

A PRACTICE GUIDE TO MEDIATION OF DISPUTES AT THE PERSONNEL APPEALS BOARD

About Mediation

The Personnel Appeals Board (PAB or the Board) offers mediation as a means to resolve workplace disputes that result in a charge being filed with the Board's Office of General Counsel (PAB/OGC). Mediation is an informal process in which parties meet separately and/or jointly with a trained neutral third party to explore voluntary, mutually satisfactory solutions to a dispute. Mediation provides a faster way to resolve cases and allows the parties to avoid litigation which can be lengthy, stressful, and time-consuming. During mediation, you and the other party will have the opportunity to discuss the issues raised in the charge you filed, to clear up any misunderstandings, and to seek and present areas of agreement. The mediator's only role is to assist the parties in reaching agreement or resolution of the issues. The Board uses private mediators, not employees of GAO.

GAO, the Union, or any employee, former employee or applicant who files a charge with the PAB/OGC may request mediation of the claims raised in a charge arising from any of the following:

- an appeal from a removal or suspension for more than 14 days;
- a reduction in grade or pay;
- a furlough of not more than 30 days;
- a prohibited personnel practice;
- a prohibited political activity;
- an action involving prohibited discrimination;
- a personnel relations issue the Comptroller General determined the PAB shall hear; or
- an unfair labor practice.

Upon receipt of a charge, the PAB's General Counsel will notify both the charging party and GAO that mediation is available to resolve their dispute, that mediation is a quick and beneficial means of resolving disputes, and that either party may request mediation in writing within **14 days** of the notification. Should you decide to participate in the mediation program, you need only fill out the form that will be provided to you when you file your charge with the PAB/OGC and return it to the Board's Office of General Counsel within **14 days**.

Upon receiving your completed form, the Board's General Counsel will forward a request for mediation to the other party, who has **7 days** to either accept or decline the request to participate in mediation. If the parties agree to mediation, the General Counsel will advise them that the period of time for the investigation will be extended for the length of the mediation process up to **30 days**. During mediation, the charge will not be investigated.

Once the parties have agreed to mediation, the General Counsel will forward the written request to the PAB Executive Director who will designate a mediator from a pre-approved list within **5 days** of receipt of the written request from the PAB General Counsel.

Confidentiality

All mediations are conducted on a strictly confidential basis and are neither taped nor transcribed. At the beginning of the mediation, the mediator will explain the process to the parties and join the parties in signing an agreement reflecting the confidentiality requirements and the rights and obligations of the parties. In addition, either party may meet separately with the mediator to discuss matters that he or she may not wish to share with the other party. No participant in mediation sessions may disclose what occurred in mediation, unless all of the parties and the mediator agree, in writing, or, in the rare instance that a tribunal of competent jurisdiction determines that a breach of confidentiality is warranted.

Reprisal

No one is allowed to retaliate against you in any way because you exercised your right to engage in mediation or because you declined to participate in mediation. If you believe that an act of reprisal or retaliation has occurred and that it is related to your decision about participating in mediation, you should immediately notify the Board's General Counsel.

Mediator Responsibilities

Mediation is expected to be completed within **30 days** from the time a mediator is designated. The mediator is responsible for regulating the course of the mediation, including conducting the process within the timeframes provided in this subsection. The mediator makes initial contacts with the parties, and in his or her discretion, may schedule mediation sessions in person or by telephone, meet together or separately with the parties, and permit the parties to meet apart with their representatives, as indicated. As previously noted, the mediator is responsible for explaining the confidentiality requirements to the parties at the outset of mediation. The mediator may render any assistance he or she believes is necessary and appropriate to assist the parties towards resolution, so long as he or she remains neutral when providing such assistance.

In the event that the mediator assigned to the case determines that he or she is unable to perform a neutral role in the case, he or she must withdraw from the matter and immediately notify the Executive Director so that another mediator may be appointed. In addition, either you or the other party may ask the Executive Director to disqualify a mediator by filing a written request, including the reasons for such request. The Executive Director's decision on this request is final and will not be reviewed by anyone else. Finally, the mediator shall ensure, in all appropriate cases, that the settlement process complies with the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. §626.

Timeframe

When the parties agree to mediation, the General Counsel's time period to conduct an investigation will be extended **30 days**. If the parties cannot complete mediation within **30 days** and they agree that additional time to continue mediation is needed, they may jointly request additional time from the Executive Director. The request must include the nature of the request, the underlying reasons for the extension, the number of additional days needed to continue mediation, and whether the mediator believes additional time would be beneficial. The Executive Director will grant the parties' request upon a showing of good cause.

Representation

Both you and the responsible official from GAO may elect to have a legal or personal representative present during the mediation process. A party may not, however, designate a representative whose presence would create a conflict of interest or conflict of position. The mediator will resolve questions about the suitability of a representative. The Agency's representative must have the direct authority to agree to resolve the dispute or, at the very least, have immediate access to an official who has such authority.

Official Time

All GAO employees are considered to be on official time, for compensation purposes, when engaged in the mediation process. Such official time will include a reasonable amount of time to meet the requirements of the mediation process, including but not limited to reviewing or preparing proposals and meeting with counsel or your representative.

End of Mediation

The mediator will promptly notify the Executive Director when the mediation has ended, which occurs when either a settlement has been reached, or if there is no settlement, at the end of the **30** day mediation period, or any extension, or sooner if the parties are at an impasse and cannot reach an agreement.

When the parties have agreed how to resolve their dispute and have incorporated their pact into a fully executed settlement agreement, the mediator will ensure that the agreement contains an implementation provision that permits enforcement of the terms of the agreement by the Board.

If the mediator informs the Executive Director that the mediation has ended without agreement, the Executive Director will send written notification of the end of mediation to all parties and to the Board's General Counsel. Within **5 days** of receipt of such notice, the General Counsel will commence or resume investigation of your charge.

At the close of the investigation by the Board's Office of General Counsel, but before the issuance of a Right to Petition Letter and summary to a charging party, the General Counsel shall notify the parties that they have **7 days** in which to request mediation if it has not been previously attempted. The procedures governing this process are those set forth above.

Mediation of Claims Raised in Petitions Before the Board

After your charge has been investigated and a petition has been filed with the Personnel Appeals Board, either or both parties to the action may request mediation of the claims raised in the Petition. The request, which must be in writing, will be submitted to the administrative judge assigned to the case. If one party requests mediation pursuant to this section and the other party objects to mediation by filing a response within **5 days** of receipt of the request, there will be no mediation. The administrative judge, in his or her discretion, may also recommend that the parties engage in mediation before the adjudication of the claims contained in the Petition is completed but if either party objects to the recommendation by the administrative judge to engage in mediation, the mediation will not take place.

When the parties agree to engage in mediation, the administrative judge will notify the Executive Director of the request for mediation and the Executive Director will designate a mediator within **5 days** of the request.

The administrative judge may exercise his or her discretion to delay the litigation long enough to allow the parties to engage in the mediation process. In making this determination, the administrative judge will consider the diligence of the parties in litigating the action to date, whether staying the action would unreasonably delay a hearing on the merits, and whether there have been previous attempts at mediation.

Breach of Settlement Agreement

Where mediation has resulted in a settlement agreement, either party to the agreement may file a Petition with the Board if he or she believes that the agreement has been breached or violated. The Petition must be filed within **30 days** of the date when a party knew or should have known that a breach may have occurred. The case will be assigned to an administrative judge, who may order written submissions from the parties, and at his or her discretion, may schedule the case for hearing. The administrative judge may take any of the following actions:

- (i) dismiss the claim as lacking merit;
- (ii) upon finding the claim meritorious, direct appropriate remedial action by the breaching party; or
- (iii) set aside the settlement agreement permitting the aggrieved party to proceed from the point at which the matter entered mediation, but only when specific performance of the settlement agreement will not provide appropriate relief.

A party may appeal the administrative judge's determination to the full Board within **15 days** after receiving the administrative judge's determination. A party may subsequently appeal a final decision by the full Board to the United States Court of Appeals for the Federal Circuit pursuant to 31 U.S.C. §755.

PERSONNEL APPEALS BOARD

MEDIATION FAQs

What is mediation?

Mediation is an informal process in which parties meet separately and/or jointly with a trained neutral to explore voluntary, mutually satisfactory solutions to a dispute.

Who can participate in mediation?

Anyone who files a charge with the Board's Office of General Counsel (PAB/OGC) may request mediation of the issues raised in the charge.

How do I make a request for mediation?

After you file a charge, the Board's General Counsel will notify both you and GAO that mediation is available to resolve the dispute. Either you or GAO may request mediation within **14 days** of the notification. The request must be in writing and must be filed with the Board's Office of General Counsel within the **14 days**. You will be given a mediation request form when you file your charge. Simply returning that form to PAB/OGC within the **14 days** is sufficient to start the mediation process.

Will there be any other opportunity in the investigatory process to mediate a dispute?

Yes. At the close of the investigation by the Board's Office of General Counsel, but before the issuance of a right to petition letter to a charging party, the General Counsel will notify the parties that they have **7 days** in which to request mediation if it has not been previously attempted. As discussed later, there will even be another opportunity for mediation if you file a petition with the Board.

Do either I or the Agency or the Union have to participate in mediation?

No. The Board's General Counsel will forward a request for mediation to the other party, who may accept or decline the request to participate in mediation within **7 days** of receipt of the request for mediation. No one may take any action against you for either participating or declining to participate.

How soon will it start?

Once the parties have agreed to mediation, the General Counsel will forward the original written request to the PAB Executive Director who will designate a mediator from a pre-approved list within **5 days** of receipt of the written request.

How will I know what to do?

The mediator will make the initial contacts with the parties. Before any mediation starts, the mediator will explain the entire process to the parties and join the parties in signing an agreement laying out the rights and obligations of the parties. The mediator may schedule telephonic or in-person mediation sessions, meet together or separately with the parties, and permit the parties to meet apart with their representatives, as indicated.

Does the mediator take a side?

The mediator may render any assistance he or she believes is necessary and appropriate to assist the parties towards resolution, but must remain completely neutral when providing assistance.

What if I think the mediator is favoring the other party?

Either party may ask the PAB's Executive Director to disqualify a mediator by filing a written request, including the reasons for such request. The Executive Director's decision on this request is final and will not be reviewed by anyone else.

Is the process confidential?

Yes. Participants in mediation sessions may not disclose anything that occurred in mediation, unless all of the parties and the mediator agree, in writing, or a tribunal of competent jurisdiction (a court, for example) determines that a breach of confidentiality is warranted. The agreement that the parties sign before they begin mediation will include the confidentiality requirements.

Are the parties required to pay for mediation services?

No, mediation is a service that the Board provides to people who file a charge with PAB/OGC or a petition with the Board.

What happens to my charge during mediation?

Once the parties agree to mediation, the period of time for the investigation will be extended for the length of the mediation process up to **30 days**. During mediation, the charge will not be investigated.

What if we run out of time?

If the parties cannot complete mediation within **30 days** and they agree that additional time to continue mediation is needed, they may jointly request additional time from the Executive Director. The request should include the underlying reasons for the extra time, the number of additional days needed to continue mediation, and whether the mediator believes additional time would be beneficial. The Executive Director will grant the parties' request upon a showing of good cause.

Can I have a representative?

Yes. Either party may have a legal or personal representative present during the mediation process. A party may not, however, have a representative whose presence would create a conflict of interest or conflict of position. The mediator will resolve questions about the suitability of a representative. The Agency representative must be able to resolve the dispute or, at the very least, have immediate access to an official who has such authority.

Do I have to use my leave in order to participate in mediation?

No. As a GAO employee, you are considered to be on official time, for compensation purposes, when engaged in the mediation process. Such official time will include a reasonable amount of time to meet the requirements of the mediation process, including but not limited to reviewing or preparing proposals and meeting with counsel or your representative.

What happens when we are finished with mediation?

The mediator will promptly notify the Executive Director when the mediation has ended, which occurs when either a settlement has been reached, or if there is no settlement, at the end of the **30** day mediation period, or any extension, or sooner if the parties are at an impasse.

Will there be a written agreement?

Yes. When the parties have agreed on how to resolve their dispute, they will incorporate their pact into a fully executed settlement agreement with an implementation provision that permits enforcement of the terms of the agreement by the Board.

What if we can't reach an agreement?

If the mediator informs the Executive Director that the mediation has ended without agreement, the Executive Director will send written notification of the end of mediation to all parties and to the Board's General Counsel. Within **5 days** of receipt of such notice, the General Counsel will commence or resume investigation of the initial charge that was filed.

Is mediation available after we start to litigate the charge?

Yes. Even after a Petition has been filed with the Personnel Appeals Board, either or both parties may request mediation of the claims raised in the Petition. The request, which must be in writing, is to be submitted to the administrative judge assigned to the case.

Do I have to participate in mediation at this point in my case?

No. If one party requests mediation and the other party objects to mediation by filing a response within **5 days** of receipt of the request, there will be no mediation. The administrative judge may

recommend that the parties engage in mediation before the adjudication of the claims contained in the Petition is completed but if either party objects to the recommendation by the administrative judge to engage in mediation, the mediation will not take place.

What happens to the litigation during mediation?

The administrative judge may exercise his or her discretion to delay the litigation to allow the parties to engage in the mediation process. In making this determination, the administrative judge will consider the diligence of the parties in litigating the action to date, whether staying the action would unreasonably delay a hearing on the merits, and whether there have been previous attempts at mediation.

What if the settlement agreement is violated?

Where the mediation has resulted in a settlement agreement, a party to the agreement may file a Petition with the Board if he or she believes that the agreement has been breached or violated. The Petition must be filed within **30 days** of the date when a party knew or should have known that a breach may have occurred. The case will be assigned to an administrative judge, who may order written submissions from the parties, and at his or her discretion, may schedule the case for hearing.

What can the administrative judge do?

The administrative judge may dismiss the claim as lacking merit; or, upon finding the claim meritorious, direct appropriate remedial action by the breaching party; or set aside the settlement agreement permitting the aggrieved party to proceed from the point at which the matter entered mediation, but only when specific performance of the settlement agreement will not provide appropriate relief.

What if I don't agree with the administrative judge's decision?

A party may appeal the administrative judge's determination to the full Board within **15 days** after receiving the administrative judge's determination. A party may subsequently appeal a final decision by the full Board to the United States Court of Appeals for the Federal Circuit..

