United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE TREASURY U.S. CUSTOMS SERVICE WASHINGTON, D.C. and NATIONAL TREASURY EMPLOYEES UNION	Case No. 98 FSIP 52

FACTFINDER'S REPORT

The National Treasury Employees Union (NTEU or Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Treasury, U.S. Customs Service (Customs or Employer). The undersigned was appointed by the Panel to conduct a factfinding hearing and make recommendations for settlement on the issue of an alternative dispute resolution procedure for the processing of bargaining-unit employee complaints in the civil rights area. The hearing was held on October 27 and 28, 1998. A stenographic record was made, testimony and argument were presented, and documentary evidence was submitted. The Union filed a pre-hearing brief and both parties filed post-hearing briefs.[1/]

1/ Both parties had the option of filing pre-hearing briefs.

BACKGROUND

The Employer's mission is to enforce customs and related laws and to collect revenues from imports (Tr. 7). The Union represents approximately 11,000 professional and nonprofessional employees who are assigned throughout the agency in a wide variety of positions, including, but not limited to clerical employees, customs inspectors, administrative support personnel, and import specialists (Tr. 7). The parties' current collective bargaining agreement (CBA) is to remain in effect until September 30, 1999 (Emp. Exh. 27 at 329). Article 31 of the parties' CBA establishes a dispute resolution procedure for resolving grievances (Emp. Exh. 27 at 203-12). Article 32 provides for the arbitration of grievances that are not resolved under the dispute resolution procedure (Emp. Exh. 27 at 213-20).

Pursuant to section 7121(d) of the Statute, bargaining-unit employees alleging employment discrimination based on race, color, religion, sex, national origin, age, or disability have the option of raising such matter under either a statutory procedure or a negotiated grievance procedure, provided, of course, the applicable negotiated grievance procedure does not exclude such matters. See 29 C.F.R. §§ 1614.103 and 1614.301; Emp. Exh. 1 at 1-2; Un. Exh. 1(B) at 3. This option also applies to allegations of retaliation for filing a complaint of discrimination, participating in an investigation of a complaint, or opposing a prohibited personnel practice. See 29 C.F.R. §§ 1614.103 and 1614.301; Emp. Exh. 1 at

1-2; Un. Exh. 1(B) at 3. With exceptions not relevant here, the statutory procedure for addressing employment discrimination and retaliation, or EEO complaints that arise in the Federal sector is set forth in regulations prescribed by the Equal Employment Opportunity Commission (EEOC) and are codified at 29 C.F.R. Part 1614. See 29 C.F.R. § 1614.103.

As administered within the Department of the Treasury (Treasury), responsibility for various stages of the statutory procedure is divided between Treasury and its subordinate bureaus, one of which is Customs. Currently, Customs is responsible for pre-complaint, or informal-complaint processing and Treasury is responsible for formal-complaint processing (Tr. 272-73; Er. Br. 1 n.1).

ISSUE AT IMPASSE

The parties disagree over what alternative dispute resolution procedures should be available to bargaining-unit employees for processing EEO complaints.

1. The Union's Position

In essence, the Union proposes to establish an alternative to the statutory process for resolving EEO complaints brought by bargaining-unit employees that would supplant the dispute resolution procedures set forth in the parties' current CBA. Thus, if adopted, bargaining-unit employees bringing such complaints could no longer use the dispute resolution and arbitration procedures set forth in Articles 31 and 32 but would choose between

the alternative process and the statutory procedure, in accordance with section 7121(d) of the Statute.

The full text of the Union's proposal is set forth at Appendix A of this Report and it is only summarized here. At the initial step of the Union's proposed alternative process, an employee must contact an Equal Employment Opportunity (EEO) counselor who will explain available options. Upon election of the alternative process, the Employer will attempt voluntary resolution using mediation and interest-based techniques during a 45-day period running from the initial contact with the EEO counselor. An employee electing the alternative process will retain all rights and entitlements he/she would have if the pre-complaint portion of the statutory procedure were used. At the end of the 45-day period, the employee can elect to abandon the alternative process and use the statutory procedure. If the employee chooses the alternative process, the Employer must produce within 90 days of the election to do so a Report of Investigation (ROI) that includes, among other things, witness statements, relevant documents, and relevant statistical analyses. Within 45 days of issuing the ROI, the Employer will attempt mediation of the dispute. If no resolution occurs, the dispute can be submitted to a third party neutral chosen from a panel of neutrals on the basis of demonstrated competence in EEO matters who will use mediation-arbitration techniques to resolve it.

The Union proposes that the Employer assume all costs of presenting the first 20 cases to neutrals under the alternative process. The Union proposes that the alternative become effective on the third anniversary of the parties' CBA.

In support of its proposal, the Union asserts that both of the procedures currently available for handling EEO complaints are inadequate (Un. Br. 20; Tr. 10-12). The statutory procedure itself is flawed in that EEOC Administrative Judges do not issue binding decisions but only make recommendations on complaints that they hear (Un. Exh. 1 at 7; Tr. 12). In addition, Customs and Treasury have failed to administer the statutory procedure in an effective and efficient manner (Un. Br. 1-9). Processing of complaints takes an inordinate amount of time (Un. Br. 1-6); both Customs and Treasury routinely fail to meet regulatory deadlines imposed by EEOC for complaint processing (Id.; Un. Exhs. 1(C) and (E); Er. Exh. 20(D), app. I). The protracted case processing is costly in terms of both money and employee morale (Un. Br. 7-8). Another illustration of Treasury's inept administration of the EEO program is the fact that it does not properly track or monitor case processing costs (Un. Br. 8-9).

The dispute resolution and arbitration procedures set forth in Articles 31 and 32 of the parties' CBA do not provide an effective avenue of recourse to employees complaining of employment discrimination and retaliation (Un. Br. 10-14). This is evidenced by the fact that employees do not pursue such complaints through

those procedures (Un. Br. 10). The Union's Director of Negotiations testified that he knew of only three cases involving EEO allegations that have proceeded under the negotiated grievance procedures in the parties' current and prior CBA (Tr. 80).

The Director of Negotiations asserted that two principle reasons employees avoid using the contractual process are cost and the difficulty of obtaining information (Tr. 71, 80-81). As to the first, employees recognize that because the Union must pay half the cost of arbitration, pursuing individual EEO complaints in that forum imposes a financial hardship on their local chapter (Un. Br. 11; Tr. 84, 125-27). Consequently, employees know that if they pursue their EEO complaint through the dispute resolution procedure they risk either imposing a burden on dues-paying Union members or, at the Union's discretion, being denied a hearing before an arbitrator because of the cost (Un. Br. 11-12). As to the difficulty in obtaining information, whereas employees using the statutory process have access to an ROI, employees using the negotiated grievance procedure must rely on section 7114(b)(4) of the Statute to obtain information to pursue their complaint effectively (Un. Br. 12-13; Tr. 76-79). The Director of Negotiations maintained that the standard for obtaining information under that section is very legalistic and not widely understood (Tr. 77).[2/] The Union asserts that besides deterring employees from

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2/ On cross-examination, however, he could not provide any examples of situations in which Customs has denied an

using the negotiated grievance procedure, the need to rely on section 7114(b)(4) injects an adversarial element into the negotiated grievance procedure that is not conducive to resolving EEO complaints (Un. Br. 12). The availability of an ROI would promote settlement by allowing both parties to make an informed judgement on the strength of their case and reduce the cost of any subsequent arbitrations by providing a record for use in those proceedings (Un. Br. 13, Tr. 76-78).

The Union maintains that the stringent, shorter time frames that its proposal establishes are an improvement over the statutory process (Un. Exh. 1 at 6-7). In testimony, the Director of Negotiations asserted the quality of the investigations could be maintained even in the face of the shorter time frames (Tr. 101-02). He articulated that shorter investigations would save money by reducing back-pay liability, the amount of time employees and their representatives spend on the case, the potential for requests for additional interviews and information, and hearing preparation time (Tr. 119-20).

The Union contends that the Employer's proposal continues the defects that exist in the current negotiated grievance procedure (Un. Br. 14-15). The Union claims that its proposal avoids the deficiencies that exist in the two existing processes while adopting their strengths (Tr. 11). Although the Union acknowledges

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information request made in the context of a grievance (Tr. 124).

that problems exist in its proposal as currently drafted (Un. Br. 20), it nevertheless believes that its proposal can and should be modified to provide employees with an effective process for resolving EEO complaints.[3/]

The Director of Negotiations provided testimony as to the intent of various portions of the Union's proposal. He testified that the Union does not intend for its proposed process to be used for class actions "in the legal sense" (Tr. 34-35). Under the Union's proposal, the Employer can determine who it will use to do the mediation referred to in Sections 2 and 4 (Tr. 37, 54-55). The Union intends that all issues related to the EEO matter be processed using the Union's alternative procedure; however, if the EEO issue is dropped, any remaining related issues will be dismissed from the alternative process and the employee will be allowed to pursue them through another, appropriate forum (Tr. 40-41). On cross-examination, the Director of Negotiations stated that under the Union's proposal, EEO counselors are expected to do the same things they are expected to do under the statutory procedure (Tr. 110); he acknowledged that if the statutory procedure does not require counselors to advise an employee that his/her claim does not meet criteria for an EEO complaint, neither would the Union's proposal (Tr. 109).

3/ In its post-hearing brief, the Union presents a number of options available to the Panel to cure defects in the proposals of both parties (Un. Br. 15-20).

The Director of Negotiations testified that an employee must make his/her election between the statutory procedure and alternative process at the end of the 45-day counseling period (Tr. 89-91, 116). On cross-examination, he stated that the Union's proposal does not give the Employer the right to dismiss complaints but requires investigation of all cases where an employee elects the alternative process (Tr. 117).

With respect to invoking arbitration, the Director of Negotiations testified that it is the Union's intent that once an employee elects the alternative process, he/she has an entitlement to arbitration that the Union cannot retract on a case-by-case basis (Tr. 63).[4/] Although he believed that the Union would represent complainants very often, the Union's proposal allows for them to be represented by a private attorney (Tr. 68-69). The Union has no preference regarding how the panel of neutrals will be rotated for purposes of case assignments (Tr. 65).

Concerning the part of the Union's proposal regarding the payment of arbitration costs, the Director of Negotiations stated that the Employer would be required to assume all costs only of the first 20 cases processed to arbitration (Tr. 95). He estimated

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4/ Although the Union indicated that it would provide statutory authority for this approach to invoking arbitration in its post-hearing brief (Tr. 63), it did not do so. Its brief, however, appears to concede that this is a defect in its proposal and suggests an "option" that would allow the Panel to avoid the question of who invokes arbitration (Un. Br. 15, 18).

that it would take between 1 and 1½ years to process 20 cases to arbitration (Tr. 66). He also testified that the number 20 was "snatched almost from thin air" in an effort to allow a reasonable amount of experience with the proposed process (Tr.70). The "costs" that the Employer would be required to pay under the Union's proposal are the "direct" costs, for example, the arbitrator's fee, travel and per diem; transcript costs; and charges for a private hearing room, if one was necessary (Tr. 67-68). After 20 cases, the parties would renegotiate cost arrangements (Tr.85); he opined that the Union would be motivated to complete negotiations quickly (Tr. 95-96). The Director of Negotiations testified that Subsection F of Section 4 is intended to address the fairness of the proceedings and the ethics of the arbitrators as contrasted with the substantive law that arbitrators will apply (Tr. 87-88).

According to the Director of Negotiations, the Union's proposal does not address and is not intended to affect any appeal rights that employees may have; those will continue to be controlled by law and regulation (Tr.47-52). Thus, characterizing arbitration awards as "final and binding" is not intended to preclude review of the decision that is available under law and regulation; rather, it mirrors a concept that appears in the Statute and is referenced in a Supreme Court decision [5/] (Tr. 55-58;

5/ Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), in which the Court held that an age discrimination

Un. Exh. 1(M)).

2. The Employer's Position

The Employer also proposes a process that would serve as an alternative to the existing methods for resolving EEO complaints. In essence, the Employer proposes an alternative that employees could elect either in lieu of the pre-complaint portion of the statutory procedure or as the prelude to the dispute resolution procedure set forth in the parties' CBA.

The full text of the Employer's proposal is set forth at Appendix B of this Report, and it is summarized as follows. Initially, an employee will contact an EEO counselor who will explain the two available options, i.e., the alternative and the pre-complaint process set forth in Part 1614 of the EEOC regulations. If the employee elects the alternative, a 90-day period will ensue during which the Employer will use mediation to foster a voluntary resolution. At the end of the 90-day period, the employee can elect to withdraw from the alternative process; if, however, the employee elects to continue the alternative process, he/she will follow the dispute resolution procedure set forth in Article 31 of the CBA.

The dispute resolution procedure essentially consists of three steps. Under the first, the grievant and the management official alleged to have committed a discriminatory act, among others, hold

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claim was subject to compulsory arbitration.

a dispute resolution meeting, normally with the assistance of a facilitator. At that meeting, the participants attempt resolution using collaborative problem-solving and consensual decision-making techniques. If no resolution occurs, the dispute may progress to the second step where it is submitted to a dispute resolution panel composed normally of four persons selected by striking names from lists submitted by the Employer and the Union. Normally using a facilitator, the Panel produces either a consensus recommendation to resolve the dispute or a written explanation of why it is unable to resolve the matter. Under the third step, "responsible" management and Union officials review the matter using mediation, if they mutually agree. If these reviewing officials either accept the dispute resolution panel's consensus recommendation or otherwise agree on a resolution of the dispute, their decision "shall" be binding on the parties.

If the reviewing officials are unable to agree on a resolution, the dispute may be appealed to arbitration in accordance with Article 32 of the CBA. No part of the discussions, deliberations, conclusions, offers or recommendations generated at any step of the dispute resolution procedure may be used by either party as evidence in an arbitration hearing.

The Employer asserts that although the average case-processing time for EEO complaints has steadily increased Government wide (Er. Br. 7), the average within Treasury has decreased over the last 4 fiscal years (FYs) (Er. Br. 7-8). The Employer defends the quality

of its case processing, asserting that from FY 1995 to 1997, EEOC reversed only one final agency decision issued by Treasury (Er. Br. 8). It maintains that Treasury continues efforts to improve EEO case processing (Er. Br. 8-9).

The Employer describes its proposal as designed to promote voluntary and early resolution of EEO disputes. At the initial stage of the dispute, EEO counselors will present employees with the option of using a mediation program that uses interest-based techniques, which it refers to as the Facilitated Approach to Informal Resolutions (FAIR) process (Er. Br. 3-4). Citing a study by the General Accounting Office that finds mediation is a widely-used alternative dispute resolution technique that appears to be particularly useful in resolving disputes (Er. Br. 5; Er. Exh. 2), it asserts that the FAIR process should significantly increase the resolution of informal EEO complaints (Er. Br. 5). Moreover, the FAIR process is consistent with proposed EEOC regulations and a National Performance Review Report recommendation that encourages use of alternative dispute resolution methods to resolve disputes informally (Er. Br. 4).

The Employer believes that the dispute resolution procedure contained in Article 31 of the parties' CBA provides an effective and efficient alternative to the statutory procedure for those employees wishing to pursue an EEO claim after the FAIR process is completed. Citing a draft cost-benefit analysis that it commissioned, the Employer asserts the dispute resolution procedure

has demonstrated success in resolving disputes without resorting to arbitration (Er. Br. 10-13; Er. Exh. 24). The cost-benefit analysis also shows that the "weighted cost based on resolution percentages" for the dispute resolution procedure is $1,265.49 while the "total cost of arbitrations" ranges from $1,691.31 to $5,586.79 (Er. Br. 12; Er. Exh. 24). To ensure compatibility between the dispute resolution procedure and the EEO program, the Employer has directed that whenever an EEO matter is handled through the dispute resolution procedure its managers are to coordinate with the EEO office and designate an EEO officer as management's technical representative on any dispute resolution panel convened (Er. Br. 10; Er. Exh 23). The dispute resolution procedure provides an opportunity for factfinding in conjunction with the dispute resolution panel meeting; section 7114(b)(4) of the Statute also provides a means for the Union to obtain information (Er. Br. 11).

The Employer contends that, if adopted, the Union's proposal will increase its processing costs and reduce the quality of investigations without expediting EEO complaints (Er. Br. 13-18). In this regard, by eliminating the Employer's ability to dismiss complaints in whole or in part without conducting an investigation, the Union's proposal would increase the number of investigations required, overload the system, and slow the process down (Er. Br. 14, 16, 17). By unreasonably shortening the time frames for conducting investigations, it would require the Employer to choose

between increasing the number of personnel assigned to conduct investigations and jeopardizing quality (Er. Br. 14-17). Injecting an ROI into the negotiated alternative is likely to result in a hardening of positions that is detrimental to settlement and is not likely to shorten arbitration hearings because advocates will still choose to rely on live witnesses rather than on affidavits and other products of an investigation (Er. Br. 17-18). Additionally, adopting the Union's proposal would result in the Employer bearing the cost of the entire process as well as a cost-benefit analysis (Er. Br. 15-16).

The Employer contends that various aspects of the Union's proposal undermine or are inconsistent with the statutory EEO procedure. The provision for a 45-day pre-complaint processing period with no exceptions is inconsistent with EEOC regulations (Er. Br. 18-19). In this regard, the Union's proposal either eliminates the "right of the complainant" to a 90-day period for such procedure or violates provisions for an extension after the first 30 days of the pre-complaint stage (Er. Br. 18-19). The Union's proposal makes no provision at the end of the 45-day period for a notice of right to file, time for the complainant to make an election between the available processes, the filing of a written complaint, or some evidence of an election between forums (Er. Br. 20). By not allowing the bifurcation of EEO issues from "related" ones, the Union's proposal will burden EEO counselors and investigators with matters that they are not familiar with (Er. Br.

19). By permitting employees to switch forums for the purpose of seeking resolution of "related" issues when the EEO allegation is dropped, the Union s proposal is inconsistent with 29 C.F.R. § 1614.301 as well as 5 U.S.C. § 7121(g)(2) (Er. Br. 19-20). By expanding the number of cases requiring investigation and shortening time frames, the Union's proposed alternative will drain resources from and harm the statutory procedure.

The Employer asserts that other aspects of the Union's proposal also appear to be inconsistent with the Statute. In this regard, giving employees the authority to invoke arbitration is contrary to the intent of section 7121(b)(1)(C)(iii) of the Statute (Er. Br. 21). Additionally, not representing all employees who use the Union's proposed process is inconsistent with the intent of section 7114(a)(1) of the Statute (Er. Br. 21).

Finally, the Employer believes that it is only fair that the Union share the cost of resolving EEO disputes and that failure to split the cost of arbitration will compromise the integrity of that process (Er. Br. 22).

During the hearing, Customs' Deputy Director for EEO testified that EEOC regulations allow 30 days for the informal complaint process with a 60-day extension available if the complainant approves (Tr. 148-49). She testified that within Customs the average time for processing informal complaints during FY 1998 was 38 days (Tr. 148). At the time of the hearing, Customs had 228 collateral-duty EEO counselors assigned across the country (Tr.

148); "collateral" refers to the fact that the counselors are employees performing EEO duties on a voluntary basis in addition to those of their regular occupation (Tr. 150). According to the Deputy Director, Customs has not yet piloted the FAIR program, which was developed by an interdisciplinary team of Customs employees for application to non-bargaining-unit employees and remains in draft form (Tr. 157, 160, 207). In operating the FAIR program, Customs intends to use in-house mediators, as well as mediators from Federal agency shared-neutrals programs and community-based mediation services (Tr. 165-66). On cross-examination, the Deputy Director testified that some of the EEO investigations performed by Treasury have been deficient and required supplemental investigations (Tr. 196-97). She saw no reason why Customs could not manage EEO investigations (Tr. 198-99). She believed that mediation of informal complaints could be accomplished in 45 days for cases at headquarters; however, circumstances in the field such as geographical distance, might prevent meeting a 45-day time limit for cases there (Tr. 217-18).

A Labor Relations Specialist who was involved in negotiating the CBA testified that the dispute resolution procedure is designed to afford the Union input at all steps of the process (Tr. 234). The dispute resolution meeting is designed to bring the parties together to attempt settlement before the process becomes formalized (Tr. 233-34, 242). The dispute resolution panel meeting is the first point at which witnesses can be called in and data

collected (Tr. 245). He observed, however, that pursuant to the CBA nothing that is said during the dispute resolution panel meeting can be used by either party in any ensuing arbitration (Tr. 234). He testified that the mediation that occurs at the reviewing official level is intended to involve individuals from higher levels of the organizations than were involved in earlier dispute resolution efforts (Tr. 142-44). While acknowledging that the reviewing officials might accept a resolution that the employee does not want, he opined that this was unlikely because the Union representative would know what was in the best interests of the employee (Tr. 256-57) and suggested that the employee would retain any appeal rights that he/she had to bodies such as EEOC and the Merit Systems Protection Board (MSPB) (Tr. 259-60).

Treasury's Acting Director of EEO Programs testified that EEO complaints are filed against the Secretary of the Treasury and not the Commissioner or any other person within Customs (Tr. 273). She stated that her office and the four regional complaint centers that it oversees are responsible for acknowledging, accepting or dismissing complaints emanating from the Department and its 13 bureaus, investigating those accepted, and issuing decisions on the merits (Tr. 273-74). Complaints are filed directly with the four regional complaint centers, which are assigned responsibility for a defined geographical area (Tr. 276-77; Er. Exh. 22)[6/]. She

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6/ The record shows that in FY 1997 the regional complaint centers received a total of 1,431 complaints (Er. Exh. 20©

estimated that the average complaint consists of 5 to 10 pages (Tr. 289). Treasury has approximately 24 full-time EEO investigators at various locations around the country (Tr. 278) who are supplemented by 150 to 200 collateral-duty investigators drawn from one of its bureaus, the Internal Revenue Service (IRS) (Tr. 278-79, 331). She testified that EEOC regulations allow 180 days from the date a complaint is received to complete the investigation and permit a 90-day extension (Tr. 281). She stated that complaints can be dismissed without investigation for a wide variety of reasons and that, Government wide, approximately 30 to 40 percent of complaints filed are dismissed (Tr. 282, 333).

The Acting Director testified that Treasury assesses the bureaus a percentage of its costs for processing EEO complaints; the formula for each bureau's assessment is based on the average number of complaints filed from the bureau over the prior 3 years and the size of the bureau (Tr. 274). Although Treasury tracks the overall cost of the regional complaint centers, it does not break the cost down by the various elements of case processing such as investigations (Tr. 311).[7/] She stated that prior to the mid-1980's

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App. A); for the first three quarters of FY 1998, they received 1,050 complaints (Er. Exh. 20(D), App. A).

7/ The record shows that in FY 1997, Customs was assessed $1,246,782 (Un. Exh. 1(H); Er. Exh. 21) and that 319 complaints emanated from Customs (Er. Exh. 21). According to the Acting Director, the assessment includes a 12.5% fee charged Treasury by IRS, which administers the regional complaint centers, as overhead for administrative expenses for operation of the centers (Er. Exh. 34).

the bureaus performed their own EEO investigations; however, at that point Treasury took away their authority to do so largely because it found that the average time for closure of EEO cases was 960 days (Tr. 276, 314). Treasury is in the process of establishing pilot ADR programs for the informal stage in all of its bureaus (Tr. 285-86).

The Branch Chief of the Employee Relations Office at Customs testified that the Employer's proposed procedure would be open to individual complainants and groups of named complainants but would not cover class complaints (Tr. 373-74). She also testified that the parties have not yet experienced mediation in conjunction with reviewing official deliberations at the third step of the dispute resolution procedure (Tr. 372). The Branch Chief believed that if the reviewing officials agreed on a disposition of an EEO issue that was unacceptable to the grievant, the grievant could appeal to either EEOC or MSPB as appropriate (Tr.376-81).

DISCUSSION

In approaching this assignment, the factfinder was not unmindful of the significance and importance of this undertaking in an effort to set forth an alternative dispute resolution procedure that would have a positive impact on the processing of federal sector bargaining-unit employee complaints in the civil rights area. Having reviewed the record, including all of the exhibits made a part hereof, it is clear that there is no dispute between the parties as to the need for a resolution procedure that will

increase the rate of resolutions in a timely and cost-effective manner. As has been well-documented in the parties exhibits and as has been well-chronicled in the public over at least the past decade, there has been a growing frustration on the part of all interested parties with the increasing case inventories, the increasing average age of federal agency case inventories to over 500 days to a final agency decision (FAD), and the increasing average age of agency completion of investigations to over 280 days[8/], leading to the reasonable perception that "justice delayed is justice denied". The major difference between the parties lies in the role to be played by the investigative process to reach that end; with the Union essentially adopting the importance and sequence of the investigative process as currently in effect under the EEOC statutory process at 29 C.F.R. Part 1614, and the Employer proposing a procedure that is mediation driven, with no formalized investigative process. In setting forth this factfinder's major concerns with parts of the parties respective proposals and rationale for the recommendations made herein, the factfinder readily admits that his own previous experience as an administrative judge for the EEOC, as well as litigation experience in the federal sector over the last decade played a role in this endeavor.

Turning then to a review of the parties alternative resolution

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8/ See Emp. Exh. 1 at pps. 20, 26, and 48.

proposals, the Union's proposal, at Section 2, provides that upon the employee's selection of the alternative process, the Employer would have a 45-day window upon which to complete a mediation attempt to resolve the dispute and that any and all collaterally related issues, i.e., contractual matters and other allegations potentially arising under other federal statutes, and not necessarily EEOC, would also be processed under the alternative process. Thereafter, if the employee dropped the civil rights allegations, the entire complaint would be dismissed from the alternative process and the collaterally related issues would be diverted into other appropriate forums. First, with reference to the 45-day window period for completion of the first mediation attempt, it is noted that this time frame is subject to and governed by EEOC rules and regulations, which state, in pertinent part at 29 C.F.R. § 1614.105(f), as follows:

> "Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days."

Accordingly, the Union's proposal on this element is invalid; while the Employer's mirror proposal on this same element at Section 2 is viable and valid.

Second, with reference to the commingling of EEO issues with other related non-discrimination issues and the opting in and out of forums depending on the survival of the EEO allegations, the Union's proposal is again flawed in light of the mandatory election

of forum regulations contained at 5 U.S.C. § 7121(g)(2) and 29 C.F.R. § 1614.301(a).

The Union proposal at the next stage of the process (Section 3), requires the Employer to complete a Report of Investigation (ROI) within 90 days of the employee's decision to continue with the alternative process, and herein lies a significant distinction between the respective parties. As noted above, the Employer's proposal is mediation driven and provides for no formalized investigation procedure. In addition, under the current EEOC statutory guidelines, 29 C.F.R. § 1614.108(e), agencies have 180 days to complete their investigations, and are afforded an extension of up to an additional 90 days, upon agreement with the complaining party. While the Employer indicated that it was constantly striving to reduce its average case investigation processing time and had done so by improving to a low of 189 days in the third quarter of fiscal year 98[9/], better than the national average for federal agencies, there was a limit to how low it could go while maintaining quality, and the available resources to do so. The Employer also pointed out that under the Union proposal, the agency would be required to conduct full investigations of all cases docketed in the alternative process, including those warranting dismissal on statutory jurisdictional grounds, which would necessarily increase the average case investigation

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9/ See Emp. Exh. 20d, Appendix I.

processing time and costs of completing such investigations.

As further articulated by the Employer, given the fact that studies had shown a high degree of success in resolving disputes in both the federal and private sectors where mediation and interest-based programs had been properly developed[10/], the focus should be on mediation at the front-end of the process at a time where the parties have not become entrenched in their positions, with the investigative process at the back-end in preparation for an arbitration hearing, when invoked.

Given the history of the Employer and the resources allocated for the investigative process, the Union's proposal to cut by more than fifty (50%) percent the average investigation processing time, would not appear to be viable at its proposed stage of the process.

However, analyzing the investigative element from another perspective, the Employer has indicated that thirty to forty percent (30% to 40%) of all complaints received by the Employer are dismissed.[11/] That by having to investigate all complaints as proposed by the Union requires it to fully investigate that many more complaints, with its attendant increase in costs. The Employer has further asserted that its two-year experience with the negotiated dispute resolution program in place (almost identical to its proposal herein), has resulted in a ninety-five percent (95%)

10/ See Emp. Exh. 2.

11/ See Tr.333:7-13; 349.

success rate, with only five percent (5%) of the cases being referred to arbitration.[12/] In light of the foregoing, and in an attempt to foster a system that provides for proper checks and balances and the bulk of the Employer's resources to those cases that meet the proper criteria to be categorized as potentially viable complaints, the factfinder has recommended that in conjunction with the initial 90 days to conduct the first mediation intervention effort, that the Employer concurrently conduct a preliminary investigation to determine which cases do not meet the established criteria, and accordingly, are dismissed, subject to appeal through the established EEOC statutory process. By doing so, the Employer at the inception stage of the process weeds out those cases that do not warrant the expenditure of time and resources of additional stages of mediation efforts.

In addition, assuming, as asserted by the Employer, that together with the Union, the parties could achieve a high resolution rate, i.e., a range of from seventy percent (70%) to a high of ninety-five percent (95%), such a rate of resolution would produce substantial cost savings to the Employer in that it would eliminate that proportionate rate of cases to be investigated. While the Employer has argued that it would cooperate with the Union in providing requested information in preparation for an arbitration hearing pursuant to 5 U.S.C. § 7114(b)(4), in view of

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12/ See Em. Br. 12-13; Emp. Exh. 24.

the investigative expertise developed over the years by the Employer under the EEOC statutory process, including the nuances involved in statistical analysis and compensatory damages, the factfinder is of the opinion that the Employer would be more suited, at this time, to the task of completing an investigation that would well serve as a foundation upon which an arbitrator could make a reasoned determination.

Another benefit provided by the Employer's ROI in those cases where the Union decides not to invoke arbitration on behalf of the employee(s), is that it provides a full investigative record that can be reviewed by the applicable appellate forums in the event of an appeal by the affected employee(s). While the parties indicated at the hearing that employees rights of appeal would be maintained pursuant to the applicable statutes, since the alternate resolution process proposed by the Employer is clothed in confidentiality, in effect, there would be no record for appellate review without the ROI, as recommended by the factfinder.

In addition, the parties will note that the factfinder eliminated the initial dispute meeting at Section 4 of the Employer's proposal. Having just completed a mediation effort at Section 3 of the process, it is the factfinder's opinion that this dispute meeting is duplicitous and perhaps, adversarial in nature in view of the individuals involved.

The factfinder also eliminated that portion of the Employer's proposal at Section 6, providing the responsible management and

union officials with unfettered authority to agree upon a resolution of the dispute, despite a refusal by the affected employee(s) to agree upon such proposed resolution. While in traditional collective-bargaining contractual matters, such authority does exist, the factfinder has not found such clear authority when dealing with employees statutory civil rights.

Finally, the Employer's proposal mandates that the costs of arbitration should be shared equally by the parties as contained in Article 32, Section 8 of the parties current CBA. The Employer further quotes from a 1994 report issued by the Commission on the Future of Worker-Management Relations, that states as follows:

> "To ensure impartiality of the arbitrator, both the employee and the employer should contribute to the arbitrator's fee."

However, the very next sentence goes on to say:

> "Ideally, the employee contribution should be capped in proportion to the employee's pay, so as to avoid discouraging claims by lower-wage workers." See Emp. Exh. 4, p. 32.

In addition, the Court in Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1485 (D.C. Cir. 1997), stated as follows:

> "It is doubtful that arbitrators care about who pays them, so long as they are paid for their services."[13/]

In this case, the Union's Director of Negotiations testified that to his knowledge there were only three bargaining-unit employees who had used the negotiated grievance procedure (very similar to the Employer's current proposal) with regard to the processing of

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13/ See also Gilmer, supra 500 U.S. at 30 (rejecting a presumption that arbitration panels are biased).

EEO based discrimination claims. That a major factor in the hesitancy of employees to pursue the negotiated resolution procedure was the possibility of imposing a financial burden on other dues paying members and the risk of the Union not going forward to arbitration because of the cost. In view of the lack of use of the negotiated procedure, there may be some merit to the Union's contention. In any event, in view of the substantial cost savings to be derived by the Employer through the probable substantial curtailment of the number of investigations to be performed, and in an effort to minimize this hurdle from the process, the factfinder is recommending a capped reasonable sum to be paid by the Union in the first 20 cases to go to arbitration.

RECOMMENDATION

For all of the foregoing reasons, the factfinder recommends for the parties consideration and adoption, the following proposed alternative dispute resolution procedure for the processing of bargaining-unit employee discrimination complaints in the civil rights area:

ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

Section 1:

The parties (Customs and NTEU) agree to implement on the three year anniversary of the term agreement a process that would serve as an alternative to the current methods for resolving disputes involving EEO complaints. An employee could use this process as an alternative to the EEO complaint process established by 29 CFR Part 1614. A bargaining unit employee will not have the option of raising an EEO allegation in the negotiated grievance procedure after the effective date of this agreement.

Section 2:

2.1 In order to use this alternative process, an employee, with or without a representative, would contact the EEO Counselor who, in turn, will explain the two options available to the specific employee and how to choose one of them, i.e., the 29 CFR Part 1614 process or this alternative.

2.2 If the employee chooses the alternative option, Customs will use mediation to foster a voluntary resolution to the dispute during the ninety (90) days after the employee has brought the dispute to the attention of the EEO Counselor. The employee is subject to all the requirements and retains all rights and entitlements while using the alternative process that he or she would have if using the 29 CFR Part 1614 pre-complaint process, i.e., a written counselor's report summarizing his or her actions, etc.

2.3 In addition, and concurrently during this ninety (90) day period, Customs shall conduct a preliminary investigation and determine and notify the employee and his or her representative, if all or a portion of the allegations raised do not meet the criteria for an EEO complaint, and accordingly, are dismissed, subject to appeal. In the event of a dismissal by Customs of all or a portion of the employee's discrimination allegations, the entire dispute including the allegations dismissed shall be diverted back to the 29 CFR Part 1614 statutory process and its applicable appeal requirements. Disputes unrelated to the EEO issue will not be processed using mediation once it is chosen, unless the parties mutually agree that it would be beneficial to do so.

Section 3:

3.1 If at the end of the 90 days the employee wishes to forego any further use of the alternative process, he or she may withdraw from

the alternative process and use the complaint process under 29 CFR Part 1614. If the employee elects to continue with the alternative process, the employee or the union shall make a written filing on form CF 280, Part I or a facsimile of Part I as described in Section 3.A of Article 31 of the negotiated agreement within fourteen (14) days of the end of the ninety (90) day period. The filing shall be submitted to designated union and management representatives who will be responsible for convening a dispute resolution panel. Filings by management under this article shall be made in writing directly with the chapter president or the union's national office, as appropriate.

3.2 Members of a dispute resolution panel shall be selected from a list of Customs Service employees submitted by the parties and trained in interest-based problem solving techniques, and the panel will convene within fourteen (14)days after receipt of the filing. Each party shall submit three names and strike one name submitted by the other party in order to assemble a four-person joint panel, unless the parties agree that a two-person joint panel is satisfactory.

3.3 Such panels shall normally convene at the employee's work location unless the parties agree otherwise.

3.4 The panel will use collaborative problem solving and consensual decision making techniques in an attempt to arrive at a consensus recommendation regarding the disputed matter, and will use one or more trained facilitators unless the parties agree that facilitation is not needed.

3.5 There may be one management designee and/or one union designee who will act solely as technical advisers on legal and contractual matters at each panel session. The technical advisers will not participate in decision making. Panel discussions and deliberations will be held strictly confidential.

3.6 The panel will meet until a consensus recommendation is reached, or until it is determined that more information is needed and delay is required pending receipt, or until it is determined that no recommendation can be reached.

3.7 The panel will hear both sides of the dispute from the employee raising the issue and or his union representative, and from the responsible management official, and will ask questions as necessary. Prior to panel meeting(s), the facilitator will assist the filer(s) and respondent(s) in completing form CF-280, Part II, face-to-face, if possible and telephonically, if necessary. If the parties agree that facilitation is not needed, the panel will assist the filer(s) and respondent(s) in completing Part II prior

to their meeting(s).

3.8 The panel will then deliberate in private with the facilitator(s), and with the technical advisers present if they are needed.

3.9 If the dispute resolution panel arrives at a consensus recommendation, it will provide the parties to the dispute and the responsible management and union officials with its written recommendation within seven (7) days after its final meeting. If the dispute resolution panel is unable to arrive at a consensus recommendation, it will, within seven (7) days after its final meeting, provide the parties to the dispute and the responsible management and union officials with a written explanation of why it was unable to resolve the matter.

Section 4:

4.1 The responsible management and union officials will review the disputed matter including Part I and Part II of the written CF-280 filing and the written explanation received from the dispute resolution panel within seven (7) days after receiving it. They may by mutual agreement secure mediation assistance with their review from FMCS or some other mediation source. Any costs associated with mediation shall be shared equally by the parties.

4.2 Mediation is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of issues in dispute.

4.3 If the responsible management, union officials and employee grievant(s) are unable to agree on a resolution of the dispute, the parties shall document such fact in writing within seven (7) days of the date of the mediation and or of the parties final meeting to attempt resolution of the issues.

Section 5:

Thereafter, in those cases where the parties (including the employee grievant[s]) have been unable to reach a resolution of the dispute, Customs will produce a Report of Investigation (ROI) within 150 days of the documented date described above in Section 4. This ROI will meet all the standards of the reports that are done under the current statutory process. For example, it will include signed and sworn statements from relevant witnesses, copies of all relevant documents, and statistical analysis where

appropriate. Copies of the report will be given to the employee and his or her representative, along with the responsible management official.

Section 6:

6.1 Within forty-five (45) days of receiving the report, responsible management and union officials may attempt to mediate the dispute with the employee grievant(s). If they are unable to produce a voluntary settlement during that time, the dispute may be moved to arbitration by either party to this agreement. The party invoking arbitration shall inform the other party in writing within fifteen (15) days after the expiration of the forty-five (45) days referenced above. The dispute resolution file shall consist of the written request for a dispute resolution panel, written CF-280 filing, written dispute resolution panel recommendation or explanation and written invocation of arbitration. No part of the discussions, deliberations, conclusions, offers or recommendations generated at any step of the alternative resolution procedure shall be binding in any way on either party once the matter in dispute has been advanced to arbitration, nor shall any of these elements be used by either party as evidence in an arbitration hearing. Part II of the written CF-280 filing shall be excluded from use as evidence in an arbitration hearing.

6.2 In the event the union decides not to invoke arbitration on the dispute, such decision, in writing, shall be furnished to the employee grievant(s) and the responsible management official within the same fifteen (15) day time frame referenced in section 6.1 above. In such event, the employee grievant(s) shall be entitled to appeal the dispute to the appropriate federal agency, in accordance with applicable rules and regulations.

6.3 Within fifteen (15) days after invoking arbitration, management will assign the dispute to a third party neutral who will use a mediation-arbitration process to settle the dispute. The ideal solution will be a mediated one, but the arbitrator will have the power to issue a final and binding written arbitration decision resolving all issues in dispute. The arbitrator shall be empowered to hold a hearing, swear witnesses, order the production of documents, and do whatever else is necessary that an arbitrator or EEOC administrative judge could normally do to develop a complete record, i.e., draw an adverse inference where warranted. The arbitrator shall also be empowered to order any remedy that an arbitrator, EEOC, or an EEOC administrative judge could in the same case. The arbitrator will schedule matters so that he or she can normally close the case no later than 120 days after it has been assigned.

6.4 If management fails to assign the dispute within the fifteen (15) days mentioned above or the ROI is more than fifteen (15) days overdue, the employee and his or her representative shall have the authority to assign the dispute to one of the arbitrators on the list of approved arbitrators rather than wait for the process to be followed. In this situation, the employee and his or her representative can choose any arbitrator that is available. Once the arbitrator is selected, he or she shall control the scheduling of the case.

6.5 Those arbitrators who are assigned cases from unit employees will be jointly chosen by the union and management. The parties will choose five arbitrators at the outset of this agreement and they will serve on assigned cases in a rotation established by Customs. If the parties are unable to agree on the selection of arbitrators, the American Arbitration Association (AAA) shall have the authority within sixty (60) days after the effective date of this agreement to select the arbitrators. In order to exercise its authority, it will suffice if either party or both submit a written request soliciting their assistance in selecting an arbitration panel in accordance with the criteria described herein. The arbitrators shall be chosen based upon demonstrated competence in EEO matters and arbitrations, i.e., they teach civil rights courses in law school, they are former EEOC administrative judges, they have a track record of dealing with EEO matters in arbitration, etc. Cases will normally be assigned on a rotating basis among them.

6.6 All issues related to the right, if any, to appeal the final and binding arbitration decision, shall be controlled by applicable federal rules and regulations, and not by this agreement.

Section 7:

7.1 For the first 20 cases that are presented to arbitration, the union shall pay the sum of $750.00 toward payment of arbitration expenses, per case; and Customs shall be obligated to pay and assume the remainder of the arbitration expenses, per case. The arbitration expenses shall include but not be limited to the arbitrator's fees and travel and per-diem expenses, charges for court reporter fees and transcripts of the proceeding, and the cost of any non-governmental hearing rooms or facilities that may be used. In the event the union prevails on any of the issues in dispute, Customs shall either reimburse the union for the $750.00 payment or assume the obligation of paying all the arbitration expenses in the case at hand.

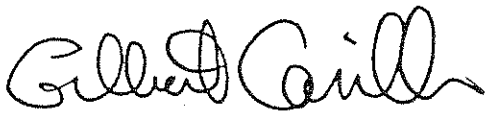
7.2 Concurrently, during the 20-case period of time, the parties jointly or separately may conduct whatever cost-benefit analysis they may deem necessary. After the completion of the 20 cases, Customs shall have the right to reopen this agreement to address costs. If Customs reopens this agreement at that time, the union shall be free to reopen any matter in this agreement. If the union reopens on matters beyond costs, Customs may do so as well. Otherwise, this agreement shall stay in place for the term of the parties term agreement, and may be reopened with the term agreement.

Section 8:

8.1 On the effective date of this agreement, Customs will initiate a publicity program with NTEU that widely informs all employees of the existence of this alternative program. This will include management mailing to the homes of all employees a letter outlining the program, posting materials on bulletin boards to solicit interest in the program, and making similar material available to employees through internal electronic media.

8.2 Either party may reopen this agreement due to a conflict that may be produced by the issuance of new regulations related to federal sector EEO complaints.

Respectfully submitted,



Gilbert Carrillo
Factfinder

February 15, 1999
Davie, Florida

Union's Final Offer

Section 1

The parties agree to implement on the three year anniversary of the term agreement a process that would serve as an alternative to the current methods for resolving disputes involving EEO complaints. An employee could use this process as an alternative to the EEO statutory process. A bargaining unit employee will not have the option of raising an EEO allegation in the negotiated grievance procedure after the effective date of this agreement. The process outlined in this memo will be the exclusive alternative to the statutory procedure for unit employees.

Section 2

In order to use this alternative process, an employee, with or without a representative, would contact the EEO Counselor who, in turn, will explain the options available to the specific employee and how to choose one of them.

If the employee chooses the alternative option, management will use a combination of mediation and interest-based techniques to foster a voluntary resolution to the dispute during the 45 days after the employee has brought the dispute to the attention of the EEO Counselor. The employee retains all the rights and entitlements while using the alternative process that he or she would have if using any of the other process options, e.g., a written counselor's report summarizing his or her actions, notice that the complaint does not meet the criteria for an EEO complaint, etc.

All disputes related to the EEO issue will be processed using this alternative option, once it is chosen, e.g., related negotiated contract matters and allegations that regulations or other statutes have been violated. However, if at any time the employee drops the alleged civil rights violation, leaving in dispute only contract, statutory, and/or regulatory allegations unrelated to civil rights, the complaint will be dismissed from this alternative process and the employee will be allowed to continue the dispute in whatever other forum is appropriate, e.g., the negotiated grievance procedure.

Section 3

If at the end of the 45 days the employee wishes to forego any

further use of the alternative process, he or she may withdraw from the alternative process and use the statutory process. If the employee elects to continue with the alternative process, management will produce a Report of Investigation within 90 days of the decision to elect to continue in the alternative process. This report will meet all the standards of the reports that are done under the statutory process. For example, it will include signed and sworn statements from relevant witnesses, copies of all relevant documents, and statistical analyses where appropriate. Copies of the report will be given to the employee and his or her representative.

Section 4

A. Within 45 days of receiving the report, management will attempt to mediate the dispute. If it is unable to produce a voluntary settlement during that time, management will assign the dispute to a third party neutral who will use a mediation-arbitration process to settle the dispute. The ideal solution will be a mediated one, but the neutral will have the power to issue a final and binding written arbitration decision resolving all matters in dispute. The neutral will be empowered to hold a hearing, swear witnesses, order the production of documents, and do whatever else is necessary that an arbitrator or EEOC Hearing Officer could normally do to develop a complete record, e.g., draw an adverse inference for refusal (or inability) to testify or produce documents. The neutral is also empowered to order any remedy that an arbitrator, EEOC or an EEOC hearing officer could in the same case. The neutral will schedule matters so that he or she can normally close the case no later than 120 days after it has been assigned.

B. If management fails to assign and schedule the dispute within five (5) workdays after the end of the 45-day period mentioned above or the Report of Investigation is more than 15 days overdue, the employee and his or her representative will have the power to assign the dispute to one of the neutrals on the list of approved neutrals rather than wait for the process to be followed. In this situation, the employees and his or her representative can choose any neutral that is available.

Once the neutral is selected, he or she will control the scheduling of the case.

C. Those neutrals who are assigned cases from unit employees will be jointly chosen by the union and management. The parties will choose five neutrals at the outset of this agreement and they will be assigned cases in rotation established by the employer. If the parties are unable to agree on the selections, the AAA will be empowered 60 days after the effective date of this agreement to select the neutrals. All they must do is receive a letter requesting their help from one or both parties and then follow the criteria we have outlined. The neutrals will also be chosen based on a demonstrated competence in EEO matters and arbitrations, e.g., they teach civil rights courses in law school, they are former EEOC hearing officers, they have a track record of dealing with EEO matters in arbitration, etc. Cases will normally be assigned on a rotating basis among them.

D. For the first 20 cases that are presented to the neutrals, the agency will assume all costs. It will also conduct a cost-benefit analysis that meets professional standards. Thereafter, once the parties have data about costs, management will be free to reopen this agreement to address costs. If management reopens this agreement at that time, the union will be free to reopen any matter in this agreement. If the union reopens on matters beyond costs, the employer may do so as well. Otherwise, this agreement will stay in place for the term of the parties' term agreement and may be reopened with the term agreement.

E. All issues related to the right, if any, to appeal the final and binding arbitration decision, will be controlled by law and not this agreement.

F. The neutrals will disqualify themselves from the panel or individual cases based on any apparent conflict of interest and they will otherwise comply with all suggestions of the Supreme Court in providing a fair and objective hearing in these matters.

Section 5

A. On the effective date of this agreement, management will initiate a publicity program with NTEU that widely informs all employees of the existence of this alternative program. This will include management mailing to the homes of all employees a letter outlining the program, posting materials on bulletin boards to solicit interest in the program, and making similar material

available to employees through internal electronic media.

B. Either party may reopen this agreement due to a conflict that is produced by the issuance of new regulations related to federal sector EEO complaints.

Section 1

The U.S. Customs Service (Customs) agrees to implement a process that would serve as an alternative to the current method for resolving disputes involving EEO complaints. An employee could use this process as an alternative to the EEO complaint process established by 29 CFR Part 1614.

Section 2

In order to use this alternative process, an employee would contact the EEO Counselor who, in turn will explain the two options available to the specific employee and how to choose one of them, i.e., the 29 CFR Part 1614 process or this alternative.

If the employee chooses the alternative option, Customs will use mediation to foster a voluntary resolution to the dispute during the 90 days after the employee has brought the dispute to the attention of the EEO Counselor. The employee retains all the rights and entitlements while using the alternative process that he or she would have if using the 29 CFR Part 1614 pre-complaint process. Disputes unrelated to the EEO issue will not be processed using mediation once it is chosen.

Section 3

If at the end of the 90 days the employee wishes to forego any further use of the alternative process, he or she may withdraw from the alternative process under 29 CFR Part 1614. If the employee elects to continue with the alternative process, the employee will follow the dispute resolution procedure of Article 31 of the parties[']{.underline} negotiated agreement.

Section 4

Under Section 10, Step 1.A. of the negotiated agreement, the employee or the union, within a reasonable period of time thereafter, shall present to the employee's immediate supervisor a written request for a dispute meeting which shall include a description of the issue.

If the immediate supervisor was not responsible for or involved in the issue being disputed or does not have the authority to resolve

the dispute, the employee or the union and the employee's immediate supervisor will jointly forward the written request for a meeting to the manager responsible for or directly involved in the issue or to the manager who has the authority to resolve the dispute.

A dispute resolution meeting shall take place within seven (7) calendar days after the written request for such a meeting has been presented to the appropriate management official. This period may be extended up to three (3) additional days by agreement of the parties. The meeting shall normally take place at the employee's work location unless the parties agree otherwise.

Present at such meeting will be the employee who is raising the issue, the union representative, the individual alleged to have taken the disputed action, and the individual who has the authority to resolve the dispute. If the individual alleged to have taken the disputed action also has the authority to resolve the dispute, then that individual's immediate supervisor will also be present at the meeting. Participants are encouraged to hold such meetings face-to-face; individuals unable to be physically present at such meetings will participate in them through telephone conferencing or some other audio-visual technology.

If the issue involves a group or consolidated set of facts or events arising out of the same incident, no more than three (3) employees raising the issue may be designated to attend or participate in such meeting.

One or more facilitators trained in interest-based problem solving will also be present at such meetings unless both parties agree that facilitation is not needed. The facilitator(s) will be selected by agreement of the parties.

The participants at such meetings shall be authorized to resolve the dispute in question by utilizing collaborative problem solving and consensual decision making techniques. If the participants arrive at a consensus resolution of the dispute, their decision shall be binding on the parties, prepared in writing by the participants and provided to the party raising the issue within seven (7) days after the close of the meeting.

Section 5

If the dispute resolution meeting does not resolve the dispute, the party raising the issue shall make a written filing on form CF 280, Part I or a facsimile of Part I as described in Section 8.A of Article 31 of the negotiated agreement within seven j(7) days after the close of the meeting. The filing shall be submitted to designated union and management representatives who will be responsible for convening a dispute resolution panel.

Filings by management under this article shall be made directly with the chapter president or the union's national office, as appropriate.

Members of a dispute resolution panel shall be selected from a list of Customs Service employee[s] submitted by the parties and trained in interest-based problem solving techniques, and the panel will convene within 14 days after receipt of the filing. Each party shall submit three names and strike one name submitted by the other party in order to assemble a four-person panel, unless the parties agree that a two-person joint panel is satisfactory.

Such panels shall normally convene at the employer's work location unless the parties agree otherwise.

The panel will use collaborative problem solving and consensual decision making techniques in an attempt to arrive at a consensus recommendation regarding the disputed matter, and will use one or more trained facilitators unless the parties agree that facilitation is not needed.

There will be one management designee and/or one union designee who will act solely as technical advisers on legal and contractual matters at each panel session. The technical advisers will not participate in decision making. Panel discussions and deliberations will be held strictly confidential.

The panel will meet until a consensus recommendation is reached, or until it is determined that more information is needed and delay is required pending receipt, or until it is determined that no recommendation can be reached.

The panel will hear both sides of the dispute from the employee raising the issue and/or his union representative, and from the responsible management official, and will ask questions as necessary. Prior to panel meeting(s), the facilitator will assist the filer(s) and respondent(s) in completing form CF-280, Part II, face-to-face, if possible and telephonically, if necessary. If the parties agree that facilitation is not needed, the panel will assist the filer(s) and respondent(s) in completing Part II prior to their meeting(s).

The panel will then deliberate in private with the facilitator(s), and with the technical advisers present if they are needed.

If the dispute resolution panel arrives at a consensus recommendation, it will provide the parties to the dispute and the responsible management and union officials with its written recommendation within seven (7) days after its final meeting.

If the dispute resolution panel is unable to arrive at a consensus recommendation, it will, within seven (7) days after its final meeting, provide the parties to the dispute and the responsible management and union officials with a written explanation of why it was unable to resolve the matter.

Section 6

The responsible management and union officials will review the disputed matter including Part I and Part II of the written CF-280 filing and the written explanation received from the dispute resolution panel within seven (7) days after receiving it. They may by mutual agreement secure mediation assistance with their review from FMCS or some other mediation source. Any costs associated with mediation shall be shared equally by the parties.

Mediation is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of issues in dispute.

If the responsible management and union officials accept the dispute resolution panel's consensus recommendation or otherwise agree on a resolution of the dispute, they will provide the parties

to the dispute with their written decision within seven (7) days after their final meeting. This decision shall be binding on the parties.

If the responsible management and union officials are unable to agree on a resolution of the dispute, the dispute may be appealed to arbitration in accordance with the provisions of Article 32, Section 3.

The dispute resolution file shall consist of the written request for a dispute resolution meeting, written CF-280 filing, written dispute resolution panel recommendation or explanation and written invocation of arbitration.

No part of the discussions, deliberations, conclusions, offers or recommendations generated at any step of the Article 31 dispute resolution procedure shall be binding in any way on either party once the matter in dispute has been advanced to arbitration, nor shall any of these elements be used by either party as evidence in an arbitration hearing. Part II of the written CF-280 filing shall be excluded from use as evidence in an arbitration hearing.