



DEPARTMENTS OF THE ARMY AND THE AIR FORCE

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NGKS/TAG

1 April 2020

MEMORANDUM FOR DISTRIBUTION

SUBJECT: TAG Policy Letter #43, Equal Employment and Military Equal Opportunity
Alternative Dispute Resolution

1. References:

- a. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), as Revised, 5 Aug 15
- b. 29 C.F.R. § 1614, Federal Sector Equal Employment Opportunity
- c. Title 5 U.S.C. § 571 through 584, Administrative Dispute Resolution Act of 1996
- d. CNGBI 0402.01, National Guard Alternative Dispute Resolution, 24 Jul 15
- e. CNGBM 0402.01, Alternative Dispute Resolution Procedures, 04 Jan 16
- f. CNGBI 9600.01, Alternative Dispute Resolution Policy and Guidance, 09 Jun 13
- g. CNGBN 9600, State National Guard Civilian Equal Employment Opportunity Complaint Processing and Reporting Guidance, 10 May 17

2. Applicability: This policy is applicable to all Kansas National Guard (KSNG) employees (Title 5 and Title 32 Technician), applicants for employment who are managed under the designation of the Kansas Adjutant General, and military members assigned to the KSNG to include Kansas Army National Guard (KSARNG) members; Kansas Air National Guard (KSANG); KSARNG Active Guard and Reserve (AGR) program; and KSANG AGR program.

3. It is KSNG policy to encourage and support the voluntary use of Alternative Dispute Resolution (ADR) and other collaborative dispute-resolution processes to the maximum extent practical and appropriate. Resolving workplace disputes at the earliest feasible stage at the lowest possible organizational level is consistent with the Federal and military regulation, restores focus mission readiness and preserves dignity and respect of diverse personnel. As leaders develop, the ability to negotiate successful outcomes is critical to professional growth. The KSNG strives to empower all employees and Service Members to manage and resolve conflict as early as possible in order to create an environment conducive to those attempts.

4. The KSNG will use ADR in Equal Employment Opportunity (EEO) and Military Equal Opportunity (MEO) discrimination complaints to the maximum extent practical and appropriate.

ADR is a term used to describe a variety of approaches to resolving disputes rather than traditional adjudicatory methods or adversarial methods. Currently the KSNG supports two types of ADR techniques to resolve conflicts: mediation and facilitation.

a. Mediation is an intervention in which a trained impartial and neutral third party, who has no decision-making authority, assists the opposing parties to identify and affirm a resolution. The objective of this intervention is to assist the parties in reaching a mutually-acceptable resolution of the issues in dispute.

b. Facilitation is an intervention in which a trained unbiased third party utilizes professional techniques to improve the flow of information in a meeting between parties to a dispute. The term facilitator is often used interchangeably with the term mediator, but a facilitator does not typically become as involved in the substantives issues as does a mediator. Facilitators focus more on the process involved in resolving a matter. The facilitator generally works with all of the participants at once and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator focuses on procedural assistance and remains impartial to the topics under discussion.

5. The use of ADR will be governed by the following core principles: fairness, flexibility, training, and evaluation.

a. The KSNG will remain focused on developing a fair process throughout the EEO/MEO ADR proceeding by providing information about the EEO/MEO ADR program to parties as soon as possible, the right to be represented throughout the EEO/MEO ADR program, and the opportunity to obtain legal or assistance during the process. In addition, aggrieved parties are free to end the EEO ADR process at any time and return to the informal EEO process in which he/she will be issued a Notice of Right to File a Formal Complaint; or in the formal EEO process to the place where processing had ceased. Both parties will not be forced into a resolution by any agency management, EEO officials, or the third-party neutral.

b. The KSNG will strive to maintain an impartial and independent ADR program free from any control by either party. Using a neutral third-party as a facilitator or mediator ensures this impartiality. Tasked neutrals will have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all participants.

c. Confidentiality is essential to the success of EEO/MEO ADR proceedings in accordance with the Administrative Dispute Resolution Act of 1996 (ADRA), specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Information collected before and/or discussed with the ADR forum will be destroyed by the third-party neutral upon the conclusion of the ADR session. Any resolutions will only be disseminated to offices and/or personnel with a need to know. Any agreement resolving concerns of discrimination through the ADR program will be drafted and evaluated by subject matter experts to ensure the tenants of resolution are enforceable.

6. Supervisors, leaders and personnel must remain flexible to respond and resolve the variety of complex personnel situations. This flexibility allows leaders and personnel to adapt to changing circumstances which cannot be anticipated or predicted. Any participant requesting an

accommodation to support his/her involvement of any stage of the EEO/MEO ADR process can be requested by contacting the State Equal Opportunity Office (SEOO) at (785) 646-0025 or (785) 646-0026.

7. All workplace disputes initiated in writing to the SEOO will be screened for non-selection using the criteria below. The KSNG is not required to use ADR if any of the following circumstances exist:

- a. A definitive decision in the matter is needed;
- b. The matter involves significant issues of government policy that cannot be resolved without additional proceedings;
- c. The need to maintain an established government policy, requiring consistent results;
- d. The matter significantly affects non-parties. For example, a dispute whose resolution would significantly affect working conditions of non-party employees, or significantly change the interpretation of a collective bargaining agreement, may be inappropriate for mediated settlement;
- e. The need for the development of a full public record;
- f. Agency counsel determines the agency must maintain continuing jurisdiction over the matter or finds it appropriate to file a motion to dismiss or summary judgment;
- g. Military personnel quality force actions, such as involuntary administrative separations, denials of reenlistment, resignations, promotion propriety actions, and officer grade determinations;
- h. Allegations of criminal misconduct;
- i. Civilian position classification appeals that involve the technical interpretation and application of Office of Personnel Management position classification standards;
- j. An indication that fraud, waste or abuse was committed by either party;
- k. There is a need for uniform treatment toward an issue or disputant. For example, the issue has nationwide impact or many similar suits are pending and there is no legitimate reason to settle with only one party; or
- l. Disputes in which there is substantial evidence that the claimant initiated the action to harass or intimidate, or is otherwise flagrantly abusing the process.

8. Each ADR request will be reviewed individually by the State Equal Employment Manager (SEEM), or delegate, and/or an appointed State Judge Advocate (SJA). TAG, or delegate, will make the final determination in any case where authorized agency officials disagree about the suitability of ADR to resolve a dispute. Once the KSNG decides to offer EEO/MEO ADR, the alleged responding party has a duty to cooperate, like any witness, in the EEO/MEO ADR process, but will not have settlement authority.

9. The KSNG will utilize neutrals from the following sources:

- a. Other federal agencies/sub-components (through a federal neutral sharing program or other arrangement);
- b. Private organizations, private contractors, bar associations, or individual volunteers; or
- c. Certified and trained personnel within the KSNG. Any use of internal mediators will ensure these neutrals are impartial and independent with respect to both perception and reality.

10. All aggrieved parties, witnesses and supervisors must cooperate with the ADR process to include responding to requests of information from EEO or ADR staff. Information obtained in this process is confidential under the ADRA of 1996, 5 U.S.C. § 571, et seq, as long as the person taking the information is designated as neutral by the ADR Manager or other competent authority for purposes of confidentiality protection. EEO professionals functioning in this capacity are designated as neutrals referred to as “administrative neutrals”.

11. Individual ADR case management and execution will support timelines outlined in respective federal and military regulations.

- a. In accordance with 29 C.F.R. § 1614 and EEO MD-110:

- (1) EEO ADR cases initiated in the pre-complaint phase will not exceed ninety (90) days. If the dispute is not resolved in this timeframe, the KSNG’s EEO Counselor will advise the aggrieved person no later than the 90th day after the EEO Counselor contact of his/her right to file a formal complaint. However, resolution efforts may continue so long as the parties and the neutral agree.


- (2) EEO ADR cases initiated in the formal complaint phase will not exceed more than 90 days by agreement. If the dispute is not resolved, the complaint must be processed within the extended time period.

- b. MEO ADR cases will be processed in a reasonable amount of time with respect to complaint timelines outlined in CNGBI 9601.01, *National Guard Discrimination Complaint Process*. All efforts must be made by MEO staff to execute MEO ADR cases or requests within 90 days of the request for mediation. If the dispute is not resolved in the Informal Resolution Request timeframe, the KSNG’s MEO staff will advise the aggrieved person no later than the 180th day on the respective NGB Form 333 of his/her right to file a Formal Resolution Request. Resolution efforts may continue so long as leadership and parties agree. ADR cases initiated during a Formal Resolution Request (FRR) will not exceed 90 days. An aggrieved’s request for ADR does not absolve the KSNG from investigating any concerns of discrimination or harassment directed by NGB-EI-CMA.

12. All employees, supervisors, and neutrals will receive training and education on the EEO and MEO ADR under the applicable laws and regulations. Furthermore, the KSNG will perform continuous evaluation of the program to determine if the EEO/MEO ADR programs have achieved its goals and purpose. Participants will provide feedback on how the program might be made more efficient and achieve better results.

13. Point of contact for this memorandum is the State Equal Employment Manager (EEO Director) at (785) 646-0025.

14. This policy supersedes TAG Policy Letter #43 dated 26 March 2020. This policy shall be prominently posted in all personnel offices, shops, unit information boards, and on organization internal and external websites.


DAVID A. WEISHAAR, Major General, KSNG
The Adjutant General

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