DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the General Counsel

5 Mar 03

MEMORANDUM FOR SAF/MRE
AF/DPPF

FROM: SAF/GCD

SUBJECT: Guidance for ADR Practitioners on Impact of *Dept. of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA* (D.C. Circuit, 17 Jan 03) on EEO Mediations

On 17 Jan 03, the D.C. Circuit Court of Appeals handed down its decision in *Dept. of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA*. The court ruled that the Air Force had committed an unfair labor practice when it conducted an EEO mediation session with a complainant, who was also a bargaining unit employee, without notifying the union or giving it an opportunity to attend the mediation. The court agreed with the FLRA that an EEO complaint is a "grievance" under the Federal Service Labor Management Relations Statute, and a mediation of that complaint is a "formal discussion" at which the union has a right to be present. The court's holding conflicts with an earlier decision by the Ninth Circuit Court of Appeals in a case arising out of Luke AFB, thus leaving the question unsettled for now. The Air Force has long maintained that EEO complaints are not "grievances" for purposes of the FSLMRS.

Relevance of this Decision to Air Force ADR Practitioners

In its decision the D.C. Circuit court rejected government arguments that allowing the union to attend EEO mediations would be inconsistent with the federal Administrative Dispute Resolution Act and would undermine confidentiality of ADR proceedings, saying that the ADR Act does not address union presence at ADR proceedings, nor is there any basis for assuming that the union cannot keep confidential matters confidential. The court speculated that its decision might have been different had the complainant objected to the union's presence, noting that such an objection could create a conflict that "should be resolved in favor of the employee." However, since there was no evidence the employee did object, that question went unanswered.

Impact of this Case on the Conduct of Air Force ADR Proceedings

ADR practitioners have asked about the impact of the *Dover* decision on ADR proceedings in EEO complaints or other workplace disputes that are outside the negotiated grievance procedure. The direct impact of *Dover* is relatively limited, but the indirect impact is unclear. The decision is binding only in the District of Columbia, where the D.C. Circuit court sits, thus affecting only Bolling AFB. Unions elsewhere may use the *Dover* decision to argue for similar participation in EEO mediations whenever the complainant is a member of the

bargaining unit. Unless the request is made in the District of Columbia, however, the Air Force position continues to be that the union has no statutory right to attend an EEO mediation session.

Guidance to Air Force ADR Program Administrators and Third-Party Neutrals

Two fundamental principles underlying Air Force ADR policy and practice are *neutrality* and *impartiality*. Air Force personnel who administer ADR programs and serve as third party neutrals are bound to these principles. Union attendance at a mediation, or any other meeting of employee and management, is therefore an issue best left to the expertise of union officials and labor relations professionals. Accordingly, ADR program managers, intake personnel, and neutrals, are advised to refer all matters pertaining to union attendance at an ADR proceeding (other than as the employee's designated representative) to the servicing Labor Relations Officer and Staff Judge Advocate for resolution. If a union observer attempts to attend or indicates an intention to attend an ADR proceeding, the LRO, SJA, and ADR program manager shall coordinate with SAF/GCD the procedures for adequately safeguarding confidentiality of ADR communications before commencing the ADR proceeding.

Please disseminate this guidance to field units through appropriate functional channels. Questions regarding this guidance, or Air Force ADR practice in general, should be directed to SAF/GCD at DSN 227-0379, commercial (703) 697-0379. General questions regarding the *Dover* decision should be directed to the Air Force General Litigation Division, Employment Law Branch, or the Central Labor Law Office.

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(Dispute Resolution)

cc:
AFLSA/JACL (CLLO)
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