



Greater Los Angeles Federal Executive Board

# SMART Handbook

Be SMART ► Use SMART



*For EEO Complaints, Grievances, & Workplace Disputes, Use*

**Shared MediAtoR Team**

Revised May 2015

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# Definitions

**SMART = (Shared Mediator Team)**: A program of the **Greater Los Angeles Federal Executive Board (FEB)**, which arranges for *Alternative Dispute Resolution (ADR)*, specifically *Shared Neutral Mediators*, to resolve local workplace disputes effectively, efficiently, and at reduced cost.

**Some of the following definitions are based on 5 USC 571 (1999):**

**Agency Processes**: Mechanisms already in place to deal with workplace disputes in Federal agencies, such as the Equal Employment Opportunity (EEO) process, union contract provisions, agency grievance procedures, etc.

**Alternative Dispute Resolution (ADR)**: A wide range of problem-solving procedures, which use neutral third parties to resolve disputes, as an alternative to **Agency Processes** or to formal, adversarial methods, like litigation. Examples are mediation, facilitation, conciliation, negotiation, and arbitration.

**Issues in Controversy**: Workplace disputes or problems that may be resolved through traditional **Agency Processes** or non-traditional processes, like **ADR**.

**Mediation**: A voluntary, confidential, informal process whereby a trained neutral third party, a mediator, assists the disputing parties in finding a mutually acceptable solution in a manner different from traditional methods. Unlike litigation; for example, the rules of evidence do not apply, no testimony is taken, and the mediator does not decide the dispute.

**Mutually Acceptable**: Satisfactory to the needs and expectations of all parties involved in a dispute.

**Negotiate**: To confer, discuss, or bargain in order to reach agreement on a subject of common concern to the parties.

**Neutral**: An individual, who does not have a stake in the issues or outcome of a dispute, and who functions specifically to aid the parties in resolving it.

**Party**: A person who will be significantly affected by the outcome and who participates in the proceeding.

**Settlement Agreement**: A legally binding written agreement signed by all parties, containing a mutually acceptable solution to a dispute.

**Shared Neutral**: A Federal employee, who is a trained mediator on a roster of FEB mediators, available for ADR cases at other agencies. In SMART, the home agency pays the mediator's salary and the user agency pays travel costs.

**Union Grievance**: A process available to bargaining unit employees and union officials to communicate issues to management.

**Voluntary**: Each party has chosen to participate of their own free will.

# Expert Comments on Mediation

"Sometimes we have parties who feel devastated with the way the Administrative Judge decided the dispute should be resolved. When they lose a case like that, they have to revisit the issue...Mediation is the best opportunity for both parties to participate in a compromise to resolve the complaint...FEB mediators I have found to be both professional and capable."

*Dwight Lewis, Administrative Judge, EEO Commission*

**"The Mediation Process is truly empowerment."**

*Teal Lewis,*  
*Interagency Mediation*  
*Chair*  
**Dallas/Fort Worth**  
**Federal Executive**  
**Board**



# Advantages of SMART



## From a satisfied Employee:

- "My relationship with my manager improved.
  - When I tried **SMART**, I was on my third EEO Complaint.
  - Although I won my last complaint, the problems with my manager persisted. Maybe he treated me worse because he resented losing.
  - Communication with my manager was poor; I dreaded coming to work.
  - During the **SMART** mediation session, I felt safe expressing my feelings to my manager. The neutral mediators were witnesses. What I said could not be distorted later.
  - My manager apologized for some things he had said and done.
  - He expressed concerns about my work that I had never heard before.
  - I understood for the first time what to change and promised to improve. I delayed filing the third formal Complaint, and ended up never filing it.
  - After the **SMART** session, my manager talked to me more and treated me more fairly. He seemed more patient and less vindictive.
  - Understanding my priorities, I did better work in the areas noted by my manager and received some positive feedback for the first time.
  - No longer in dread of coming to the office, I started to enjoy my work more.
  - I have now gone two years without an EEO Complaint; previously I had filed a Complaint each year.
- **SMART** resolves problems faster.
  - **SMART** resolved my complaint within a few weeks after I contacted the EEO Counselor. My prior Complaints dragged on many months.
  - During those times, I was under a lot of stress; things were very tense with my manager at work. I developed medical problems and my work suffered.
- **SMART** is Impartial and preserves Confidentiality.
  - Because **SMART** mediators come from another agency, I felt more comfortable speaking openly.
  - I knew what I said would not be the subject of gossip in my agency.
  - The co-mediators seemed objective, rather than tools of management.
  - The **SMART** mediators seemed to have a greater influence over my manager than agency staff.
  - Although I will probably never see the co-mediators again, I will always be grateful for their assistance."



# Advantages of SMART

## Managers like SMART because:

- Productivity is improved.
  - Most **SMART** disputes are resolved in a few weeks with one day's time spent by each party.
- In contrast, EEO Complaints may require years to resolve, hundreds of hours of management, employee, and staff time and thousands of dollars of costs.
- **SMART** seems to clear the air better, freeing the parties to focus on work.
- **SMART** results in fewer repeat complaints, which improves productivity.
- SMART improves relationships.
  - The parties informally discuss the issues and may vent their frustrations.
  - No one is forced to agree to anything: if the mediation doesn't work, the parties pursue their usual options.
  - **SMART** is always worth a try; there is nothing to lose except a few hours of time and everything to gain, if resolution occurs.
  - The parties maintain control of the process.
  - **SMART** mediators try to satisfy both parties' interests and needs in leading the parties to a solution.
  - No outside party, like a judge, imposes an outcome.
  - Because **SMART** is a WIN-WIN method with no loser, employees seem less adversarial after **SMART** mediation than after a court loss.
- SMART is Impartial and preserves Confidentiality.
  - Because **SMART** mediators come from other agencies, managers consider them more neutral.
  - Confidentiality prohibits gossip about cases.
  - Managers are less concerned about losing face with outside mediators conducting the sessions.
  - Managers consider it a plus that they are unlikely to see the **SMART** mediators again.
- SMART is free.
  - The user agency pays only local mileage and parking costs.
  - The agency lending the **SMART** mediator pays its own employee's salary.



# Advantages of SMART

Union Officials like SMART because it resolves grievances.

- "SMART seems to better address the root causes of workplace problems."
- I was impressed with the SMART mediators' skills in facilitating an open exchange between the employee and manager, as a first step in finding resolution.
- Even "difficult" managers behave more flexibly and are more willing to compromise during SMART mediations.
- After SMART mediations, fewer repeat grievances against the same managers occur, thanks to improved communication.
- SMART increases union productivity.
- SMART cases are resolved in a few weeks, with only one day's time spent by the union official.
- Without SMART, grievances have taken years to resolve and drained away our limited union staff time.
- With SMART, the union can help more employees by not getting tied up with a few time-consuming cases.
- SMART mediators are free to the union.
- SMART lets the union stay in control.
- The union may attend the SMART session and speak on the employee's behalf.
  - SMART mediators address the employees' interests and do not impose solutions, as does a judge.
  - If the mediation does not resolve the case, the union still has legal remedies available, so it has nothing to lose trying SMART.
  - With no possibility of losing cases, the union does not risk losing face and marring its success rate in SMART mediations.
- SMART mediators are professional.
  - SMART mediators were well trained and effective.
  - Both sides trusted their objectivity
  - Because SMART mediators come from another agency, both parties trust the confidentiality of the proceeding more."



# Advantages of SMART

## Agency Heads like SMART for many reasons:

### •Productivity is increased.

- Most **SMART** disputes are resolved in a few weeks, with a maximum of one day's time spent by each party.
- In contrast, we have had EEO Complaints that took years to resolve and cost hundreds of hours and thousands of dollars of staff time.
- After **SMART** resolutions, we have fewer repeat disputes between the same parties.

### •SMART Mediators are free.

- My agency pays only local mileage and parking costs.
- The agency lending the **SMART** mediator pays its own employee's salary.

### •Relationships and morale improve.

- The parties informally discuss the issues and may vent their frustrations.
- No one is forced to agree to anything: if the mediation doesn't work, the parties pursue their usual options.
- The parties maintain control of the process.
- SMART** mediators try to satisfy both parties' interests.
- No outside party, like a judge, imposes an outcome.
- There is no loser, as in court.

### •SMART is impartial and preserves confidentiality.

- Because **SMART** mediators come from another agency, both parties feel more comfortable.
- The parties do not know and will probably never again see the **SMART** mediator after the mediation."

# **Frequently Asked Questions**

## **A SMART Mediator answers your questions:**

**What is a SMART Mediation?** A SMART mediation involves a workplace or employment-related dispute, such as an EEO complaint or grievance, in a federal agency in the southern half of California. The trained mediator comes from a different federal agency to assure impartiality and may be assisted by a co-mediator.

### **What is the authority for SMART?**

- In 1996, the Administrative Dispute Resolution Act passed.
- Also, EEOC Notice 915.002 of 1995 stated, "The Equal Employment Opportunity Commission (EEOC) is firmly committed to using alternative methods for resolving disputes in all of its activities...ADR can provide faster, less expensive and contentious, and more productive results."
- Since November 1999, EEOC Regulation 29 CFR Part 1614 has required federal agencies to make an ADR program available during the EEO pre-complaint and formal complaint processes.

**What is Your Role as Mediator?** My job is to facilitate the mediation process to help the parties reach a resolution of their dispute. I do not decide the case or dictate the terms of a settlement. Both parties win and there is no loser, if agreement occurs.

**How Long Do Most Mediations Last?** Most SMART mediation sessions last eight hours or less.

### **Is Mediation a Legal Proceeding?**

- It is not a legal proceeding, nor do I provide legal advice.
- When you agree to mediation, you do not waive the right to proceed with the formal legal dispute resolution process, provided that you file a timely complaint/grievance.
- If you are unsure of your timeframes, please check with your representative or the appropriate agency officials.

### **How does a typical Mediation Conference start?**

- I begin with an opening statement in a joint session with both parties, regarding my role as a neutral.
- I do not represent or advocate for or against either party.
- Next, I ask the complainant/grievant, to tell me in his/her own words about the issues and desired remedy.
- Then the management representative gives her/his viewpoint of the dispute.

### **What Occurs After the Conference Opening?**

- In the middle phase, the parties have a joint discussion with clarifying questions asked and potential solutions discussed.
- Sometimes, I meet privately (caucus) with each participant.
- Information discussed in caucus is confidential and will generally not be shared with anyone else.
- Caucuses may include "reality checking" (objective assessment of your position, demands and expectations).
- Then I may reconvene the joint session and determine if there is any area of agreement on any issue.

- If not, the parties may continue to negotiate, possibly re-caucusing with me, until it is clear if a settlement is going to emerge.

**What Happens if Agreement Occurs?**

- Either party may consult with representatives regarding the proposed settlement agreement.
- If settlement is reached, I draft an agreement acceptable to all parties and representatives.
- Appropriate management or legal personnel often review and approve the terms before they are effective.
- A signed settlement agreement is legally binding on the parties.

**What Aspects of Mediation are Confidential?** If you tell me something in private and ask me to keep it confidential, I am bound by law not to disclose this information voluntarily.

- A few rare exceptions exist, e.g., I may have to share information with authorities, if you say that
- you committed a crime or act of fraud, waste, or abuse, or
- you plan to commit a violent physical act,
- The session is neither tape-recorded nor transcribed; after the session, notes and document copies are destroyed.
- The mediation agreement and the resulting settlement agreement are *not* completely confidential, because officials have to review the agreement before it becomes binding on the agency.
- The complainant/grievant may not request information from me in any future legal proceeding, if the mediation does not resolve the dispute. 5 USC 574 contains full information.

**May Representatives Attend a Mediation?** Yes, as long as you notify the mediator in advance. Either party may bring a representative or legal counsel subject to negotiated agreements for bargaining unit employees.

**What Standards Guide a Mediator?** SMART mediators follow the Model Standards of Conduct for Mediators issued by the American Arbitration Association (AAA); the American Bar Association (ABA); and the Society of Professionals in Dispute Resolution (SPIDR now part of ACR, Association for Conflict Resolution).

- 1. Self-Determination:** Self-determination (voluntary choices and uncoerced agreements made by parties) governs mediation. The mediator encourages parties to consider all proposed options.
- 2. Impartiality:** Mediator impartiality is essential for success.
- 3. Conflicts of Interest:** A conflict of interest is a dealing, relationship, or interest in the controversy or its outcome that may create bias or the perception of possible bias. The mediator discloses all actual and potential conflicts. If all parties agree, the mediation may proceed. If the conflict of interest casts doubt on the integrity of the process, the mediator declines to proceed.
- 4. Confidentiality:** The mediator shall not voluntarily disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law. Only the SMART Coordinator sees all SMART evaluation forms and program records.
- 5. Quality of the Process:** The mediator has the proper training and experience and conducts the session timely, fairly, and diligently.

**For What Types of Disputes is Mediation Helpful?**

- The parties want settlement, but personality conflicts or poor communication has hampered negotiations.
- An underlying issue not formally part of the complaint and not resolvable by available legal relief may exist.
- The parties shall or should have a continuing relationship.

- If at least one party's view of the case is unrealistic, a discussion with a mediator may move the process forward.
- The parties expect to settle eventually, maybe at court.
- At least one party wants to avoid an imposed outcome.
- At least one party wants to avoid high litigation costs.
- Despite a desire to avoid adverse precedent, traditional negotiations have reached an impasse.
- Multiple and/ or complex issues are involved.
- A resolution is needed quickly.
- The parties prefer to maintain confidentiality about the issues.
- More than one possible solution exists; no solution is necessarily "right."
- For bargaining unit employees, using ADR must have been negotiated or agreed to by union and management.

**For What Types of Disputes is Mediation Less Helpful?**

- One or both parties may be guilty of criminal conduct, fraud, waste or abuse.
- Significant legal, policy, or constitutional issues are present.
- One party wants a precedent, a principle established, or a point proved.
- Uniform treatment of the issue or disputant is needed, e.g., the issue has nationwide impact or many similar suits are pending.
- A full public record of the proceeding is important.
- The dispute significantly affects non-parties, e.g., the relationship between a local union and federal agency.
- The case is likely to settle through unassisted negotiations.
- One party seeks major damages.
- One or both of the parties are not open to mediation.

**How much does SMART cost?** SMART provides FREE mediation when both parties request it. Trained SMART mediators are federal employees paid by their home agencies or private mediators providing Pro Bono services. The using agency pays local travel, e.g., mileage. The only condition of participation is that all parties (disputants), SMART mediators, and Federal agency coordinators, complete program evaluation forms after the mediation and forward them to the SMART Coordinator. This confidential information is used only to assess and improve SMART.

**How much money can SMART save?** Two examples of costs saved follow:

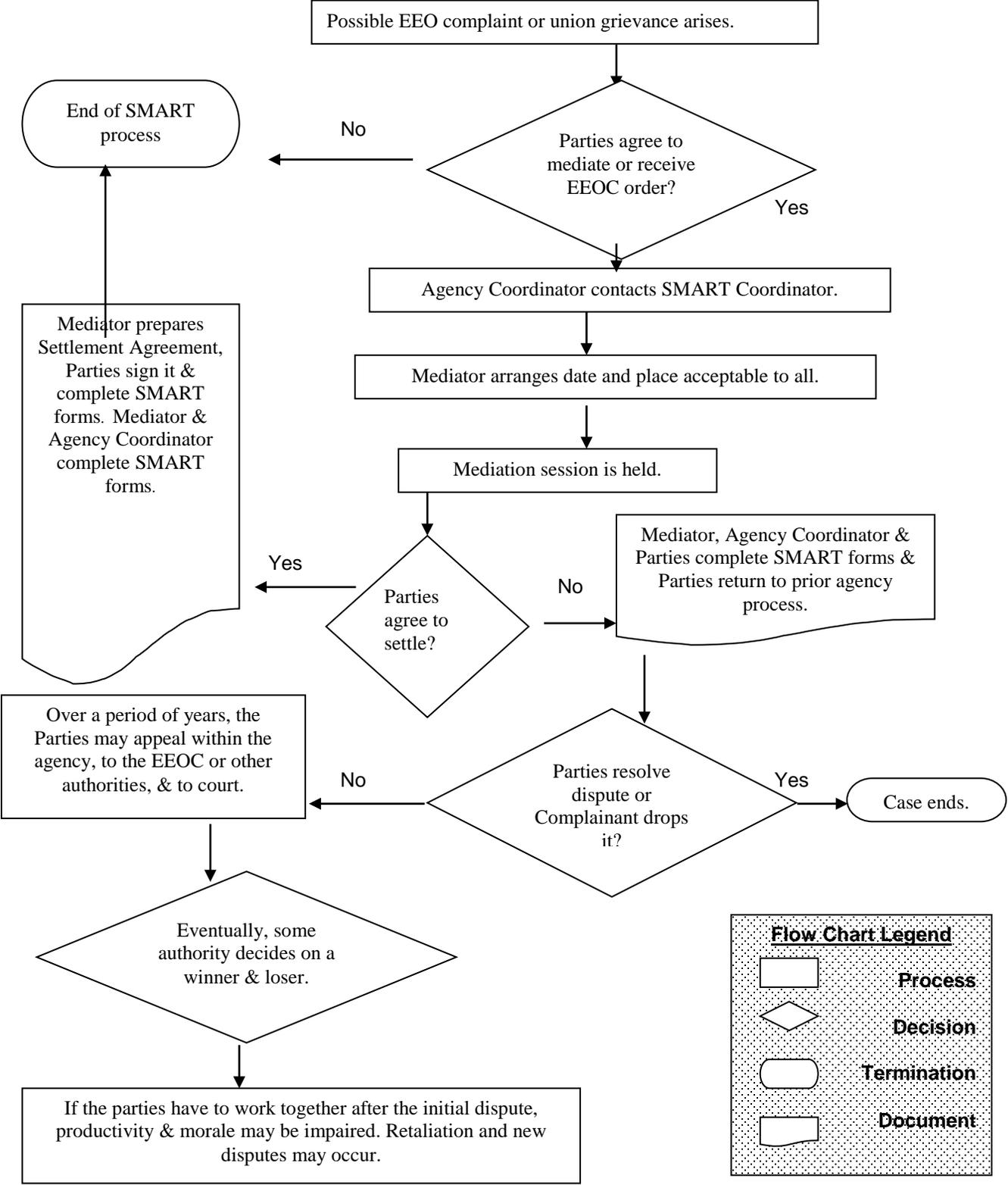
- An EEO Complaint that goes all the way to court may cost over \$200,000.
- Agencies hiring outside mediators may pay \$300 an hour or \$5,000 a case.

**Does mediation work?** Approximately 80% of mediated cases are resolved. Participants express a high degree of satisfaction with the fair and efficient process that avoids the stress of a lengthy investigation and possible litigation.

**If I have more questions, whom shall I contact?**

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# Greater LA Federal Executive Board SMART (Shared Mediator Team) **FLOW CHART**



**Flow Chart Legend**

-  **Process**
-  **Decision**
-  **Termination**
-  **Document**

