

Hello, All!

Has this happened to you? You are busy with your day-to-day duties, and your administrative assistant informs you that the garrison Equal Employment Opportunity (EEO) office is on the telephone. You answer the call and are informed that one of the employees you supervise has filed an informal complaint of discrimination, either against you, another supervisor, or another employee in your directorate. The EEO office wants to know if you are willing mediate this complaint with a neutral arbitrator. You have no idea about the nature of the complaint or any of the facts associated with the complaint. You are at a loss as to what to do.

This type of call can be very distressing for many obvious reasons, the least of which is that you do not know what the EEO office means by mediation or whether you should accept the EEO office's offer to mediate. This *Legal Eagle* will discuss mediation from the management standpoint. Specifically, it will discuss Army policy about mediation, the obvious benefits and potential pitfalls associated with mediation, and a list of questions to ask yourself when deciding whether or not to mediate an EEO complaint. With a better understanding of this information, we hope to eliminate any fear that you have concerning the mediation process and to give you the necessary tools to decide what is in your agency's best interest in deciding whether to accept or reject an offer to mediate.

AR 690-600, *Equal Employment Opportunity Complaints*, is the starting point. Chapter 2 states the Army's policy that EEO matters should be resolved at the lowest possible level. This promotes an efficient work force, is cost effective, and on a practical level makes life easier for you and your staff. The Army's preferred method of settling EEO disputes is mediation. The concept of mediation is simple enough. You or your designee (someone you trust and authorize to speak for you), along with the complaining employee, sit down with a neutral party, trained by the Army, and discuss the matter. The neutral party will ensure that both parties understand their participation is voluntary and, most importantly, confidential (discussed in more detail below). Then you simply start talking. The neutral party is not a judge and does not evaluate the merits of one position over the other. Instead, the neutral party's role is to facilitate communication and to have both parties consider alternative points of view. The mediation proceedings are confidential and may not be disclosed by any of the parties.

You or your designee should not enter into the mediation with any preconceived notions of what is going to happen in mediation, what the facts of the case are, or what specific terms you will or will not agree to (within certain fiscal limits). Instead, be open-minded and listen to the employee's desires. When the employee starts telling you the facts as he or she perceives them, make sure you ask the employee for details. What the employee may want can vary, from wanting money, a new position, new duties, or just an avenue to vent some pent-up frustration. You will also find that many times the employee does not know what he or she wants. In any of these situations, it is always appropriate to ask why. Why does the employee deserve money, a new position, or new duties?

Always be respectful and TRY not to be argumentative. Take notes (that must be destroyed at the end of negotiations) and then do one of two things. If you know about the facts under consideration, present these facts to the employee. Do not be afraid to agree with the employee when the employee is right, but do not be afraid to point out if the employee does not have correct information. If, on the other hand, you do not know the facts as articulated by the employee, ask for time to "caucus." A caucus is a "time-out" that allows you to verify or clarify facts articulated by the employee with whomever you deem necessary. **HOWEVER**, you need to keep in mind that when a caucus is conducted, the confidentiality requirements remain intact. That means, as awkward as it may sound, the clarifying questions must be asked in a vacuum, without disclosing that you are involved in an EEO mediation.

Now that you have facts and have articulated them to the complaining employee, you should get a response from the employee. Spend time talking about the facts, but not too much time, especially if there are two different versions of the facts that are not going to get rectified. Do not be afraid to agree to disagree. In other words, you might feel the complaining employee's facts are wrong and the employee does not have a valid complaint. But remember, the employee believes his or her facts and thinks the

complaint has merit. In this circumstance, your opinion will not resolve the problem, and the EEO complaint process will proceed any way. So, do not let factual disagreements interfere with the goal, which is resolution of the problem.

To that end, you can make an offer of resolution, the complaining employee can make a counter-offer, and so forth. It is important to be creative in your offers. Most importantly, do not get discouraged if this “give-and-take” takes up a great deal of time. Honest, open, friendly mediation can go a long way in satisfying the employee, resolving a potential problem inside your agency, and saving you and many of your employees; time and money.

Finally, here is checklist of things questions to answer prior to agreeing to and entering into mediation.

- Has the complaining employee agreed to mediation in writing? The regulation requires it, and you should ask to see that agreement in writing prior to your participation in mediation.
- Who is agency attorney? Does the complaining employee have an attorney? If you do not know the name of the attorney representing the agency, then ask the EEO officer and call that attorney to discuss any issue have. If the complaining employee’s attorney is to attend the mediation, the agency attorney should also attend. If the complaining employee is unrepresented, it is normally inappropriate to have agency counsel at the mediation table. **HOWEVER**, you or your designee should have the agency attorney’s telephone number available. That attorney may be called at any time during mediation to provide you or your designee with advice and guidance
- What is the nature of the allegations? You should demand to know what the complaint involves— e.g., race, sex, age, disability discrimination; the actions or incidents that form the basis of the complain, and against whom the complaint was made. This information is essential to your decision- making process.
- Based upon the nature of the allegation, is this something that can be resolved by meditation? This is a difficult question. You should consult with agency counsel to resolve this difficult issue.
- Who should represent your agency in mediation? This is your decision, alone. It might be you or one of your trusted deputies. It might also be the person alleged to have discriminated against the employee.
- Are you prepared to give your mediator settlement authority? You must trust your mediator. To that end, that mediator must have the authority to settle the case at mediation. You can limit that authority prior to the beginning of mediation, but once mediation begins, and subject to your limitations, that person must be able to bind your agency to the extent of the authority you have given.
- Has agency counsel been advised of the terms of the agreement and are they legally sufficient? Army regulation requires agency counsel to review the agreement to make sure all the terms of the agreement are legal and comport with regulations. Prior to the parties’ final agreement, agency counsel should review the agreement for legal sufficiency.

Mediation is not difficult when approached with information. It can benefit your agency and the complaining employee, without protracted investigation and litigation, providing a positive resolution for everyone. Always remember, you are not alone in making these decisions. Agency counsel is always available to assist you—please don’t hesitate to ask if you have questions.