



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office Of The General Counsel

MEMORANDUM FOR ALMAJCOM/DRU/CCs

FEB 18 2009

FROM: SAF/GC
1740 Air Force Pentagon
Washington DC 20330-1740

SUBJECT: Use of ADR in the NSPS Reconsideration Process

Title 5, Section 9901.413 of the Code of Federal Regulations (5 CFR § 9901.413) establishes an administrative reconsideration process for challenges to performance ratings under the National Security Personnel System (NSPS) performance management system. This section of the regulation authorizes alternative dispute resolution (ADR) at any stage of that process (5 CFR § 9901.413(d)). The purpose of this memorandum is to provide guidance for building and implementing a meaningful ADR option into the reconsideration process. It has been coordinated with the Air Force NSPS Program Office in AF/A1XN and with the Civilian Force Policy Division in AF/A1PC. Please ensure dissemination to those within your commands responsible for ADR and NSPS implementation and administration.

5 CFR § 9901.413(d) provides that ADR “techniques, such as mediation, interest-based problem-solving, or others, may be pursued at any time during the reconsideration process consistent with the Component’s policies and procedures.” Air Force ADR policy strongly encourages early dispute resolution techniques to resolve workplace disputes (AFI 51-1201, paragraph 2), and this includes disagreements over job performance ratings. Accordingly, building a strong ADR option into the reconsideration process is consistent with Air Force policy.

Although the Air Force does not mandate any particular ADR method to resolve workplace disputes, our experience over the years has shown the facilitative dispute resolution methods utilizing a trained, third party (a “neutral”), such as mediation, are most effective because they are simple, adaptable, and usually produce a voluntary settlement. Therefore, we believe these processes are the best option for the reconsideration process.

Below are several questions that arose following previous performance ratings cycles. They and their corresponding answers are offered to help organizations build an effective ADR option into their reconsideration procedures. In turn, these procedures must be effectively publicized to all pay pool participants so they are aware of them.

1. How does the reconsideration process work?

Let’s begin with a brief overview of the reconsideration process itself. The NSPS

regulation, 5 CFR § 9901.413, as supplemented by Subchapter 1940.13 (SC 1940.13) of the DoD Civilian Personnel Manual (DoD 1400.25-M), establishes the reconsideration process as the “sole and exclusive agency administrative process” for nonbargaining unit employees to challenge a rating of record or a job objective rating. Bargaining unit employees must utilize the negotiated grievance procedures available to them to challenge a rating of record or job objective rating. If a negotiated grievance procedure is not available or if challenging a rating of record or job objective is outside the scope of the negotiated grievance procedure, then the bargaining unit employee can utilize the reconsideration process. Certain matters cannot be challenged, including payout determinations, recommended ratings, interim reviews or closeout assessments (SC1940.13.2). In addition, claims that a rating was based on unlawful discrimination are beyond the reconsideration process and must be processed through the EEO discrimination complaint procedure (SC 1940.13.3).

Procedurally, reconsideration is a relatively simple two-stage process (SC1940.13.1-SC1940.13.13). The employee must submit a written request for reconsideration to the Pay Pool Manager (PPM) within 10 calendar days after receiving the final rating of record. The employee can request a personal meeting with the PPM to discuss the rating and is entitled to representation if the PPM determines there is no conflict of interest. The PPM has 15 calendar days to render a decision on the request. The employee may appeal the decision to the Performance Review Authority (PRA) or the PRA’s designee, who has another 15 calendar days to render a final decision. The entire process, without extensions, can be completed in less than 45 calendar days.

2. What ADR methods should be used in the reconsideration process?

We have previously suggested facilitative techniques, such as mediation, as being the best fit for reconsideration. We believe this for several reasons. The reconsideration process was designed to be simple, to work quickly, and to produce a fair result. Facilitative ADR techniques meet each of these objectives. Moreover, they are versatile. A trained neutral can help parties better communicate with each other across the table to reach resolution or, in the absence of agreement, a better decision on the merits. In those cases where emotional elements or other barriers to effective joint communications exist, the neutral can utilize private discussions to overcome those barriers. In all cases, the process is simple to convene, typically takes a half-day or less, and produces a voluntary settlement about 75% of the time. Therefore, these techniques can be built into the reconsideration process with little or no modification, and have a high probability of success.

3. How should ADR be incorporated into the reconsideration process?

Since the goal of any ADR process is to reach a voluntary agreement between the parties to resolve their differences, it should be implemented in a way that best promotes that goal. Organizations may pursue ADR at either the initial stage of reconsideration when the PPM has the request, or the appeal stage when the PRA or designee has it, or both. Wherever it is pursued, it should be to maximize the opportunity for resolution. We think the opportunity is best at the initial stage, before the PPM acts on the request. Once the PPM acts, modifying or reversing the decision through an ADR process may be more difficult. We emphasize here that

this is a recommendation only. Organizations are free to offer ADR at either stage of the reconsideration process, or both.

Regardless of when ADR is offered, employees must be made aware of the option and have a meaningful opportunity to request it. If ADR is offered as part of the initial stage of the process, the form used for requesting reconsideration should include a brief description of the ADR option and a means of requesting it. If ADR is offered as part of the appeal stage, a similar mechanism for requesting ADR should be employed. A sample form for this purpose, with relevant ADR language is attached.

In most cases, the time periods permitted for reconsideration should be sufficient to conduct ADR, but one way to accommodate possible delays is to include with the ADR election in the reconsideration request form an additional request for a 15 or 30-day extension of the 15 calendar day time limit. This is permissible under SC1940.13.11, and the additional time should be more than sufficient for the ADR process to be completed.

The one time limit that does not appear to be extendable is the initial filing requirement of 10 calendar days beginning with the employee's receipt of the final rating of record (SC1940.13.1.1). Failure to request reconsideration in a timely manner can foreclose a challenge in the reconsideration process (SC1940.13.4), and the administrative grievance process is not available because of the exclusive nature of the reconsideration process for challenging a rating. In such cases, the employee's only recourse is to forums not limited by NSPS, such as the Equal Employment Opportunity (EEO) or Office of Special Counsel (OSC) complaint processes (discussed in more detail below). Therefore, it is essential that all employees be made aware of the availability of the reconsideration process and the time limits for invoking it.

4. Is management participation in ADR mandatory, and must the PPM personally attend each session?

There is no Air Force-wide mandatory ADR policy for managers and supervisors, but several installations have local policies. Such policies do not violate the voluntary nature of ADR because the organization is the party to the dispute, not the individual manager or supervisor. Local mandatory ADR policies are the organization's voluntary decision to pursue ADR whenever it has been found appropriate and the employee has requested it. Using applicable statutory and regulatory criteria (see AFI 51-1201, paragraph 21), it is difficult to envision a ratings challenge in the reconsideration process that is *not* appropriate for ADR, and we see nothing in the NSPS regulation or the implementing issuance that would otherwise preclude the application of mandatory ADR policies. Indeed, if such policies are consistent with Air Force policy, as we believe they are, the language in the issuance allowing ADR when consistent with Component policies and procedures would expressly authorize their use. Accordingly, PPMs and other management officials at such locations should routinely agree to ADR when it is requested by the employee.

Even at locations without mandatory ADR policies, where management may decline ADR even if it has been offered to and accepted by the employee, we think such a course sends the wrong message and should be the rare exception, not the rule. Moreover, management

should keep in mind that there are other external forums that are potentially available to an employee wishing to challenge a rating, such as the EEO complaint process, and ADR is fully available in those forums.

If management does participate in ADR, we believe the PPM must personally sign or approve any resulting agreement, although he or she need not personally attend every ADR session. We base this answer on the fact that, unlike the PRA for whom the issuance permits a “designee,” the PPM appears to be personally responsible for considering the reconsideration request and issuing the decision. However, the issuance gives the PPM considerable discretion regarding personal meetings with the employee, including the right to determine the “method of communication” to be used (SC1940.13.7). In our opinion, this language is broad enough to permit communication through proxies when the personal meeting is in the form of an ADR session. So long as the PPM personally signs and/or approves the settlement agreement (or the decision if settlement is not reached), he or she does not have to personally attend the session. If the PPM does not attend, who should? Normally, it will be the employee’s supervisor or rating official, but exceptions can be made locally as circumstances warrant.

5. How should settlements be handled?

If a settlement is reached as a result of an ADR session, normal procedures for review and approval of settlement agreements will apply, and if approved, the settlement agreement will serve as the final disposition of the request. If, as part of the settlement, the employee waives further right of appeal or other remedies pertaining to the matter in dispute (a typical term in a settlement agreement), that ends the matter. If no settlement is reached, the PPM (or PRA) must render a decision, subject to the employee’s right to appeal (if any) or to pursue a remedy in an external forum such as EEO.

For management, the chief value of a settlement versus a decision is *finality*. As part of a settlement, the employee typically withdraws the instant claim and waives any further claims based on the same facts. This means a settlement at the PPM stage of the process forecloses an appeal to the PRA, as well as collateral claims in other forums not affected by NSPS, such as EEO. Such an outcome is not possible in a unilateral decision.

While it is advantageous to any ADR proceeding that the parties have available a wide range of *legal* settlement options, nothing in this guidance should be construed to suggest or imply support for negotiated outcomes that are contrary to NSPS pay for performance principles.

6. Who can serve as a neutral in the reconsideration process?

The organization can use third party neutrals from any source, including locally-assigned collateral duty neutrals. To avoid conflicts of interest, or perceptions of bias or partiality, ensure that the neutral is properly trained (including basic understanding of the NSPS performance management system) and otherwise qualified to perform the duties of a neutral, is not in the same pay pool or assigned to the same organization as the employee requesting reconsideration, is not a PPM, PRA or member of a pay pool panel, and is not serving as the employee’s personal representative.

If the organization cannot obtain qualified neutrals locally, consider other Air Force installations in close proximity, or contact SAF/GCD for assistance.

7. Are any ADR procedures available outside the reconsideration process?

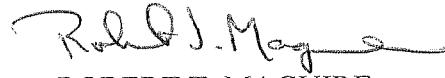
As we have previously noted, the reconsideration process is the “sole and exclusive agency administrative process” for nonbargaining unit employees to challenge a rating of record or a job objective rating. For bargaining unit employees, if a negotiated grievance procedure is available, it is the “exclusive administrative procedures” to challenge a rating of record or job objective rating. Only when a negotiated grievance procedure is not available may a bargaining unit employee utilize the reconsideration process to challenge a rating of record or a job objective rating. No other internal administrative processes are authorized for challenges to ratings of record or job objective ratings. Therefore, employees cannot use the agency grievance procedure, nor may they use an independent ADR program unless that program has been incorporated into the reconsideration procedure as discussed above or is part of the negotiated grievance procedure.

The foregoing applies onto to internal agency dispute resolution processes. Since NSPS does not affect the EEO complaint process, those procedures, including the availability of ADR, are not affected or limited by the reconsideration process. An employee can skip the reconsideration process and go straight to the EEO complain process, if the basis for the challenge states a claim for discrimination. Indeed, the implementing issuance requires any rating challenge that alleges prohibited discrimination to be referred to the EEO complaint process (SC1940.13.3). Once a challenge is in the EEO process, ADR is made available at both the informal and formal stages per EEOC rules (see 29 CFR § 1614.102(b)(2)). Another, less well-known forum that is also unaffected by NSPS is the U.S. Office of Special Counsel (OSC), responsible for investigating and correcting violations of prohibited personnel practices and whistleblower retaliation. OSC has an internally administered ADR program that may be available to the employee.

In summary, ADR is authorized for use in the reconsideration process, consistent with Air Force policy strongly encouraging its use. Although no individual ADR technique is mandated, both the governing regulation and this office recommend a facilitative ADR process such as mediation for its relative simplicity, effectiveness, and adaptability to the reconsideration process. Whichever method is selected and at whatever stage of the process it is implemented, ADR is voluntary for the employee, but its use should be encouraged. Although no Air Force policy mandates that management agree to ADR, local command policies may do so, and in any case we highly recommend that management participate. After all, mutually agreeable settlements are of benefit to both the employee and management, provided that they are not inconsistent with NSPS pay for performance principles. Finally, participation in ADR by management does not require the PPM to attend every ADR session personally, so long as he or she personally acts on all decisions and settlements that come out of the ADR process.

Our POC for this guidance is Norm Jacobson in our Dispute Resolution Division (SAF/GCD). He can be reached at 703-588 (DSN 425) 2220 or by email at norman.jacobson@pentagon.af.mil.

This memorandum supersedes all previous guidance provided on this subject by this office to include our memorandum, same subject, dated 8 August 2007.



ROBERT T. MAGUIRE
Acting General Counsel

Attachment:
Sample Request Form

Attachment
Sample Request Form

(Date of Request)

TO: Pay Pool Manager

FROM: Employee

SUBJECT: Request for Reconsideration, Rating of Record

In accordance with 5 CFR 9901.413(d), I hereby request reconsideration of the rating of record/ job objective rating I received on ____ (date) ____ . A copy of the rating is attached.

Nature of change requested (state the new overall/job objective rating or other relief you are requesting):

Basis of request (state reason(s) why you believe your rating of record/job objective rating should be adjusted; if you need more space, use back of form):

Check all that apply:

_____ I request that I be represented by (give name, office symbol, and duty phone and or email address of requested representative: _____.

_____ I request an opportunity to meet personally with the pay pool manager (automatic if ADR is selected).

_____ I request ADR if available. NOTE: Alternative Dispute Resolution (ADR) is a voluntary process that uses facilitative techniques to help parties resolve a disagreement. If you request ADR and it is available, a trained, independent, neutral third party will help you and management try to resolve your request. Agreeing to ADR does not obligate you to settle or to agree to any term to which you object. However, if you do agree to settle and you sign an agreement to that effect, you will be bound to that agreement. If you have any questions about the ADR process and how it works, please contact the Installation ADR Manager for Workplace Disputes: (name and contact information for the Installation ADR Manager).

_____ I request an additional (15) (30) calendar days [select one] to conduct ADR.

EMPLOYEE SIGNATURE

Attachment: Rating of Record/Job Objective Rating

cc: Rating official; HR office

1st Ind., Pay Pool Manager

TO: HRO, Employee

SUBJECT: Request for Reconsideration – (Employee Name)

I find this request for reconsideration to be (timely) (untimely). [Select one; if untimely, state basis for determination]

If applicable: Pursuant to SC1940.13.1.2 of the DoD Civilian Personnel Manual (DoD 1400.25-M), I have determined that the individual identified by the employee to represent the employee in this reconsideration process (does) (does not) have a conflict of interest. [State the basis for any determination of a conflict of interest.] Accordingly, the request for representation is (approved) (disapproved). [Disapproval should be based only on a finding of conflict of interest.]

If applicable: Pursuant to SC1940.13.7 of the DoD Civilian Personnel Manual (DoD 1400.25-M), the request for personal meeting is (granted) (not granted). [If granted, state the date, time and location of the meeting. If not granted, state the reason why.]

The employee (has) (has not) requested ADR.

If applicable: On behalf of management, I (agree) (do not agree) to ADR. [NOTE: Local command policy may make ADR mandatory if requested by the employee.]

If applicable: The ADR session will constitute the personal meeting and will be scheduled at a date, time, and location agreeable to the employee and management.

If applicable: The request for an extension of time to conduct ADR is (granted) (not granted).

PAY POOL MANAGER