

ADR LAW NOTES



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

Defense Logistics Agency ADR Practice Group

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MEDIATION RESOLVES SUPERVISOR-ASSOCIATE DISPUTE

The willingness of a supervisor and an associate to use mediation as a method to resolve several outstanding disputes resulted in the resolution of multiple long standing conflicts and the establishment of a new and stronger working relationship between the parties.

When a new supervisor was assigned to an existing team, supervisor-associate misunderstandings and disputes arose. Those conflicts led to increased communication problems, a deteriorating work relationship and productivity losses. Discipline issues arose and the matters were moving step by step along the negotiated Labor/Management grievance process as discipline related decisions were being finalized.

In an effort to change the direction of the conflicts and try a different path, a meeting was convened with all the critical players in attendance: the supervisor, the associate, local counsel, senior management representatives, and a union representative. An experienced DLA mediator chaired the convening. During this process, open and honest discussions were exchanged between the parties. Concerns were aired and mediation was proposed as a dispute resolution technique. The mediator explained the general mediation process while emphasizing the privacy benefits of mediation as well as the control the parties' have over both the mediation and the results. The mediator helped shape the parties' concerns and goals into a mediation format which was agreed to by all. The agreement to mediate provided for the supervisor and associate to meet privately with the mediator, without the

advocacy participation of legal counsel or the union

representative. (Counsel and the union representative were available for consultation throughout the mediation process).

The mediation was conducted four days after the conveying. After a five-hour session, agreement was reached on all of the issues. The agreement addressed old disputes and established a mechanism to prevent future misunderstandings. At the mediation's conclusion, the associate and supervisor were talking to each other as team members and as converts to the mediation process.

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ADR TALK AT NCMA CHAPTER MEETING

A DSCP attorney spoke about DSCP's ADR Program at the local chapter of the National Contract Management Association. Most of the attendees were employees of government contractors who had little or no experience with ADR. The audience had many questions concerning the use of ADR techniques, especially mediation, in resolving Government contract disputes. Feedback from the audience after the speech was uniformly positive. Several contractors who had dealings with DCMC stated that they would now consider requesting ADR to help resolve contract disputes they had with the government.

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THE FIRST AGENCY MEDIATED PROTEST UNDER DSCR'S PILOT PROJECT

The first mediation under DSCR's pilot project of Mediated Agency Protests was conducted at DSCR on April 6, 1999. The session was co-mediated by a member of the DSCR Office of Counsel and a DSCR Commodity Services branch chief. Both New Pig Corporation (NPC), the protestor, and DSCR were represented by counsel.

The protest concerned a DSCR solicitation for oil sorbents, also known as mat rolls. The item description included a list of five acceptable manufacturer's part numbered items. NPC was neither a known nor an accepted source of supply. The solicitation also provided for the submission of alternative offers that met the following three requirements: 1) Each roll absorb at minimum 65-gallons of medium viscosity oil, 2) Each roll measure 38 inches by 144 feet, and 3) Each roll have static resistant properties. NPC protested that the requirement for a 65-gallon absorbency rate was overly restrictive.¹

During the mediation, NPC through its counsel, John Howell of Squire, Sanders & Dempsey, advised that in house testing established only one of the five listed part numbers met the 65-gallon absorbency requirement. NPC also requested the requirement for static resistance be changed to reflect a specific anti-static level. DSCR explained that users of the rolls required various anti-static levels and consequently, it would not be in the government's best interest to make this requirement more specific. However, DSCR identified that the 65-gallon absorbency rate was larger than the government's need. A settlement was reached

¹ Originally, NPC protested both the absorbency and size requirements, but prior to the mediation, withdrew its protest concerning size.

whereby the solicitation would be amended to require 1) a 52 gallon minimum absorbency rate, and 2) a test report from all offerors establishing that an independent testing lab verified their product met the absorption rate.

All parties to the mediation were focused on obtaining a common ground and maintaining an open dialogue. As stated by NPC's counsel, the mediation was the best avenue for his client in terms of both time and money spent as well as in the opportunity to directly address issues.

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U.S. CORPORATIONS WIDELY USE ADR

According to a survey of the nation's top corporations, ADR is now widely used in U.S. corporations to resolve complex business disputes. The survey was a joint initiative of Cornell University, the Foundation for the Prevention and Early Resolution of Conflict, and Price Waterhouse LLP. More than 530 corporations in the Fortune 1,000 category were polled for the survey. Corporate respondents were identified as the general counsel, deputy counsel or chief litigator.

Cost effectiveness was listed as a principal reason for the widespread use of ADR and mediation was identified as the most often used ADR technique, with arbitration second. Approximately half of the respondents expressed a lack of confidence in the arbitrator, while approximately thirty percent exhibited a lack of confidence in the mediator. Nevertheless, the corporations seemed satisfied using ADR to resolve disputes. For more information about the survey, contact the Institute on Conflict Resolution at Cornell University.

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