

# ***The U.S. Army Alternative Dispute Resolution Program***

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***Annual Report  
2009***

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*Army ADR Program Office  
Office of the General Counsel*

*April 21, 2010*

# **Army Alternative Dispute Resolution Program Annual Report for 2009**

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**ANNUAL ADR REPORT FOR 2009**  
**EXECUTIVE SUMMARY**

Army ADR policy and program responsibility are housed in the Office of the General Counsel. In January 2008, OGC established the Army ADR Program Office to implement Army ADR policy encouraging the use of ADR whenever appropriate to resolve Army disputes as early as possible, by the fastest and least expensive means available, and at the lowest organizational level. Creation of the ADR Program Office in OGC brings the Army into line with the other Military Departments. The ADR Program Office consists of a full-time program director and two full-time attorneys to develop ADR initiatives in the areas of civilian workplace disputes and government contract disputes. A recently approved concept plan and associated funding will add a full-time office manager to the ADR Program Office's staff.

The Army ADR Program's vision, mission and strategic goals are all geared to increasing the Army's use of ADR to resolve disputes more efficiently and effectively. The keys to meeting these goals are command support, training, and quality ADR resources at individual activity levels, where the majority of dispute resolution takes place. Since ADR and other self-directed settlement efforts are voluntary, the parties to a dispute have to want to use it. Therefore, training Army personnel in what ADR is, how it is used, and how to conduct it, is the foundation of any successful program. Accordingly, building and sustaining a viable ADR training program has been Job One for the ADR program since its inception in 2008, and we made significant progress toward that goal in 2009.

Over the course of 2009, the ADR Program Office developed and delivered the first ever Army Basic Mediation Course to new Army mediators at five Army locations, at little or no cost to the host installation. In addition, the ADR Program Office arranged with the Civilian Human Resources Agency (CHRA) to host and fund a one-week mediation course as part of its residential curriculum at its training facility at Aberdeen Training Ground, beginning in 2010. We aim to make this one-week course permanent, to be offered at least annually. In addition to mediation training, the ADR Program Office designed and conducted workshops for EEO officers, counselors, and labor attorneys at two IMCOM-sponsored events: the Multi-Functional Conference in Kansas City in April 2009, and the Installation Management Institute Conference in Atlanta in June 2009. From these sessions, the ADR Program garnered several requests for training, briefings, and assistance for local ADR program development.

The ADR program in 2009 continued to work on establishing a dedicated program budget to help fund training and other initiatives to increase the Army's ADR utilization. Securing adequate funding has been a continuing challenge for the program, given current budget constraints, and 2009 was no exception. However, we have been able to supplement internal funding with resources from requesters and instructional support from DoD and other components to provide high-quality training with a minimal budgetary footprint. We expect that pattern to continue for the foreseeable future.

As indicated in the FY 2009 Army ADR report to DoD (Enclosure 2), the Army uses ADR in most major dispute areas. Of particular note is the significant use of ombudsmen (an ADR process) to assist our Wounded Warriors and their families. ADR usage in workplace and acquisition disputes was comparable to FY08 levels. The ADR program for acquisition disputes was hampered in 2009 with the unexpected departure of the acquisition ADR attorney and the months-long search for a qualified replacement. Fortunately, the program found a highly qualified contract litigation attorney and ADR specialist with many years of DoD experience in DLA and the Air Force, so we believe we're back on track for 2010.

## **THE ARMY ADR PROGRAM ANNUAL REPORT FOR 2009**

### **1. Introduction**

The Administrative Dispute Resolution Act of 1996 (ADRA)<sup>1</sup> requires all federal agencies to establish policies addressing the use of alternative dispute resolution (ADR) in their dispute resolution procedures. Similarly, DoD Directive 5145.5 requires all Components to establish policies and programs to promote the voluntary use of ADR to resolve disputes.<sup>2</sup> ADR is a collective term that describes a variety of relatively informal processes that are generally used to resolve disputes in lieu of litigation. ADR proceedings typically use a neutral third party to assist the parties in resolving issues in controversy, and include mediation, arbitration, facilitation, and ombuds. Army has had an ADR policy since 1995, but there was no centralized implementation of that policy until 2007 (Enclosure 1). Current Army ADR policy as reflected in Enclosure 1 designates the Principal Deputy General Counsel as the Army Dispute Resolution Specialist<sup>3</sup> and directs that an ADR specialist be hired within the Office of the General Counsel (OGC) to centrally manage an ADR program for workplace and acquisition disputes.<sup>4</sup> The Army ADR Program Office opened in January 2008, and is staffed by a full-time director and two full-time attorneys to implement ADR in workplace and acquisition disputes. A manpower position for a full-time administrative assistant was recently approved, and will come on board when it is funded. The program office is located in leased office space in Arlington (Rosslyn) Virginia.

**2. Army ADR Program Vision, Mission and Strategic Goals.** The Army's ADR policy is to encourage ADR in appropriate cases, at the earliest stage feasible, by the fastest and least expensive method possible, at the lowest possible organizational level. ADR is a voluntary process (especially for the non-Army parties to the dispute); therefore, ADR mission and strategic goals must be aligned to encourage, not mandate, this use.

**A. Vision:** Instill world class conflict management and informal dispute resolution capabilities in all interested Army personnel, thereby reducing the costs of conflict, improving the quality of outcomes, and preserving resources for the Army's national security mission.

**B. Mission:** Promote and facilitate the use of ADR and other informal, collaborative conflict management methods in all Army activities, to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level, in support of DoD and Army business transformation objectives.

**C. Strategic Goals:**

- Establish and sustain an organic Army conflict management and dispute resolution capability at every level through delivery of world-class ADR and negotiation skills training to Army personnel.
- Formulate and implement coherent, consistent Army-wide ADR and conflict management policies that promote ADR as the first option to conflict and dispute resolution whenever practicable and appropriate.

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<sup>1</sup> Public Law 104-320, codified at 5 U.S. Code, §§ 571-584.

<sup>2</sup> DoDD 5145.5 will soon be replaced by DoD Instruction 5145.05, "Alternative Dispute Resolution." Significantly, the new DoD policy adds proactive dispute prevention and avoidance to components' ADR program portfolios.

<sup>3</sup> This is a statutory designation, required by Section 3 of the ADRA, 5 U.S.C. § 571 (Note).

<sup>4</sup> The establishment of a discrete ADR program office aligns the Army with the other Military Departments (MILDEPs) and with the Department of Defense, all of which have discrete ADR program offices operating within their respective General Counsel offices.

- Facilitate the provision of timely, high-quality third-party neutral and other ADR services to Army field activities whenever and wherever they are required.
- Identify and eliminate barriers to using or attempting ADR through outreach and awareness education at all echelons of each Army command.

### 3. ADR Program Budget and Manning

A. ADR Program Budget. A major responsibility tasked in the Jun 07 ADR policy memorandum is to submit and execute the ADR program budget. Over the years, the Army has lagged behind the other MILDEPs in execution of a Service-wide ADR strategy in part because of the lack of a dedicated ADR program budget. Since initial stand-up in early 2008, the ADR program has been working to establish an ADR Program budget and discrete accounting line as part of the OGC budget. FYs 08 and 09 were funded through Unfunded Requirements (UFR) requests as part of the overall OGC budget. The program's original POM submission for the FY10-15 cycle anticipated a funding requirement ranging from \$350,000 for FY10, to \$660,000 in FY15. In June 2009, our PBR 11-15 submission modified these figures slightly downward. Since then, as a result of our experience with travel and training costs in FY09, which make up the bulk of the ADR program budget, and in light of current budget constraints, we believe we can deliver the same services at significantly lower cost than was originally projected.<sup>5</sup> Accordingly, our POM submission for FY12-17 has reduced the range of requested funding to \$290,000 to \$400,000 per year (see Figure 1).

**Figure 1. FY10-15 Projected ADR Program Funding vs. FY12-17 Projected Funding.**

**FY10-15:**

FY10	FY11	FY12	FY13	FY14	FY15
\$350K	\$455K	\$615K	\$635K	\$650K	\$660K

**FY12-17:**

FY12	FY13	FY14	FY15	FY16	FY17
\$290K	\$363K	\$370K	\$370K	\$400K	\$400K

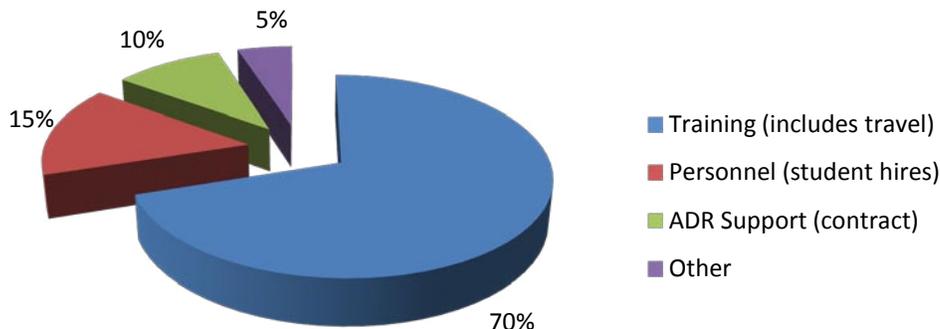
These figures put the Army ADR program somewhat below the other MILDEPs, despite the fact that the Army is considerably larger with more eligible dispute activity. However, our experience over the past year has been that training is much less a drag on ADR program funds than was originally thought. Moreover, we have successfully established partnerships for delivery of training programs with the Air Force and DoD ADR program offices, enabling us to supplement our own limited training resources. The result of these partnerships is to enable us to provide twice the training at about half the cost.

The bulk of ADR program funding is dedicated to travel to support the ADR training mission. This mission derives from Section 3(c) of the ADRA, as well as several of the program

<sup>5</sup> Original cost estimates for training were based on our experience managing training for the Air Force ADR program (both the program director and the deputy director came to the Army ADR Program from the Air Force program). A one-week mediation course would cost approximately \$10,000 for instructor and evaluator support. In contrast, our Army courses have shared these costs with the requesting activity and our training partners (Air Force and DoD ADR program), resulting in a much lower funding footprint per course for OGC.

responsibilities spelled out in the Jun 07 Army ADR policy memorandum. Accordingly, about 70 cents of every dollar proposed for ADR funding goes to support training. This includes travel for instructors and others involved in the training function and training materials/equipment. Figure 2 shows a relational breakout, by percentage, of the program's four major funding components.

**Figure 2. Distribution of Programmed Funding for ADR**



B. ADR Program Manning. Current ADR program manning includes the program director, an attorney who was originally hired as a “Highly Qualified Expert” under the authority of 5 U.S.C. § 9903. Effective FY 2010, the program director’s HQE position is being transitioned to a new YA-03 attorney position on the OGC Table of Distribution and Allowances (TDA).<sup>6</sup> Assisting the program director are two YA-03 attorneys who are responsible for implementing the ADR program in workplace and acquisition disputes. These positions are currently funded by ASA(M&RA) and ASA(ALT), but were recently approved as permanent OGC authorizations and will be funded as part of OGC’s civilian pay obligation. With the repeal of the National Security Personnel System, all three YA-03 ADR attorney positions will transition to the GS-15 grade level.

The ADR program office did not have dedicated administrative support in 2009, utilizing OGC main office administrative support on an as-needed basis. A concept plan for a full-time administrative assistant for the ADR program was recently approved. However, it is not anticipated that funding for the position will be available before FY12. To fill gaps in administrative support during the interim, we included ADR support duties in the position description of a new administrative assistant hire in the OGC front office, and we have included in our proposed budget for FY11 and beyond funding for one or two student hires under the Student Educational Employment Program (SEEP) administered by OPM.

As the ADR Program continues to ramp up, we anticipate a potential requirement for two additional attorney positions: one to expand the ADR program to environmental disputes (not currently an official part of our portfolio), with a main focus on the Army Corps of Engineers, and the other to back up the workplace ADR and training programs. Currently, both programs are being managed by one attorney, who also serves as the Deputy ADR Program Director. This is not sustainable for the long term, based on current training operations tempo.

<sup>6</sup> This transition became effective 31 January 2010, with the incumbent being competitively selected to fill the new YA-03 position.

#### **4. ADR in Workplace Disputes**

The ADR program for workplace disputes primarily focuses on the Army civilian employee community, although there are potential applications among military personnel as well. Workplace ADR activity in the Army is concentrated in discrimination complaints filed under Equal Employment Opportunity Commission complaint procedures in 29 C.F.R. Part 1614, but ADR is also used, to a lesser and more sporadic degree, in non-EEO workplace disputes, such as employee grievances, adverse personnel actions, and labor-management disputes. The discussion below highlights ADR activity in the EEO complaints program, and non-EEO workplace disputes.

A. ADR Utilization in Army EEO Complaints. The EEOC requires all agencies to have ADR available at both the informal and formal stages of the EEO complaint process. At the informal pre-complaint stage, ADR is one of two options for resolving the matter and avoiding a formal complaint. Once a formal complaint is filed, ADR is available, but is not an express alternative to the investigation and adjudication procedure mandated by EEOC. As a result, ADR is used much less frequently at the formal stage than it is at the informal stage of the complaint process.

ADR activity in both informal and formal phases of the EEO complaint process is tracked and reported to the EEOC every year via the EEOC Form 462, Annual Federal Equal Opportunity Statistical Report of Discrimination Complaints (the "462 report").<sup>7</sup> As shown in Figure 3, the following discussion pulls data from the Army's 462 report for FYs 2009 and 2008, as well as comparative data for all agencies for FY08 (the latest year available), found on the EEOC's website<sup>8</sup>. For our purposes, the critical data points are the percentage of cases in which ADR was offered by the Army activity processing the complaint (the *ADR offer rate*); the percentage of offers that were accepted compared to the total number of cases (the *ADR participation rate*), and the percentage of ADR cases in which a resolution was achieved (the *ADR resolution rate*).

(1) Informal Pre-Complaints. In FY 09, the Army reported offering ADR in 1100 informal cases, or 47% of the total volume of 2342 cases. This is the same offer rate as in FY 08. Of these 1100 offers, 555 (50.5%) were agreed to by the complainant, resulting in an overall ADR participation rate of 23.7%. This is a slight improvement over the FY08 participation rate of 22%. A settlement was reached in 202, or 36%, of the ADR cases. This is slightly higher than the 35% resolution rate reported in FY08. In addition to the 202 settlements reported, another 146 cases resulted in no formal complaint being filed, thus effectively terminating the dispute at the informal complaint stage.

(2) Formal Complaints. In its report to the EEOC, the Army reported closing 1222 formal complaints in FY09. Of these, there were 311 offers of ADR, for an ADR offer rate of 25.5%. This compares to a 28% offer rate in FY08. The offer of ADR was accepted in 218 cases (over 70% of the offers), resulting in an overall ADR participation rate of 17.8%. This is somewhat lower than the 20% participation rate reported in FY08. Resolution rates for ADR in formal complaints in FY09 were comparable to FY08. Of the 218 cases in ADR, 141 settled and another 10 were withdrawn, for a resolution rate of 69%, a modest increase over the 66% resolution rate reported in FY08.

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<sup>7</sup> ADR data for informal pre-complaints is reported in Part X of the EEOC Form 462. ADR data in the formal complaint phase is reported in Part XI. Copies of the Army's Form 462 report for FY09 and FY08 have been filed with DoD as part of the annual ADR reporting requirement, and are also available for review in the Army ADR Program Office.

<sup>8</sup> Annual Report on the Federal Workforce Fiscal Year 2008, <http://www.eeoc.gov/federal/reports/fsp2008/index.html>.

(3) Observations. Our analysis of the Form 462 data yields several observations: first, ADR is not being used as much as it should be in informal pre-complaints. In our opinion, the main culprit is an ADR offer rate—47% in both FY09 and FY08—that is just too low.<sup>9</sup> For ADR to be part of the dispute resolution picture, it must be on the table, and in Army pre-complaint cases, ADR is not on the table in over half the cases. While there are some cases for which ADR is not appropriate, these cases are relatively rare, especially in the informal EEO context.<sup>10</sup> Second, the Army's ADR acceptance rate of 50.5% in FY09 is reasonable, given ADR's voluntary nature. Accordingly, the low rate of ADR participation is due more to a low offer rate than a low acceptance rate. This is important, because it focuses us on the reasons ADR is not offered more, not on why it isn't accepted more. Third, the Army's ADR participation rate in formal complaints, while objectively low as reported (17.8%), is considerably better than the federal agency average (only 6.5%). Fourth, the Army does a better job resolving EEO cases through ADR than the federal average. Its ADR resolution rates of 36% in informal cases and 69% in formal cases were both significantly higher than the government-wide averages of 31% and 57.7%, respectively. See Figure 3.

(4) Takeaways. One takeaway from these observations is that ADR is relatively effective in resolving EEO cases, *when it is used*. Another takeaway is that Army activities need to offer ADR more than they are, particularly in informal pre-complaints. This is as much a leadership issue as it is a practitioner issue. One obvious factor in the low offer rate is policy-borne: AR 690-600, the EEO complaint regulation, does not require a claim to be reviewed for ADR unless the employee first expresses an interest in ADR. This places the impetus for ADR on the employee, when it should lie with the agency, and does not equate well with the Army's (and DoD's) policy to treat every dispute as a potential candidate for ADR. All informal pre-complaints that are accepted for counseling under EEOC procedures should be screened to determine whether ADR is appropriate. If the employee has not expressed interest in ADR, it is the counselor's job to ensure that lack of interest is not due to a lack of information. We have recommended changes to the ADR provisions in AR 690-600 as part of a rewrite of that regulation, but delays in progress of that rewrite are causing us to pursue a different strategy that involves proposing, coordinating and issuing, through EEO channels, supplemental guidance to clarify (without contradicting) AR 690-600's ADR provisions. In addition to this policy solution, we use training of participants in EEO, including attorneys, to overcome myths and outdated attitudes that inhibit consideration of ADR except in a few cases. One thing we emphasize is that ADR provides a means for solving problems, regardless of the underlying legal claim, whereas litigation does not. We are already beginning to see a shift in the paradigm as more and more people get comfortable with ADR as part of the dispute resolution landscape.

A takeaway for the formal complaint stage is that ADR usage rates tend to be lower not because of anything the Army is doing or not doing, but because of a structural limitation of the formal complaint process itself. EEOC regulatory policy authorizes ADR at the formal stage of the complaint and generally encourages parties to work toward settlement at all stages of the EEO complaint process, but it does not set aside an alternative procedure to accommodate ADR in lieu of the agency investigation.<sup>11</sup> As a result, ADR proceedings must be de-conflicted

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<sup>9</sup> In its Annual Report on the Federal Workforce for FY 2008 (latest year available), the EEOC reported that all federal agencies offered ADR in a combined 81.3% of informal cases, significantly higher than the Army's 47%. See Figure 3.

<sup>10</sup> The ADRA gives examples of disputes that would be inappropriate for ADR, including cases with significant legal issues that require a decision for precedent, cases in which a resolution would materially affect non-parties to the dispute, and cases that require the making of a public record. 5 U.S.C. § 572(b). Most EEO complaints do not present these features.

<sup>11</sup> In a proposed revision to the complaint processing rule (29 CFR Part 1614), the EEOC has included a provision for authorizing pilot programs to streamline case processing. 74 Fed. Reg. 67839 (Dec. 21, 2009). One such pilot might emphasize mediation as a separate step in the complaint investigation process.

with the required investigation, including working within the regulatory time standards. Yet the data show with some consistency that when ADR is offered at the formal complaint stage, most complainants accept the offer, and most cases of ADR result in settlement. As noted in Figure 3, 70% of the offers of ADR in Army formal complaints were accepted in FY 09, and 69% of ADR cases resulted in a settlement. Both results are considerably higher than the informal stage. We can speculate as to the reasons for the greater success of ADR at the formal stage, but among them are third party neutrals that have more training, more experience, and more subject matter knowledge than mediators in informal cases. In addition, parties at the formal complaint stage have better knowledge and understanding of the facts, and perhaps greater motivation to settle as the case drags on and costs rise.

**Figure 3. ADR Offer, Participation, and Resolution Rates in EEO Cases (FY09 vs. FY08)**  
(Source: EEOC 462 Reports for FY08 and 09)

Process Stage	Army FY09	Army FY08	Change	All Agencies (FY08) <sup>12</sup>
<b>Informal Pre-Complaint</b>				
ADR Offer Rate	47%	47%	0	81.3%
ADR Acceptance Rate	50.5%	47%	+ 3.5	61%
ADR Participation Rate	23.7%	22%	+ 1.7	49.5%
ADR Resolution Rate	36%	35%	+ 1.0	31%
<b>Formal Complaint</b>				
ADR Offer Rate	25.5%	28%	- 2.5	18.7%
ADR Acceptance Rate	70%	70%	0	34.8%
ADR Participation Rate	17.8%	20%	- 2.2	6.5%
ADR Resolution Rate	69%	66%	+ 3	57.7%

B. ADR Utilization in Non-EEO Disputes. Unlike EEO complaints, non-EEO workplace disputes, such as grievances, appeals, and labor-management disputes, do not have explicit or uniform procedures for using ADR, even though most of these types of disputes are well-suited for ADR at the administrative stage. The agencies that hear these cases, such as the Merit Systems Protection Board and the Federal Labor Relations Authority, generally encourage the parties to avail themselves of agency-sponsored ADR options, but they have not made ADR an integral part of their procedural rules the way the EEOC has done with discrimination complaints. As a result, at many Army locations, mediation and other ADR processes to resolve non-EEO disputes are available only as an adjunct of the local EEO office's ADR program. Some EEO offices have been proactive and aggressive in providing these services to non-EEO disputants; others less so.

Responding to a questionnaire we sent out in 2008, Civilian Personnel Advisory Centers (CPACs) at several Army installations indicated that they do have ADR as an option in their negotiated grievance procedures. For example, 32% of locations that have one or more unions representing civilian employees have negotiated ADR processes as part of their grievance procedures. Conversely, however, 68% do not. So while ADR is not uncommon in negotiated grievance procedures, it is the exception not the rule. This is borne out in the FY 09 data call. Of 244 locations responding to the call, only 44 reported any workplace dispute activity in which ADR was used. The rest either reported no ADR activity, or no dispute activity that would

<sup>12</sup> Data for FY09 is not yet available as of the writing of this report.

generate an opportunity for ADR. This is where ADR training programs to Labor and Employee Relations Specialists and others involved in non-EEO disputes can be beneficial, and we have incorporated such training into many of their training programs.<sup>13</sup>

Our ADR report to DoD for FY09 (Enclosure 2) shows a total of 24 ADR procedures used in labor-management cases (grievances and unfair labor practice cases) and 37 in other workplace areas (principally MSPB appeals and grievances by non-bargaining unit employees). Mediation is the principal method of ADR used, although peer review—a process whereby employee complaints are heard and decided by combined management and union panels, was the next most common ADR process. Peer review panels are useful in rebuilding frayed or broken union-management relationships, because they compel the two sides to work together towards a common goal: resolving employee grievances.

## **5. ADR in Acquisition Disputes**

The acquisition ADR program is focused primarily on contract disputes that are or could be heard by the Armed Services Board of Contract Appeals (ASBCA), the Government Accountability Office (GAO), the Court of Federal Claims, or federal district courts.

The acquisition ADR program attorney position was vacant for several months in 2009 with the unexpected departure of the incumbent in April. Her replacement, a veteran contract litigator and ADR specialist with the Defense Logistics Agency and the Air Force Contract Litigation Division, joined the Army ADR team in September 2009. Since then, he has been working with key procurement and legal stakeholders, including the Acquisition Law Division in OGC, the Contract and Fiscal Law division in the Army Legal Services Agency (USALSA), the Army Contracting Command and Army Materiel Command, and the United States Army Corps of Engineers (USACE) Chief Counsel's Office, to understand barriers to ADR use in Army contract disputes and to promote strategies for expanding the use of ADR moving forward.

Many Army contract disputes are already on the dockets of the relevant tribunals. Many more are in the "pre-appeal" stage at the contracting officer level. Early identification and resolution of these pre-appeal disputes in the fermenting stage is critical to efficient contract administration. Our goal in contract disputes is early dispute resolution, by the fastest and most inexpensive method possible. That goal can be achieved through traditional ADR methods such as mediation or other third-party interventions, or through simpler, more direct methods, including intelligent negotiation strategies, depending on the case and the forum.

Contract administration issues that result in appeals filed under the Contract Disputes Act regularly take several years to resolve when before the ASBCA or Federal Courts, with escalating transaction and interest costs adding to any settlement or judgment costs. Moreover, ongoing disputes can interfere with contract performance as the case drags on. These factors make ADR methods utilizing third-party neutrals an attractive option for early resolution of contract appeals. The ASBCA provides several ADR options using specially trained ASBCA judges unaffiliated with the appeal to serve as neutrals, free of charge to the litigating parties.

The Army's total ASBCA caseload is split between regular Army contract disputes, which are handled by the Contract and Fiscal Law Division (KFLD) of the U.S. Army Legal Services

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<sup>13</sup> For example, we are co-instructing the one-week Intermediate Labor and Employee Management Relations Course at the Civilian Human Resources Agency (CHRA) training facility at Aberdeen Proving Ground MD in March 2010.

Agency (USALSA), and U.S. Army Corps of Engineers (USACE) contract disputes, which are handled mainly by Corps district offices and the Chief Counsel's office.

A. ADR Utilization in Army ASBCA Cases. In FY 2009, the ASBCA disposed of 74 Army Appeals and docketed 113 new Appeals, leaving 186 active Army Appeals. KFLD used ADR on four appeals. KFLD successfully resolved each of these four appeals, resulting in a 100% resolution rate. Two related appeals with an Appellant were resolved during a single Summary Trial with Binding Decision procedure. Two other related appeals with an Appellant were resolved during a single mediation using an ASBCA judge as a Settlement Judge. KFLD also resolved 36 appeals using traditional settlement negotiation methods and/or structured negotiations, defined for purposes as settlement that occurs without either neutral participation or execution of an ADR Agreement by the parties.<sup>14</sup>

B. ADR Utilization in USACE ASBCA Cases. In FY 2009, the ASBCA disposed of 158 USACE Appeals and docketed 110 new Appeals, leaving 144 active USACE Appeals. USACE used ADR in two disputes. USACE successfully resolved one dispute using ADR, resulting in a 50% resolution rate. One appeal with an Appellant was resolved using an ASBCA judge as a Settlement Judge. USACE also attempted resolution of one pre-appeal matter using a Settlement Judge, but was unable to reach settlement. Notably, the Settlement Judge wrote a letter of Commendation to the USACE Chief Counsel recognizing the professional presentation by USACE during this pre-appeal matter. USACE also resolved 10 appeals using traditional settlement negotiation methods and/or structured negotiations.

C. AMC Bid Protest Program. For several years Army Materiel Command has sponsored an award-winning agency-level program to consider and resolve bid protests in an effort to stave off protests to the Government Accountability Office or the U.S. Court of Federal Claims. Consisting primarily of an extended debriefing process, the program has shown outstanding success, with protests being resolved at the agency level in over 80% of the cases. In FY 2009, 47 protests were considered, and all 47 were resolved without further action, a perfect record (see Enclosure 2). These efforts not only save time and resources that would otherwise be spent defending against protests before the GAO or COFC, they also strengthen AMC's business relationships with its suppliers through greater communication and collaboration.

We anticipate that as ADR awareness and negotiation skills training efforts continue in 2010 and beyond, we will have continued success in AMC's bid protest program, as well as an increase in ADR usage by both KFLD and USACE in their docketed disputes and an increase in the number of pre-appeal matters resolved using ADR techniques.

## **6. ADR Training**

Training Army personnel in ADR and its various skill sets, including mediation and negotiation training, is Job 1 for the Army ADR program. Notwithstanding significant budgetary constraints, the ADR Program was able to develop and deliver an impressive array of training to various Army audiences in a variety of forums in 2009.

A. Workplace ADR Training. In the Workplace area, the ADR Program Office delivered a wide variety of training to a wide variety of audiences. Average attendance in mediation training

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<sup>14</sup> Under the Contract Disputes Act, ADR is any procedure chosen by the contractor and contracting officer to resolve a dispute. By that definition, ADR in contract disputes is generally understood to include structured negotiations between the parties. However, DoD uses a more traditional definition of ADR, which requires the presence of a third-party neutral. Accordingly, the 36 appeals resolved by KFLD through negotiations in FY 2009 were not reported as ADRs in the Army's annual report (Form 2815—see Enclosure 2).

is 24-30 students. All five mediation courses we delivered in 2009 enjoyed a cumulative rating of "5," the highest available, in end-of-course critiques. Among the training we provided in 2009:

- (1) 40-Hour Basic Mediation Course, Ft. Detrick MD.
- (2) 40-Hour Basic Mediation Course for Attorneys in the NCA.
- (3) 40-Hour Basic Mediation Course, Walter Reed Army Medical Center.
- (4) 40-Hour Basic Mediation Course, Ft. McCoy WI.
- (5) 40-Hour Basic Mediation Course, Ft. Wainwright AK.
- (6) Mediation Refresher and ADR Awareness Training, The Presidio CA
- (7) ADR Training for Labor and Management-Employee Relations Specialists, Civilian Human Resources Agency, Aberdeen Proving Ground MD
- (8) Mediation Refresher, Atlantic Region EEO Conference, Ft. Detrick MD.
- (9) Mediation and Conflict Management Training, Defense Employment and Labor Relations Symposium, Atlanta GA (for HR practitioners and attorneys across DoD).
- (10) ADR Workshops for EEO directors and labor counselors, IMCOM Multi-Functional Conference, Kansas City MO.
- (11) ADR Workshop for EEO counselors, Installation Management Institute Conference, Atlanta GA.
- (12) Conflict Management Tools for BRAC, G-1 BRAC Conference, National Conference Center, Landsdowne VA.

In addition, the ADR Program, working with course directors at CHRA, established a residential one-week basic mediation course at the Civilian Personnel School at Aberdeen. The inaugural course is to be held in April 2010. The ADR Program has also integrated basic ADR and negotiation instruction into the labor and employee-management relation courses at CHRA.

In most cases, these training events were made possible through the collaboration of our Sister Services and DoD. The Air Force ADR Program in particular, and the DoD ADR Office, assisted with instructional support for several of the mediation courses. To maximize benefits, we focused on training joint audiences whenever feasible. This training model has so far worked well, with several joint training courses, including mediation courses in Japan, Hawaii, and San Antonio, set for early spring 2010, at little or no cost to the Army.

B. Acquisition ADR Training. The ADR Program Office delivers ADR training, focused on ADR in contract disputes, to the Contract Attorneys Course and the Graduate Course at the Army TJAG Legal Center and School in Charlottesville. We also partner with the Air Force for a two-day negotiation skills course for contract litigators.

A training partnership with the AMC Command Counsel's Office to develop and deliver ADR training to attorneys and acquisition personnel at various AMC locations was temporarily

suspended due to the sudden departure of the acquisition ADR attorney in April 2009, but has been revived and will begin deployment summer 2010.

C. General ADR and Negotiation Training. In May of 2009 the Army ADR program, working with the Air Force ADR Program Office, funded 20 Army billets and selected 20 Army JAG and civilian attorneys to attend the Negotiation and ADR Course (NADRC) at the Air Force Judge Advocate General School, Maxwell AFB AL. We also provided instructional support for the course. NADRC stresses negotiation skills training through interactive exercises and role-playing, and is a perennial favorite, judging by end-of-course critiques and comments. The 2009 course was no exception, with Army JAGs and civilian attorneys unanimous in praise for the course. The Air Force has demonstrated its continuing commitment to treat ADR and negotiation training for attorneys as a joint Air Force-Army effort, with 20 seats in the 2010 course reserved for Army JAGs and civilian attorneys.

The ADR Program Office also delivered courses in ADR, mediation advocacy and negotiation skills to the Federal Litigation Course, Rule of Law Course, and Basic and Advanced Labor and Employment Law courses at the Army JAG School.

## **7. *Projects and Activities for 2010***

A. Mediation Initiative for FOIA Disputes. The Army ADR Program Office is working closely with our DoD counterparts, the Federal Interagency ADR Working Group, and the newly established Office of Government Information Services, to implement the OPEN Government Act of 2007 amendments to the Freedom of Information Act, providing for mediation as a non-exclusive alternative to litigation in the resolution of disputes between requesters and the Army. Over the course of 2010, we will develop a training and program management framework to achieve this capability. This is a major focus area for the Army ADR Program in 2010.

B. Education and Training. The Army ADR Program has an ambitious training schedule for 2010. We have scheduled six full 40-hour basic mediation courses, including five on-site courses for new Army mediators in Japan, Hawaii, San Antonio, Rock Island, Walter Reed Army Medical Center, and a fully-funded residential course at the CHRA training center at Aberdeen proving Ground. In addition, we are co-teaching an Air Force Advanced Mediation Course, the Negotiation and ADR Course for attorneys, various courses at the Army Judge Advocate General's Legal Center and School in Charlottesville VA, the Army War College in Carlisle Barracks PA, and the Defense Employee and Labor Relations Seminar in Atlanta. In addition, we are working with the Army Materiel Command Acquisition Counsel to deliver a series of ADR awareness presentations to AMC installations around the country, beginning Summer 2010. Finally, we are in discussions with the Army JAG School to expand ADR and negotiations training in several course offerings, including the JAG basic course and the Senior Officer Legal Orientation Course. Finally, as a result of briefings on conflict management tools for BRAC to Army CPAC officials and commanders, we anticipate requests for conflict management training throughout 2010 and into 2011.

C. ADR Data Collection. Assessing the value of ADR requires access to relevant, accurate data. In the workplace area, a new data collection protocol for non-EEO disputes has been established and distributed to all Army locations, with the invaluable assistance of the Labor Relations and Management-Employee Relations Offices of G-1. This new protocol allows Army, for the first time, to track and report ADR activity in workplace disputes against the total pool of eligible disputes, allowing us to assess ADR utilization from year to year. In addition, the ADR Program Office is collaborating with Army G-1 in proposing ADR data collection protocols for a possible DoD-level case tracking and reporting system in non-EEO disputes. In the acquisition

area, we are working with the Contract and Fiscal Law Division in the Army Legal Services Agency to secure independent access to case tracking databases and to include relevant ADR data in their standard case management and tracking protocols.

D. Policy Guidance for ADR in EEO Complaints. We are working with the Army EEO Compliance and Complaints Review Office to issue supplementary guidance to Army regulation 690-600 regarding the use of ADR in the processing of informal and formal EEO complaints. This informal guidance will ultimately be incorporated into the next formal revision of AR 690-600.

E. Policy Guidance for ADR in Contract Appeals. We are developing regulatory guidance to encourage a more strategic approach to ADR in contract disputes. This guidance includes proposed revision of the dispute procedures in the Army supplement to the Federal Acquisition Regulation to require a determination in every contract dispute whether ADR is appropriate or not, utilizing statutory and other well-defined criteria. This is consistent with current FAR guidance that generally requires the parties to a contract dispute to articulate why an offer or request for ADR was rejected. It is also consistent with Army ADR policy that every case be "considered" for ADR. Requiring a focused inquiry into whether ADR is appropriate for each dispute does not restrict Army options or hamper it from presenting a robust defense when called for, but it does allow for better decision-making in support of legitimate business objectives. We anticipate the new AFARS requirement would itself be supplemented by additional procedural guidance to be published by the ADR Program Office after appropriate coordination with affected stakeholders.

F. ADR Five-Year Plan. The ADR Program Office is developing the Army ADR Five-Year Plan to map out implementation of ADR initiatives in workplace and acquisition disputes.

G. ADR Website. The Office of General Counsel began a top-to-bottom overhaul of its public website in 2009. As part of that effort, the Army ADR Program is significantly expanding its presence and should go live in the summer of 2010.

## **8. Future Direction and Challenges**

### **A. Budget**

Ensuring sufficient funding to achieve ADR program objectives will continue to be a challenge in today's constrained budget environment. We will continue submitting ADR program needs as part of the POM process, but until adequate dedicated program funding is secured, the ADR program will continue to maximize outside bill-payers and external DoD partners to provide joint sponsorship of training and other functions.

### **B. Manpower**

With a full-time director and two full-time supporting attorneys, the Army ADR Program Office is sufficiently staffed with to oversee ADR in workplace and acquisition disputes. However, if 2008, 2009, and the current schedule for 2010 are any indication, our training portfolio will continue to increase, which will put significant pressure on current staffing. Moreover, we would like to expand the ADR program into other dispute areas, such as environmental disputes. These responsibilities will undoubtedly drive requests for additional manpower at some point in the future. Our current challenge is to ensure the office manager position approved in 2009 is fully funded as soon as possible so that we can hire a qualified person to provide administrative

and program management support. This will take some of the administrative tasks off the shoulders of the attorneys.

C. Support to the Field. Because ADR is a tool for resolving disputes, it is largely tied to the location where the dispute arose. Centralized ADR program support for ADR is therefore focused on ensuring that those who manage the disposition of disputes, whether EEO complaints, grievances, or contract claims, have adequate ADR options available to them if and when they are needed. Our vision, and our business model, is to use part of the ADR Program budget to make these resources available, including mediators and other third-party neutrals, trainers, and subject matter experts.

## **9. Conclusion**

Notwithstanding budget constraints and personnel uncertainties, 2009 was a successful year for the Army ADR Program. We opened up several new training opportunities and partnerships which not only bore fruit in 2009, but have us well-positioned for a busy 2010 as well. We successfully identified several barriers to greater ADR utilization and developed strategies to begin eliminating or mitigating them. We have successfully integrated the Army ADR program as a leader among the DoD ADR community, and the election of our Acquisition ADR director as vice-chair of the Federal Interagency ADR Working Group Steering Committee has cemented the Army's stature among other federal ADR programs. We are well positioned to make 2010 an even more successful year, with increasing emphasis on policy development, training and outreach in acquisition and workplace disputes and environmental conflict resolution.

## ENCLOSURE 1



DEPARTMENT OF THE ARMY  
WASHINGTON DC 20310

JUN 22 2007

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Alternative Dispute Resolution Policy

1. This memorandum reaffirms the Army's implementation of the Administrative Dispute Resolution Act of 1990 by Secretary of the Army Memorandum, subject: Implementation of the Administrative Dispute Resolution Act of 1990, dated July 25, 1995. That Act, and Congress' renewal of the legislation through the Administrative Dispute Resolution Act of 1996, encourage the use of Alternative Dispute Resolution (ADR) to reduce the time and costs of settling disputes and empower deciding officials to resolve conflicts more creatively and expeditiously.
2. During the past decade, the Army has used ADR to settle thousands of disputes in a variety of areas, ranging from contract claims to personnel matters. This experience has demonstrated that ADR is an effective tool to resolve disputes quickly and with less cost than traditional methods.
3. Army personnel are urged to use ADR procedures in appropriate cases. The use of ADR techniques may resolve all or part of the issue in controversy. The goal is to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level. It is essential that personnel involved in the resolution of disputes receive ADR training and consider ADR in each case.
4. The Principal Deputy General Counsel of the Army is the Army's Dispute Resolution Specialist (ADRS). The ADRS shall:
  - a. Serve as the proponent for establishing and implementing Army ADR policy, guidance, and regulations;
  - b. Submit, manage, and execute the Army ADR Program budget;
  - c. Encourage, develop, and implement ADR initiatives, activities, and training throughout the Army;
  - d. Identify and eliminate unnecessary barriers to the use of ADR;
  - e. Ensure Army personnel are aware of and have access to existing ADR resources;
  - f. Ensure appropriate personnel receive ADR briefings and training;

SUBJECT: Army Alternative Dispute Resolution Policy

g. Prepare a summary report to the Secretary of the Army by September 30 of each year regarding progress made in implementing the Army ADR program in the previous year;

h. Develop a five-year plan for the Army ADR Program;

i. Secure resources necessary to implement the Army ADR policy and program;  
and,

j. Coordinate with the Assistant Secretaries of the Army for Acquisition, Logistics, and Technology; Civil Works; Manpower and Reserve Affairs; Installations and Environment; and Financial Management and Comptroller; The Judge Advocate General; the Command Counsel of Army Materiel Command; the Chief Counsel of the Corps of Engineers; and other appropriate organizations for the development and implementation of the Army ADR program.

5. To assist the ADRS in performing these responsibilities, I am directing the hiring of an ADR specialist within the Office of the Army General Counsel (OGC). In addition, the Deputy Under Secretary of the Army, in coordination with the Assistant Secretaries of the Army for Manpower and Reserve Affairs and Acquisition, Logistics, and Technology, shall identify appropriate personnel to detail to the OGC, for the purpose of facilitating the application of ADR initiatives in the areas of workplace disputes and acquisition.



Pete Geren  
Acting Secretary of the Army

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## ENCLOSURE 2

<b>ALTERNATIVE DISPUTE RESOLUTION (ADR) ANNUAL REPORT</b> FISCAL YEAR 2009 REPORTING COMPONENT Department of the Army	REPORT CONTROL SYMBOL DD-GC(A)2099
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Please adhere to the definitions on pages 3 and 4 or, in the alternative, provide your Component's definition in the Narrative section on page 2.

Does your Component handle EEO cases? YES NO

- If YES, attach a copy of the relevant EEOC Form 462.
- If copy is attached, only complete the EEO column below if numbers differ from the EEO Form.

Does your Component engage in environmental conflict resolution (ECR)? YES NO

- If YES, attach a copy of the OMB-CEQ form.

	EEO <i>(If different from EEOC Form 462)</i>	WORKPLACE <i>(Labor-Management)</i>	WORKPLACE <i>(Other)</i>	ACQUISITION	CLAIMS	OTHER <i>(Do not include ECR or EEO reporting)</i>	TOTAL NUMBER OF ADR EVENTS BY PROCESS
CONCILIATION			9				9
MEDIATION	5	7	18	2		24	56
EARLY NEUTRAL EVALUATION		1	1				2
NON-BINDING ARBITRATION							0
SETTLEMENT JUDGE/ CONFERENCE	7		9	2		44	62
FACTFINDING							0
REVIEW PANEL		16					16
OTHER				47			47
<b>TOTAL NUMBER OF ADR EVENTS BY SUBJECT MATTER</b>	<b>12</b>	<b>24</b>	<b>37</b>	<b>51</b>		<b>68</b>	<b>192</b>
<b>NUMBER OF RESOLUTIONS REACHED BY ADR</b>	<b>5</b>	<b>14</b>	<b>31</b>	<b>50</b>		<b>55</b>	<b>155</b>
<b>PERCENTAGE OF ADR CASES RESOLVED BY ADR</b>	<b>42%</b>	<b>58%</b>	<b>84%</b>	<b>98%</b>		<b>81%</b>	<b>81%</b>

	EEO <i>(If different from EEOC Form 462)</i>	WORKPLACE <i>(Labor-Management)</i>	WORKPLACE <i>(Other)</i>	ACQUISITION	CLAIMS	OTHER <i>(Do not include ECR or EEO reporting)</i>	TOTAL NUMBER OF ADR EVENTS BY PROCESS
FACILITATION		8	3				11
OMBUDSMAN		17				6902	6919
PARTNERING							
BINDING ARBITRATION		53					53
SUMMARY TRIAL W/ BINDING DECISION				2			2

**LIST SPECIFIC ACTIONS TAKEN THIS FISCAL YEAR TO ENCOURAGE THE CONSIDERATION AND/OR USE OF ADR AND/OR CONFLICT MANAGEMENT** *(Attach additional sheets as necessary)*

1. In FY09, the Army ADR Program delivered five 40-hour basic mediation courses to Army and other Service audiences at five different locations, conducted workshops for EEO directors, counselors, and labor attorneys at conferences in Kansas City and Atlanta, conducted mediation refresher and awareness training at multiple Army locations. The ADR program Office collaborated with the US Army Corps of Engineers' Institute for Water Resources in developing collaborative conflict management tools and helped update and revise IWR's extensive library of ADR publications and case studies.

2. Army Materiel Command (AMC) holds periodic video and teleconferences with contracting officers and legal personnel to encourage the use of ADR in resolving contract formation and administration issues. The HQ, AMC-Level Bid Protest Procedures appear in every AMC solicitation.

**LESSONS LEARNED** *(Attach additional sheets as necessary)*

- Describe lessons learned from use of ADR or conflict management
- Provide points of contact for each lesson

1. AMC has been able to eliminate further protest filings at either the GAO or Court of Federal Claims by resolving protest issues at the HQ, AMC level. None of these "local" protests handled at the HQ, AMC-Level were further appealed during FY 09. POC: Vera Meza, (703) 806-8758

2. One of the Corps of Engineers' ADR attempts was unsuccessful. In BPLW Architects & Engineers, Inc., the Corps attempted to process a pre-appeal ADR involving an affirmative \$7.6 million Government claim against the A/E. Corps counsel made a highly professional presentation, but counsel for the Contractor did not proceed in the spirit of cooperation that is involved in ADR. The Settlement Judge (Judge Monroe E. Freeman, Jr.) wrote a Letter of Commendation to the Corps' Chief Counsel in recognition of the professional presentation by the Corps.

POC: Thomas H. Gourlay, Jr. (202) 761-8542  
Charles L. Webster, (817) 886-1147

**NARRATIVE** *(Attach additional sheets as necessary)*

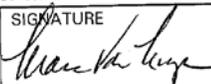
- Other information as appropriate, including a definition that differs from that described above.

1. The current draft of the ADR report, DD Form 2815, excludes dispute resolution data for five ADR methods: facilitation, ombuds, partnering, binding arbitration and summary trial with binding decision. Although we agree that that resolution data should not be used for "ombuds" activity because of the difficulty in defining what a resolution is—often it is simply a referral to another office or agency or process, which may end the matter for the ombuds, but does not necessarily "resolve" the matter. The same could be said for partnering, which is more a dispute avoidance mechanism than a dispute resolution process. In contrast, facilitation, when used in the context of a dispute, is similar to mediation in its tendency to produce a "resolution" in many, though not all disputes. Finally, binding arbitration and summary trial with binding decision in fact do "resolve" the disputes in which they are employed, even if not to the full satisfaction of one or more parties to the dispute. Accordingly, we recommend reinstating resolution data for facilitation, binding arbitration, and summary trial with binding decision.

2. Army would have reported at least an additional 46 contract disputes in which structured negotiations were used to reach resolution, but for the restrictive definition in the DD Form 2815 that suggests the requirement for a third-party neutral to qualify as an ADR event. We note that the Contract Disputes Act, as amended by the Administrative Dispute Resolution Act of 1996, appears to define ADR as any process adopted by the parties to resolve the dispute. We submit this should include structured negotiations. Moreover, we submit that any dispute that has been the subject of an ADR agreement should be included, whether or not the parties eventually resolved the matter before active third party neutral involvement.

3. The 6902 ombuds events reported under "Other" are ombuds contacts under the Army's Warriors in Transition Program.

4. Acquisition ADR events do not include GAO bid protests using outcome prediction, as Army activities that handle GAO bid protests (i.e., the Contract and Fiscal Law Division, AMC and the Corps of Engineers) have not been tracking them as ADR. Rather than have them attempt to reconstruct their data for FY09, we have advised them that while there is a good faith basis for considering outcome prediction at the GAO as not being an ADR process, the GAO considers it as such and the process seems to be consistent with the definitions of ADR used for this report. Accordingly, all have agreed to begin tracking such cases as ADR events and will include them in their FY10 ADR reports.

CONTACT INFORMATION FOR YOUR DISPUTE RESOLUTION SPECIALIST			
NAME <i>(Last, First, Middle Initial)</i> Norsworthy, Levator Jr.	TITLE Acting Principal Deputy General Counsel	TELEPHONE NUMBER <i>(Include area code)</i> (703) 697-9235	E-MAIL ADDRESS Levator.norsworthy@us.army.mil
REPORT PREPARED BY (IF DIFFERENT THAN THE DISPUTE RESOLUTION SPECIALIST)			
NAME <i>(Last, First, Middle Initial)</i> Van Nuys, Marc	SIGNATURE 	TELEPHONE NUMBER <i>(Include area code)</i> (703) 696-5240	DATE <i>(YYYYMMDD)</i> 20100115