representative for a conference room with a computer and printer. The IT folks were prepared to get me access to Outlook, as they have done in the past. I got to the location early to prepare the room and seating, as well as turn on the computer and bring up the settlement agreement. Then it happened – I entered my CAC

PIN number incorrectly and was denied access. Darn nails. (If you enter an incorrect PIN number five times, you get locked out of the CAC System. Apparently, I entered my PIN incorrectly four times before and did not know of this rule.)

The IT folks came to my rescue and told me to go to Security to get my CAC access unlocked. As I had 40+ minutes until the start of the mediation, I thought I’d have plenty of time. When Security attempted to match my fingerprints they became very perplexed. My fingerprint on my right index finger pad was a big black blob. They cleaned the scanner and pressed my finger at every possible angle for a half an hour to try to bring up a readable print. They brought in other personnel to try to help, without success. Finally someone asked if I had used Super Glue or Comet lately. I had broken an acrylic nail fumbling with my suitcase the day before, and had to repair it with Super Glue. I can really make a horrible mess with Super Glue. The glue had become embedded in the crevasses of my finger and obliterated my fingerprint. As there was no way I could produce a fingerprint that would have given me access by CAC, the IT folks worked miracles and obtained J-6 HQ’s one time approval for me to have non-CAC access to the computer system and my document. Fortunately, we got a settlement on that case so the efforts of many were not in vain.

I spent the next day traveling to Texarkana, TX, for another mediation, repeatedly using an emery board on the pad of my finger and rubbing in lotion. When I arrived at DDRT Security my fingerprint had reappeared and my CAC access was renewed! When I arrived back at DDJC, Security scanned all my fingers/thumbs on both hands and put the prints on record in the CAC System. Now, if I ever enter the incorrect PIN number AND have a Super Glue incident

again (and I probably will), I'm ready.

As for lessons learned, emailing the boilerplate agreement works very well for me. I'm also now sending a copy of the agreement to the management representative participating in the mediation. In the event I'm locked out of the system, that person can bring up the agreement utilizing their CAC card, and we can make a seamless transition from problem solving to development of settlement terms. I'm also keeping note of the amount of times I enter an incorrect CAC number. When I get to four, I plan to rush to Security for resetting of my CAC. I also recommend having more than one finger scanned for your fingerprint on CAC. Security Specialists recommend this for all, especially if you use solvents, glues, and/or cleansers. They advise that Comet (sink cleaner) is the worst offender, and it can make your fingerprints unreadable over time. Finally, I try to stay away from Super Glue.

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DLA OMBUDSMEN FOR PROCUREMENT INTEGRITY

Pursuant to an October 1, 2009 DOD Memorandum, DLA has appointed at each activity an Ombudsperson for Procurement Integrity. Those appointed are the chiefs of their respective contracting offices. In their collateral duty as ombudspersons, they are to "provide a neutral, informal, confidential and independent alternative for employees, managers and customers to seek assistance in resolving procurement integrity issues."¹ This position is different from the Ombudsman for Task and Delivery Orders which is to be used to review complaints from contractors as referenced in FAR 16.505 (b) (6).

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DLA ADR ONE BOOK CHAPTER IS NOW A DLA INSTRUCTION

The DLA ADR One Book Chapter is now DLA Instruction, Alternative Dispute Resolution (unnumbered). The information previously listed in the body of the One Book Chapter can now be found in the body of the Instruction plus enclosures 1, 2, and 3.

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FOCUS ON ADR TO RESOLVE FOIA DISPUTES

Although ADR has always been available to resolve FOIA disputes, it is now receiving new status and emphasis in the FOIA world. In 2007, Congress passed the Open Government Act, which, among other things, amended FOIA to create an Office of Government Information Service (OGIS) within the National Archives and Records Administration. Part of the purpose of this office is to offer mediation services to resolve disputes between agencies and those making FOIA requests. The increase in FOIA workload, combined with the Administration's policies on open Government, make ADR a natural fit for FOIA disputes.

At a January meeting with the DoD ADR Coordinating Committee, OGIS Director Miriam Nisbet stressed that her office will rely on agencies as much as possible to use their own ADR resources when mediation opportunities arise. Recognizing agency expertise in specific subject matter areas, Ms. Nisbet noted that "resolving things in-house is the best solution." However, her office, sometimes referred to as the FOIA Ombudsman, will be available as a resource. She also stressed that, while she encourages mediation at any stage of a dispute, her focus is before the dispute becomes docketed litigation. Although OGIS only opened officially in September of 2009, they have already received many requests for help (mostly from requestors, but also from agencies), on both substance and process issues. Mr. Jim Hogan, DoD FOIA officer, also spoke at the program, encouraging the use of ADR in resolving FOIA disputes, and supporting mediation training for FOIA officers to familiarize them with ADR and its benefits.

¹ Office of the Under Secretary of Defense October 1, 2009 Memorandum, Subject: Ombudsman for Procurement Integrity

DLA ADR Specialists should be aware of the new ADR focus in FOIA, to help FOIA clients with mediation training, answer questions that FOIA officers may raise on the new law and OGIS's role, and to help make ADR available to resolve FOIA disputes. For more information on OGIS, see www.archives.gov/ogis, or call them at 1-800-837-1996.

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