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Part 1

MERIT SYSTEMS PROTECTION BOARD ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 2000

OCTOBER 23, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. GEKAS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3312]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3312) to clarify the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board to establish under such act a 3-year pilot program that will provide a voluntary early intervention alternative dispute resolution process to assist Federal agencies and employees in resolving certain personnel actions and disputes in administrative programs, having considered the same, report favorably thereon with amendment and recommends that the bill as amended do pass.

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89–006

The amendments are as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Merit Systems Protection Board Administrative Dispute Resolution Act of 2000".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Workplace disputes waste resources of the Federal Government, take up too much time, and deflect managers and employees from their primary job functions.

(2) The Merit Systems Protection Board (hereafter in this Act referred to as the "Board") has already taken steps to encourage agency use of ADR before appeals are filed with the Board, including extending the regulatory time limit for filing appeals when the parties agree to try ADR, but high levels of litigation continue.

(3) The Board's administrative judges, who decide appeals from personnel actions by Federal agencies, find that by the time cases are formally filed with the Board, the positions of the parties have hardened, communication between the parties is difficult and often antagonistic, and the parties are not amenable to open discussion of alternatives to litigation.

(4) Early intervention by an outside neutral, after the first notice of a proposed action by an agency but before an appeal is filed with the Board, will allow the parties to explore settlement outside the adversarial context. However, without the encouragement of a neutral provided without cost, agencies are reluctant to support an early intervention ADR program.

(5) A short-term pilot program allowing the Board, upon the joint request of the parties, to intervene early in a personnel dispute is an effective means to test whether ADR at that stage can resolve disputes, limit appeals to the Board, and reduce time and money expended in such matters.

(6) The Board is well equipped to conduct a voluntary early intervention pilot program testing the efficacy of ADR at the initial stages of a personnel dispute. The Board can provide neutrals who are already well versed in both ADR techniques and personnel law. The Board handles a diverse workload including removals, suspensions for more than 14 days, and other adverse actions, the resolution of which entails complex legal and factual questions.

SEC. 3. MERIT SYSTEMS PROTECTION BOARD ALTERNATIVE DISPUTE RESOLUTION PILOT PROGRAM.

(a) AMENDMENT TO CHAPTER 5 OF TITLE 5.—Chapter 5 of title 5, United States Code, is amended by adding immediately after section 584 the following:

"§ 585. Establishment of voluntary early intervention alternative dispute resolution pilot program for Federal personnel disputes

"(a) IN GENERAL.—

"(1) The Board is authorized under section 572 to establish a 3-year pilot program to provide Federal employees and agencies with voluntary early intervention alternative dispute resolution (in this section referred to as 'ADR') processes to apply to certain personnel disputes. The Board shall provide ADR services, upon joint request of the parties, in matters involving removals, suspensions for more than 14 days, other adverse actions under section 7512, and removals and other actions based on unacceptable performance under section 4303.

"(2) The Board shall test and evaluate a variety of ADR techniques, which may include—

"(A) mediation conducted by private neutrals, Board staff, or neutrals from appropriate Federal agencies other than the Board;

"(B) mediation through use of neutrals agreed upon by the parties and credentialed under subsection (c)(5); and

"(C) non-binding arbitration.

"(b) EARLY INTERVENTION ADR.—

"(1) AUTHORITY.—The Board is authorized to establish an early intervention ADR process, which the agency involved and employee may jointly request, after an agency has issued a notice letter of a proposed action to an employee under section 4303 or 7513 but before an appeal is filed with the Board.

"(2) NOTICE IN PERSONNEL DISPUTES.—During the term of the pilot program, an agency shall, in the notice letter of a proposed personnel action under section 4303 or 7513—

"(A) advise the employee that early intervention ADR is available from the neutral Board, subject to the standards developed pursuant to subsection (c)(1)(A), and that the agency and employee may jointly request it; and

"(B) provide a description of the program, including the standards developed pursuant to subsection (c)(1)(A).

"(3) REQUEST.—Any agency and employee may seek early intervention ADR from the Board by filing a joint request with the Board pursuant to the program standards adopted under subsection (c)(1)(A). All personnel dispute matters appealable to the Board under section 4303 or 7513 shall be eligible for early intervention ADR, upon joint request of the parties, unless the Board determines that the matter is not appropriate for the program subject to any applicable collective bargaining agreement established under chapter 71.

"(4) CONFIDENTIALITY AND WITHDRAWAL.—The consent of an agency or an employee with respect to an early intervention ADR process is confidential and shall not be disclosed in any subsequent proceeding. Either party may withdraw from the ADR process at any time.

"(5) ANCILLARY MATTER.—In any personnel dispute accepted by the Board for the ADR pilot program authorized by this section, the Board may attempt to resolve any ancillary matter which the Board would be authorized to decide if the personnel action were effected under section 4303 or 7513, including—

"(A) a claim of discrimination as described in section 7702(a)(1)(B);

"(B) a prohibited personnel practice claim as described in section 2302(b); or

"(C) a claim that the agency's action is or would be, if effected, not in accordance with law.

"(c) IMPLEMENTATION.—

"(1) PROGRAM DUTIES.—In carrying out the program under this section, the Board shall—

"(A) develop and prescribe standards for selecting and handling cases in which ADR has been requested and is to be used;

"(B) take such actions as may be necessary upon joint request of the parties, including waiver of all statutory, regulatory, or Board imposed adjudicatory time frames; and

"(C) establish a time target within which it intends to complete the ADR process.

"(2) EXTENSION.—The Board, upon the joint request of the parties, may extend the time period as it finds appropriate.

"(3) ADVOCACY AND OUTREACH.—The Board shall conduct briefings and other outreach, on a non-reimbursable basis, aimed at increasing awareness and understanding of the ADR program on the part of the Federal workforce—including executives, managers, and other employees.

"(4) RECRUITMENT.—The Chairman of the Board may contract on a reimbursable basis with officials from other Federal agencies and contract with other contractors or temporary staff to carry out the provisions of this section.

"(5) TRAINING AND CREDENTIALLING OF NEUTRALS.—The Board shall develop a training and credentialing program to ensure that all individuals selected by the Board to serve as program neutrals have a sufficient understanding of the issues that arise before the Board and are sufficiently skilled in the practice of meditation or any other relevant form of ADR.

"(6) REGULATIONS.—The Board is authorized to prescribe such regulations as may be necessary to implement the ADR program established by this section.

"(d) EVALUATION.—

"(1) CRITERIA.—The Board's Office of Policy and Evaluation shall establish criteria for evaluating the ADR pilot program and prepare a report containing findings and recommendations as to whether voluntary early intervention ADR is desirable, effective, and appropriate for cases subject to section 4303 or 7513.

"(2) REPORT CONTENT.—The report, subject to subsection (b)(4) and section 574, shall include—

"(A) the number of cases subject to the ADR program, the agencies involved, the results, and the resources expended;

"(B) a comprehensive analysis of the effectiveness of the program, including associated resource and time savings (if any), and the effect on the Board's caseload and average case processing time;

"(C) a survey of customer satisfaction; and

"(D) a recommendation regarding the desirability of extending the ADR program beyond the prescribed expiration date and any recommended changes.

The recommendation under subparagraph (D) shall discuss the relationship between the Board's pilot ADR program and those workplace ADR programs conducted by other Federal agencies.

"(3) REPORT DATE.—The report shall be submitted to the President and the Congress 180 days before the close of the ADR pilot program.".

(b) APPROPRIATIONS.—

(1) IN GENERAL.—For the purpose of carrying out the ADR pilot program established by this section, there are authorized to be appropriated such sums as may be necessary for each of the 3 fiscal years beginning after the date of enactment of this Act.

(2) NO REDUCTIONS.—The authorization of appropriations by paragraph (1) shall not have the effect of reducing any funds appropriated for the Board for the purpose of carrying out its statutory mission under section 1204.

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect no later than the close of the 60th day after the enactment of appropriations authorized by subsection (b)(1) and shall remain in effect for 3 years from the effective date.

(d) CONFORMING AMENDMENT.—The table of sections for subchapter IV of chapter 5 of title 5, United States Code, is amended by adding after the item relating to section 584 the following new item:

"585. Establishment of voluntary early intervention alternative dispute resolution pilot program for Federal personnel disputes.".

Amend the title so as to read:

A bill to clarify the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board to establish under such Act a 3-year pilot program that will provide a voluntary early intervention alternative dispute resolution process to assist Federal agencies and employees in resolving certain personnel actions.

PURPOSE AND SUMMARY

H.R. 3312, the "Merit Systems Protection Board Alternative Dispute Resolution Act of 2000," is designed to further encourage the use of alternative dispute resolution within the Federal Government. H.R. 3312 clarifies the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board (MSPB or the Board) to establish a 3-year pilot program to provide Federal agencies and employees the opportunity to seek early intervention alternative dispute resolution [1] (ADR) to resolve certain types of workplace disputes before they escalate into formal litigation before the Board. The act also requires the MSPB to evaluate different ADR techniques and to submit a report to Congress and the President detailing the effectiveness of the pilot program within 6 months of its expiration. Finally, H.R. 3312 authorizes the appropriation of sums necessary to implement the pilot program during each year of the program's 3-year duration.

BACKGROUND AND NEED FOR THE LEGISLATION

Alternative Dispute Resolution

Over the last few decades, as litigation costs have risen and court dockets have become increasingly congested, parties have come to rely on various forms of ADR to resolve their contractual disputes in a timely and cost-effective manner. The use of ADR has been encouraged by Congress and the Federal courts, which have enunciated a strong national policy in favor of it.

[1] ADR refers to procedures for settling disputes by means other than litigation; e.g. by arbitration, mediation, mini-trials or a hybrid of each. Usually less costly and more expeditious, ADR is increasingly used in commercial and labor disputes and in other disputes that would likely otherwise involve court litigation. BLACK'S LAW DICTIONARY 78 (6th ed. 1990).

Congress' first expression of Federal support for ADR came in 1925 with passage of the Federal Arbitration Act (FAA).[2] The act reversed judicial hostility toward arbitration, a common form of ADR, by making agreements to arbitrate enforceable "save upon such grounds as exist in law or in equity for the revocation of any contract."[3] At the same time, the Federal courts have advanced ADR by liberally construing arbitration clauses in contracts and by invalidating State efforts to limit the enforcement of these agreements. For example, the Supreme Court has held that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[4] The Court has also held that congressional passage of the FAA "declared a national policy favoring arbitration and withdrew the power of the States to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[5] Finally, the Court has unequivocally rejected State efforts to limit the enforcement of arbitration agreements by ruling that the FAA preempts all State laws that subject arbitration agreements to heightened levels of contractual scrutiny.[6]

Prevalence of ADR in the Federal Government

In response to spiraling litigation costs faced by the Federal Government, Congress has sought to extend the benefits of ADR to Federal agencies. Finding that the "availability of a wide range of dispute resolution procedures * * * will enhance the operation of the Government and better serve the public," Congress passed the Administrative Dispute Resolution Act[7] (ADRA) in 1990. The ADRA required Federal agencies to: adopt a policy favoring ADR; designate a senior official as the agency responsible for ADR; provide training on ADR methods; and review agency contracts and agreements for possible implementation of ADR techniques. A year later, President Bush issued a corresponding executive order affirming the benefits of ADR and encouraging its continued implementation throughout the Federal Government.[8]

Encouraged by the success of ADR programs at Federal agencies, Congress permanently reauthorized the ADRA, with amendments, in 1996.[9] The 1996 amendments extended the scope of the ADRA by authorizing Federal agencies to establish ADR programs employing binding arbitration[10] and by prohibiting the disclosure of confidential material obtained in the course of ADR settlement under the Freedom of Information Act.[11] These amendments have served to further enhance the use of ADR at Federal agencies. Congress has also encouraged the judicial branch to implement ADR programs. In 1990, Congress authorized Federal district courts to implement pilot ADR programs to facilitate settlement outside of

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[2] United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2000)).
[3] See *id.* § 2.
[4] *Moses Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
[5] *Southland Corp.* v. *Keating*, 465 U.S. 1, 18 (1984).
[6] *Allied-Bruce Terminix* v. *Cos.* v. *Dobson*, 513 U.S. 265 (1995).
[7] Pub. L. No. 101–552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 581–593 (2000)).
[8] Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991) (codified at 5 U.S.C. §§ 581–593 (2000)).
[9] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320, 110 Stat. 38709.
[10] See *id.* § 590.
[11] See *id.* § 584.

the formal litigation process.[12] In 1998, Congress greatly expanded government support of ADR by passing legislation requiring every Federal district court to provide litigants at least one ADR alternative during the Federal civil litigation process.[13]

Merit Systems Protection Board

The Merit Systems Protection Board (the Board) is an independent adjudicatory agency which was established by the Civil Service Reform Act of 1978.[14] The Board has appellate jurisdiction over certain types of adverse personnel actions[15] taken against Federal employees. Board decisions are appealable to the U.S. Court of Appeals for the Federal Circuit, or if the appeal concerns a discrimination claim, to the Equal Employment Opportunity Commission.[16] Since its creation, the Board has heard tens of thousands of cases while providing Federal employees with an institutionally independent and impartial forum for resolving their employment disputes with Federal agencies.

Over the last decade, Congress has steadily expanded the jurisdiction of the Board. Examples of this expansion include the Whistleblower Protection Act of 1989,[17] the Civil Rights Act of 1991,[18] the Uniformed Services Employment and Reemployment Rights Act of 1994,[19] the Presidential and Executive Office Accountability Act of 1996,[20] and the Veterans Employment Opportunities Act of 1998.[21] The added scope and complexity of the Board's jurisdiction has not been matched by a commensurate increase in judicial resources. Since 1993, MSPB's staff has fallen nearly 25 percent, from 323 to 250 employees.[22] In 1999, the Board and its regional and field offices closed 9,806 cases.[23] While the MSPB has lived up to its promise of providing Federal employees with an independent appellate forum to resolve employment disputes with the Federal agencies for which they work, the volume of this caseload has necessitated further exploration of alternatives to formal litigation before the Board.

H.R. 3312, MSPB Alternative Dispute Resolution Act of 2000

H.R. 3312 would clarify the Administrative Dispute Resolution Act of 1996 to authorize a 3-year, early intervention pilot ADR program at the Board to assist Federal agencies and employees in resolving personnel actions and disputes within the MSPB's jurisdiction. The pilot program is designed to assist the Board's judges in managing an increasing caseload while reducing litigation expenses faced by Federal agencies and employees who might have otherwise sought formal litigation before the Board.

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[12] Civil Justice Reform Act of 1990, Pub. L. No. 101–650, 104 Stat 5089 (codified at 28 U.S.C. §§ 471–82 (2000)).
[13] Alternative Dispute Resolution Act of 1998, Pub. L. No. 105–315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 2000)).
[14] Pub. L. No. 95–454, 91 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).
[15] 5 U.S.C. §§ 7512 & 4303 (2000).
[16] See *id.* § 1204 (codified at 5 U.S.C. §§ 1201–22 (2000)).
[17] Pub. L. No. 101–12, 103 Stat. 16.
[18] Pub. L. No. 102–166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.)
[19] Pub. L. No. 103–353, 108 Stat. 3149 (codified at 38 U.S.C. §§ 4301–4333 (2000)).
[20] Pub. L. No. 104–331, 110 Stat. 4054 (codified at 3 U.S.C. § 401 (2000)).
[21] Pub. L. No. 105–339, 112 Stat. 3182 (codified in scattered sections of 8 U.S.C.).
[22] 1999 MSPB. ANN. REP. 6.
[23] *Id.* at 11.

A key feature of the pilot program permits Federal agencies and employees to seek early intervention ADR from a neutral *after* the first notice of planned agency action but *before* an appeal is formally filed with the Board. This provision for early intervention outside the adversarial context helps to maximize the chances of settlement before the positions of the parties harden and become so antagonistic that settlement is unlikely. Since a fully litigated Board appeal can be as costly as private litigation, the administrative savings from effective early settlement can be substantial. The program is also notable for its voluntariness, since either party may withdraw from ADR at any stage of the process. Establishment of this program will in no way affect the collective bargaining rights of covered personnel.

Another important provision of H.R. 3312 requires that the Board evaluate the efficacy of a variety of ADR techniques. H.R. 3312 authorizes such sums as may be necessary to fund the pilot program. The provision of funds will ensure that MSPB has the resources necessary to fully implement the pilot program while encouraging the participation of other agencies in the program. Finally, the bill requires the Board's Office of Policy and Evaluation to submit a comprehensive report detailing the effectiveness of the pilot program within 6 months of the program's termination. This information, to be drawn from empirical evidence based upon actual settlements, will allow Congress to more fully ascertain the fiscal prudence of extending the program beyond the 3-year period of the pilot program.

COMMITTEE CONSIDERATION

On June 20, 2000, the Subcommittee on Commercial and Administrative Law met in open session and ordered favorably reported the bill H.R. 3312, as amended, unanimously by voice vote, a quorum being present. On September 19, 2000, the committee met in open session and ordered favorably reported the bill H.R. 3312, with a single amendment in the nature of a substitute unanimously by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is applicable because this legislation provides new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to H.R.3312, the following estimate and comparison prepared by the Director of the Congressional Budget Office under Section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 22, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3312, a bill to clarify the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board to establish under such act a 3-year pilot program that will provide a voluntary early intervention alternative dispute resolution process to assist federal agencies and employees in resolving certain personnel actions.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 3312—A bill to clarify the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board to establish under such act a 3-year pilot program that will provide a voluntary early intervention alternative dispute resolution process to assist federal agencies and employees in resolving certain personnel actions

H.R. 3312 would authorize the Merit Systems Protection Board (MSPB) to establish a three-year pilot program to encourage agencies and employees to use alternative dispute resolution (ADR) procedures to settle disputes before they escalate into formal actions before the MSPB. The bill would require that the MSPB evaluate and report on the pilot program within six months of its expiration. H.R. 3312 would authorize the appropriation of such sums as are necessary each year to implement the program.

Based on information from the MSPB, CBO estimates that implementing H.R. 3312 would cost around $2 million in each of fiscal years 2001 through 2003. (The MSPB received an appropriation of $27.6 million for fiscal year 2000.) That estimate would allow the MSPB to develop and advertise the program to federal agencies, to both hire new employees and contract with nonfederal professionals, to train and certify individuals in the practice of ADR techniques, and to report on the program's effectiveness. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 3312 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is John R. Righter, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title

This section entitles the bill the "Merit Systems Protection Board Administrative Dispute Resolution Act of 2000."

Section 2. Findings

Section 2 consists of a congressional statement of findings. The findings reflect Congress' recognition of the cost, time and expense of Federal workplace disputes and the persistence of high levels of litigation at the MSPB. The statement stresses the importance of early intervention ADR to help resolve disputes while parties are more amenable to formal litigation, and notes that Federal agencies are more inclined to support alternatives to formal litigation if neutrals are provided to them without expense. The findings state that a pilot program that permits Federal agencies and employees to request early intervention ADR at the Board would effectively test the efficacy of ADR in this context. Finally, the statement stresses that the Board is well-equipped to implement the pilot program since Board judges are well-versed in both ADR techniques and in the substance of employment law.

Section 3. Merit Systems Protection Board Alternative Dispute Resolution Pilot Program

Section 3(a) amends chapter 5 of title 5 of the United States Code by adding section 585, which authorizes the establishment of a voluntary early intervention ADR pilot program at the Board. Subsection (a) specifies the types of personnel and administrative disputes that may be resolved by the program and requires the Board to evaluate a variety of ADR techniques, including mediation conducted by Board staff, private neutrals, or neutrals from appropriate Federal agencies other than the Board.

Subsection (b) stresses that Federal agencies and employees may jointly request to participate in the program at any time if the dispute is one under a Board administrative program. In the case of personnel disputes, parties may jointly request ADR under the program after an agency has issued a notice letter of proposed action under section 4303 or 7513 of title 5. This subsection requires that the notice letter of proposed agency action under sections 4303 and 7513 describe the Board's early intervention ADR program and inform employees of their option to participate in the program. Section 585(b) further provides that agencies and employees may seek early intervention ADR under the program by filing a joint request with the Board and states that all personnel disputes under sections 4303 and 7513 are eligible for early intervention ADR unless the Board determines that the matter is not appropriate for the

program. Finally, section (b) provides that an agency or employee decision to participate in the Board's early intervention ADR program shall not be disclosed in any subsequent proceeding and states that either party may withdraw from the ADR program throughout the process.

Section 585(c) specifies how the Board should implement the ADR program. It requires the Board to develop and prescribe standards for selecting and handling cases in which ADR has been requested and enables the Board to take actions that might be necessary, including waiver or extension of all statutory, regulatory or Board-imposed time frames, to facilitate the success of the program. This subsection also requires the Board or other contractors hired by the Board Chairman to conduct advocacy and outreach to increase awareness of the program within the Federal workforce. Section 585(c) further requires the Board to develop a training and credentialing program to ensure that all individuals selected by the Board to serve as program neutrals possess sufficient understanding of ADR process and of the issues that arise before the Board. Finally, section 585(c) authorizes the Board to prescribe such regulations as may be necessary to implement the ADR program.

Section 585(d) sets standards for evaluating the Board's ADR pilot program. It requires the Board to establish criteria for evaluating the program and to prepare a report detailing finding and recommendations as to whether voluntary early intervention ADR is a desirable, effective, and appropriate means of resolving disputes before the Board. Section 585(d) requires the report to identify the number of cases subject to the ADR program, the agencies involved, the results of the program, and the resources expended. The report must include a detailed analysis of the effectiveness of the program, including any resource and time savings, and the program's impact on the Board's caseload and case processing time. The report must also include a customer service survey, a recommendation as to whether to extend the program beyond its expiration date, any suggested improvements to the program, and a discussion of the relationship between the Board's pilot ADR program and workplace ADR programs conducted by other Federal agencies. Section 585(d) requires that the report be submitted to the President and Congress 180 days before the close of the ADR pilot program.

Section 3(b) authorizes the appropriation of sums necessary to implement the pilot ADR program for each of the 3 years following the enactment of the act. This subsection also requires that the authorization of funds shall not reduce the funds appropriated to the Board to carry out its statutory mission under section 1204.

Section 3(c) states that the program shall take effect no later than 60 days after the enactment of appropriations authorized under subsection (b)(1) and remain in effect for 3 years from the effective date.

Section 3(d) amends subchapter IV of chapter 5 of title 5 of the United States Code by adding section 584, "Establishment of voluntary early intervention ADR pilot program for Federal personnel disputes."

AGENCY VIEWS

FEDERAL MEDIATION AND
CONCILIATION SERVICE,
Washington, DC, May 15, 2000.

Hon. GEORGE W. GEKAS,
Chairman, Subcommittee on Commercial & Administrative Law, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR CONGRESSMAN GEKAS: Please consider this letter to be the official submission of commentary by the Federal Mediation & Conciliation Service (FMCS) on HR 3312, which seeks to clarify the Administrative Dispute Resolution Act of 1996 to authorize the Merit Systems Protection Board ("MSPB" or "the Board") to establish a 3-year pilot program to provide a voluntary early intervention Alternative Dispute Resolution (ADR) process. The purpose of this commentary is to explain to the Subcommittee why FMCS believes HR 3312, modified as recommended by the Department of Justice, to be a worthy and important bill that it should recommend for passage to the Judiciary Committee.

I. ABOUT FMCS

Employing over 200 full time mediators, the largest cadre of full time mediators in the world, FMCS is a unique federal agency with over fifty years of experience in the resolution of labor-management disputes. FMCS is only one of two agencies in the federal government that has conflict resolution as its primary mission. (The other is the National Mediation Board, which resolves disputes in the air and railway transportation industries.) In recent decades, FMCS' mandate has expanded significantly in response to the changing needs of the U.S. economy and the growing awareness that FMCS' dispute resolution techniques can be successfully applied to many situations beyond the labor-management context. In particular, through congressional legislation, federal agency regulations, executive orders, and agreements with other federal agencies, FMCS has for many years provided expert services as outside third party neutrals, ADR systems designers, and ADR trainers throughout the federal government.

II. WHY THIS SUBCOMMITTEE SHOULD RECOMMEND HR 3312 FOR PASSAGE TO THE JUDICIARY COMMITTEE

It is FMCS' position that HR 3312, modified as recommended by the Department of Justice, is a good bill which, if enacted, would save a significant amount of time and money in the form of reduced litigation costs and increased productivity for employees, agencies and taxpayers alike. Resolving disputes at the lowest possible level and in the most expeditious manner avoids significant resource expenditures to resolve them more formally later on. Early resolution of disputes often better preserves workplace relationships because the parties tend to become less entrenched in their respective positions. Relationships can also improve from the joint exercise of working cooperatively toward a resolution in an ADR setting. In addition, early and lasting resolution of workplace disputes enhances productivity because it keeps employees away from their

jobs for shorter periods of time and reduces the amount of time they are mentally distracted by workplace conflict. In the long run, ADR can also contribute to the development of a culture of conflict resolution that keeps disputes from escalating in the first place.

HR 3312 provides an important mandate as well a legal and economic framework in which the above positive outcomes can occur. It provides built-in flexibility for the MSPB to experiment with different systems and approaches for resolving disputes in the most expeditious manner and at the lowest possible level. It wisely provides for the continuous learning that is necessary when an organization adopts any significant change in its operating procedures. These are significant strengths that reflect a most enlightened approach to legislation. For these reasons this Subcommittee should strongly recommend passage of HR 3312.

1. HR 3312 is also laudable for its emphasis on a systems approach to ADR

It is FMCS' view that passage of HR 3312 would be extremely beneficial not only because of its economic and social impact, but also because of its value as Congress' continuing recognition of the importance of ADR and the elements that comprise a coherent and successful ADR system. As ADR professionals, we at FMCS always advise our clients to think in terms of a systems approach. This advice recognizes that an ADR system is, in reality, the interdependence of several indispensable elements.

The draft text of HR 3312 submitted by the Justice Department ("Draft Text") recognizes the importance of these elements in several ways. First, it explicitly provides for the training and credentialing of the program's neutrals. This is a very attractive feature of the legislation: without a system in place to train the program's neutrals to ensure that they are sufficiently skilled in the practice of mediation and also understand the arcane and complex issues that the Board confronts, there would be a great risk that quality would suffer. In such a case, parties could lose faith in the system and stop using it, thereby continuing to increase the Board's caseload with even more deeply entrenched positions. For these reasons, it is wise to include a provision for the training and credentialing of the program's neutrals in HR 3312.

FMCS agrees with our colleagues at the Justice Department that the MSPB should not require parties to use mediators who are MSPB Administrative Judges (AJs) in order to participate in the program. Such an arrangement risks creating a perception that the MSPB AJ mediating the case might share information with the MSPB AJ(s) hearing the case. Irrespective of whether such a communication would actually take place, there might very well be the perception that it could. That perception is potentially very damaging to the mediation process, as candor and openness are essential elements of any successful mediation. Parties may not make the statement that can "seal the deal" if they suspect it could prejudice them before the AJ if the mediation ultimately does not resolve the issue. For these reasons as well as the reasons identified by the Justice Department, FMCS endorses subsection 585(a)(2)(A) of the HR 3312 Draft Text, requiring the Board to test and evaluate a variety of ADR techniques, including "mediation conducted by private neutrals, Board staff, or neutrals from appropriate federal

agencies other than the Board." If MSPB AJs do end up serving as mediators in this program, there should be procedures in place to assure the parties that he or she will not reveal statements made in mediation with the Judge(s) that will hear the case.

Another attractive feature of the HR 3312 Draft Text is its mandate for the Board to conduct appropriate advocacy and outreach aimed at increasing awareness and understanding of the ADR program on the part of the federal workforce. Such advocacy and outreach is critical to ensuring that the program's potential users are aware that it is available and, of fundamental importance, that they are informed as to how to recognize when ADR is appropriate and how to go about availing themselves of the program. Appropriate advocacy and outreach can also ensure that potential parties feel comfortable using the program—that they understand that it is voluntary, does not require that they forfeit any of their rights, is neutral and confidential, and that there are great potential benefits from participating in the process. For these reasons, the Draft Text's provision for outreach to federal managers, supervisors and staff is an example of very smart legislation, legislation that takes into account how it will actually be put into practice.

Finally, the bill wisely provides for an independent evaluation and feedback mechanism to track not only whether the program is meeting its objectives but also whether it is meeting the needs of its customers. As guardians of the public's trust and the public's money, it is important for implementing agencies to not only publicly account for a program's results, but also to have a feedback mechanism by which they can continuously improve the quality of their service delivery. FMCS has much confidence in the expertise of the MSPB and its capacity to deliver a quality program to the public, and trusts that as the Board designs its program it will provide for an evaluation loop to feed back into service delivery at several points, well before the final independent report is due at the end of three years. As the most experienced designers of ADR systems in the federal government, FMCS stands prepared to advise the Board, at its request, in how to provide for a continuously improving ADR program that most wisely spends the taxpayers' money.

III. CONCLUSION

As I have discussed above, this Subcommittee should recommend HR 3312, modified as recommended by the Department of Justice, for passage because it encourages early settlement of disputes, with all of the attendant benefits, and does so by taking a systems approach. While the provisions that I have discussed—training and credentialing, education and outreach, and independent evaluation and feedback—are important components of a coherent ADR system, the design of a truly effective system is a complex task requiring great expertise and experience. With FMCS' considerable expertise in the areas of ADR training and certification, education and outreach, program evaluation, maintenance of a panel of outside neutrals (FMCS has over 1400 of them), and the development and maintenance of standards of professional responsibility, we would be happy to contract with the MSPB to coordinate with and advise them as they implement this pilot program.

In conclusion, FMCS strongly encourages the Subcommittee to support this commendable legislation and the good work of the Merit Systems Protection Board by recommending it for passage to the Judiciary Committee. I would be happy to appear before the Subcommittee to provide further comment on how the proposed legislation could be implemented successfully, and the role that FMCS could play in making that happen.

Sincerely,

RICHARD BARNES, *Director.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.

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SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

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585. Establishment of voluntary early intervention alternative dispute resolution pilot program for Federal personnel disputes.

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SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

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§ 585. Establishment of voluntary early intervention alternative dispute resolution pilot program for Federal personnel disputes

(a) IN GENERAL.—

(1) The Board is authorized under section 572 to establish a 3-year pilot program to provide Federal employees and agencies with voluntary early intervention alternative dispute resolution (in this section referred to as "ADR") processes to apply to certain personnel disputes. The Board shall provide ADR services, upon joint request of the parties, in matters involving removals, suspensions for more than 14 days, other adverse actions under

section 7512, and removals and other actions based on unacceptable performance under section 4303.

(2) The Board shall test and evaluate a variety of ADR techniques, which may include—

(A) mediation conducted by private neutrals, Board staff, or neutrals from appropriate Federal agencies other than the Board;

(B) mediation through use of neutrals agreed upon by the parties and credentialed under subsection (c)(5); and

(C) non-binding arbitration.

(b) EARLY INTERVENTION ADR.—

(1) AUTHORITY.—The Board is authorized to establish an early intervention ADR process, which the agency involved and employee may jointly request, after an agency has issued a notice letter of a proposed action to an employee under section 4303 or 7513 but before an appeal is filed with the Board.

(2) NOTICE IN PERSONNEL DISPUTES.—During the term of the pilot program, an agency shall, in the notice letter of a proposed personnel action under section 4303 or 7513—

(A) advise the employee that early intervention ADR is available from the neutral Board, subject to the standards developed pursuant to subsection (c)(1)(A), and that the agency and employee may jointly request it; and

(B) provide a description of the program, including the standards developed pursuant to subsection (c)(1)(A).

(3) REQUEST.—Any agency and employee may seek early intervention ADR from the Board by filing a joint request with the Board pursuant to the program standards adopted under subsection (c)(1)(A). All personnel dispute matters appealable to the Board under section 4303 or 7513 shall be eligible for early intervention ADR, upon joint request of the parties, unless the Board determines that the matter is not appropriate for the program subject to any applicable collective bargaining agreement established under chapter 71.

(4) CONFIDENTIALITY AND WITHDRAWAL.—The consent of an agency or an employee with respect to an early intervention ADR process is confidential and shall not be disclosed in any subsequent proceeding. Either party may withdraw from the ADR process at any time.

(5) ANCILLARY MATTER.—In any personnel dispute accepted by the Board for the ADR pilot program authorized by this section, the Board may attempt to resolve any ancillary matter which the Board would be authorized to decide if the personnel action were effected under section 4303 or 7513, including—

(A) a claim of discrimination as described in section 7702(a)(1)(B);

(B) a prohibited personnel practice claim as described in section 2302(b); or

(C) a claim that the agency's action is or would be, if effected, not in accordance with law.

(c) IMPLEMENTATION.—

(1) PROGRAM DUTIES.—In carrying out the program under this section, the Board shall—

(A) develop and prescribe standards for selecting and handling cases in which ADR has been requested and is to be used;

(B) take such actions as may be necessary upon joint request of the parties, including waiver of all statutory, regulatory, or Board imposed adjudicatory time frames; and

(C) establish a time target within which it intends to complete the ADR process.

(2) EXTENSION.—The Board, upon the joint request of the parties, may extend the time period as it finds appropriate.

(3) ADVOCACY AND OUTREACH.—The Board shall conduct briefings and other outreach, on a non-reimbursable basis, aimed at increasing awareness and understanding of the ADR program on the part of the Federal workforce—including executives, managers, and other employees.

(4) RECRUITMENT.—The Chairman of the Board may contract on a reimbursable basis with officials from other Federal agencies and contract with other contractors or temporary staff to carry out the provisions of this section.

(5) TRAINING AND CREDENTIALLING OF NEUTRALS.—The Board shall develop a training and credentialing program to ensure that all individuals selected by the Board to serve as program neutrals have a sufficient understanding of the issues that arise before the Board and are sufficiently skilled in the practice of meditation or any other relevant form of ADR.

(6) REGULATIONS.—The Board is authorized to prescribe such regulations as may be necessary to implement the ADR program established by this section.

(d) EVALUATION.—

(1) CRITERIA.—The Board's Office of Policy and Evaluation shall establish criteria for evaluating the ADR pilot program and prepare a report containing findings and recommendations as to whether voluntary early intervention ADR is desirable, effective, and appropriate for cases subject to section 4303 or 7513.

(2) REPORT CONTENT.—The report, subject to subsection (b)(4) and section 574, shall include—

(A) the number of cases subject to the ADR program, the agencies involved, the results, and the resources expended;

(B) a comprehensive analysis of the effectiveness of the program, including associated resource and time savings (if any), and the effect on the Board's caseload and average case processing time;

(C) a survey of customer satisfaction; and

(D) a recommendation regarding the desirability of extending the ADR program beyond the prescribed expiration date and any recommended changes.

The recommendation under subparagraph (D) shall discuss the relationship between the Board's pilot ADR program and those workplace ADR programs conducted by other Federal agencies.

(3) REPORT DATE.—The report shall be submitted to the President and the Congress 180 days before the close of the ADR pilot program.

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