



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

Claudia T. Farr
Director

*One Capitol Square
830 East Main Street
Suite 400
Richmond, Virginia 23219*

Voice - (804) 786-7994
Toll Free - (888) 23-ADVICE
FAX - (804) 786-0111
administrator@edr.state.va.us

October 1, 2007

MEMORANDUM

TO: Division of Legislative Automated Systems (DLAS)
910 Capitol Square
General Assembly Building, Suite 660
Richmond, Virginia 23219
Attention: Legislative Documents and Reports Processing

FROM: Claudia T. Farr
Director, Dept. of Employment Dispute Resolution
Lead Staff, Interagency Dispute Resolution Advisory Council

**RE: **REPORT ON STATE AGENCY ALTERNATIVE DISPUTE
RESOLUTION PILOT PROJECTS****

Pursuant to House Bill 2054, passed by the Virginia General Assembly in the 2005 Session, the Interagency Dispute Resolution Advisory Council (or "Council") submits this report on the progress of alternative dispute resolution pilots conducted by seven executive branch agencies. Each of those agencies provided the information contained in this Report as to their respective pilots.

If you need any additional information, please contact me at 804-786-7994 or claudia.farr@edr.virginia.gov.

cc: The Honorable Viola O. Baskerville
Secretary of Administration

TABLE OF CONTENTS

Table of Contents	i
Executive Summary	ii
Report	1
Appendix: HB 2054 (2005)	20
Virginia Administrative Dispute Resolution Act	21

EXECUTIVE SUMMARY

As recognized by the General Assembly in enacting the Virginia Administrative Dispute Resolution Act (VADRA), a fundamental function of government is collaborative problem-solving, including the fair and efficient management of conflict and the resolution of disputes. Litigation and other adversarial methods of dispute resolution, while necessary at times, are costly in terms of dollars, human resources, and good will.

The Interagency Dispute Resolution Advisory Council, created by the VADRA in 2002, serves as a resource to state agencies in the development of alternative, collaborative processes for governmental problem-solving. With the support of the Council, seven state agencies – the Virginia Information Technologies Agency (VITA), the Board of Accountancy (BOA), and the Departments of Environmental Quality (DEQ), Forestry (DOF), Charitable Gaming (DCG), General Services (DGS), and Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) – took the lead in piloting these alternative processes, within a wide range of governmental functions such as procurement, contracting, resolving consumer complaints, managing the workplace, protecting the environment, and enforcing regulations.

The individual and collective experiences of the pilot agencies are instructive. For example, agencies have cited avoided costs in staff time and/or dollars, or the potential for such avoided costs. Also recognized is increased stakeholder satisfaction with agreed-upon outcomes, which generally assures a stronger, more lasting resolution. Indeed, for most of these agencies, the use of ADR is no longer a pilot, but has been integrated as a valuable tool into the agency’s operations and procedures. Reported challenges in implementing an ADR program include the need for agencies to screen out unsuitable ADR candidates, especially with respect to habitual offenders in the area of regulatory enforcement.

Key factors to a successful launch include visible support from the agency head, ADR expertise through the Council or other resources, the involvement of key agency staff and stakeholders, legal guidance from counsel at the Office of the Attorney General, and continued training to promote the necessary “culture change” at the agency and stakeholder levels.

REPORT

House Bill 2054 (2005)

Authorizes VITA to pilot the use of ADR in procurement protests

HB 2054 (2005) authorizes the Virginia Information Technologies Agency (VITA) “to promulgate administrative rules allowing the use of alternative dispute resolution in procurement protests involving its procurement of information technology and telecommunications goods and services pursuant to § 2.2-2012.” The bill further provides that VITA’s administrative rules “shall provide that deadlines specified in the Virginia Public Procurement Act for filing procurement protests are tolled during the use of alternative dispute resolution” and that the rules “shall not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review.”

Requires Interagency Dispute Resolution Advisory Council to report on agency ADR pilots

HB 2054 (2005) also requires that “[o]n or before July 1, 2006, and every July 1 thereafter until the expiration of this act [July 1, 2008], the Chief Information Officer of the Commonwealth shall submit a report to the Interagency Dispute Resolution Advisory Council (the Council) on the implementation of the provisions of this act.” Further, “[p]ursuant to the Virginia Administrative Dispute Resolution Act (§2.2-4115 et seq.), the Council shall report on this pilot project and other council alternative dispute resolution programs to the chairs of the House and Senate Committees on General Laws, the House Committee on Science and Technology, and the Joint Commission on Technology and Science.”

Interagency Dispute Resolution Advisory Council

Virginia Administrative Dispute Resolution Act

In 2002, the Virginia General Assembly passed the Virginia Administrative Dispute Resolution Act (“VADRA”), expressly authorizing all public bodies in state and local government to use alternative dispute resolution (ADR) processes -- such as mediation, facilitation, partnering, and any other process that encourages collaborative problem-solving -- to address and resolve controversial issues across a broad range of governmental functions. VADRA requires state agencies to adopt policies addressing the use of ADR in their programs and operations, and to designate an employee to serve as the agency’s Dispute Resolution Coordinator.

Council Members

VADRA also created the Interagency Dispute Resolution Advisory Council to serve as a resource to public bodies in the effective use of ADR and collaborative practices. The

Council includes the Secretary of Administration as chairperson; the Director of the Department of Employment Dispute Resolution; two state employee representatives appointed by each Cabinet Secretary from among the Dispute Resolution Coordinators within their Secretariats; and three private sector appointees by the Governor, at least two of whom must have experience in mediation. At the invitation of the Secretary of Administration, the Attorney General has also designated assistant attorneys general to serve as his liaisons with the Council.

Council Achievements

Since its inception five years ago, the Council, in partnership with private sector professional organizations such as the Virginia Mediation Network and the Virginia State Bar/Virginia Bar Association's Joint Committee on ADR, has trained well over 100 agency Dispute Resolution Coordinators in ADR program basics, created the groundwork for a pool of shared state employee ADR practitioners, launched a luncheon seminar series on ADR topics; surveyed and reported on executive branch agency usage of ADR, and launched an informative web site at www.vadra.virginia.gov.

The Council has also provided ADR expertise and support to state agencies in the development and implementation of pilot projects in which ADR and collaborative practices were put in place to address and resolve an array of issues facing state government today. Seven agencies -- VITA, the Board of Accountancy, and the Departments of Environmental Quality, Forestry, General Services, Charitable Gaming, and Mental Health, Mental Retardation and Substance Abuse Services – took the lead in piloting alternative dispute processes as a means to improve the way they do business, in areas as diverse as procurement, contracting, consumer complaints, the workplace, environmental problem-solving, and regulatory enforcement. In general, agencies found that the use of ADR and collaborative problem-solving can result in significant efficiencies and economies in appropriate cases, and typically produces more satisfying results for their stakeholders, as compared with more traditional forms of dispute resolution, such as litigation.

This Report by the Interagency Dispute Resolution Advisory Council addresses the seven agency pilots, starting with the VITA pilot, which was expressly authorized by HB 2054 (2005) and expressly included within its reporting requirements. Each of the seven agencies provided the information contained in this Report regarding its pilot.

Executive Branch ADR Pilots

I. Virginia Information Technologies Agency (VITA)

VITA has taken a very active role in implementing ADR into its procurement policies. As the Commonwealth's central procurement agency for information technology, VITA is responsible for the procurement of millions of dollars of technology each year. As part of its procurement responsibility and authority, VITA has utilized alternative dispute resolution options to resolve protests of contract awards and contractual disputes. Most

of VITA’s key strategic suppliers such as Microsoft, DELL, Oracle and HP have extensive experience with the use of alternative dispute resolution as a means of resolving disputes collaboratively within the private sector and have been very supportive of VITA’s ADR efforts.

As one of the seven pilot agencies assisted by the Interagency Dispute Resolution Advisory Council, VITA undertook a comprehensive review of its statutory authority, agency regulations, policies, standards and guidelines to identify potential areas for collaborative problem solving and dispute resolution processes. VITA quickly ascertained that a proactive use of alternative dispute resolution processes, utilizing a variety of collaborative approaches, could assist in resolving appeals from procurement (contract award) protests and in resolving any contractual dispute that may arise between the Commonwealth and a supplier. Utilizing ADR in these contexts creates many positive benefits for VITA, its suppliers and the Commonwealth through litigation avoidance, consensus building, relationship building, improved implementation and service delivery while reducing costs and increasing efficiency.

VITA established specific goals and objectives for the incorporation of ADR as a pilot program to resolve protest appeals and contractual disputes. VITA’s goals and objectives specifically included:

VITA ADR GOALS	HOW THOSE GOALS WERE ACHIEVED
<ul style="list-style-type: none"> Develop and publish VITA’s Alternative Dispute Resolution Procedures including the establishment of Alternative Dispute Resolution webpage for easy supplier access and education. 	<ul style="list-style-type: none"> See VITA’s Alternative Dispute Resolution Procedures for Contractual Disputes and Protests may be viewed at http://www.vita.virginia.gov/procurement/documents/adrProceduresForDisputes.cfm. ADR Procedures communicated to suppliers through website, forums, eVA and solicitation instructions.
<ul style="list-style-type: none"> Incorporate use of Alternative Dispute Resolution into VITA’s information technology solicitations as a required “first step” for the protesting supplier and VITA to avoid litigation in resolving protests of contract awards. 	<ul style="list-style-type: none"> VITA included language in its template solicitations for hardware, software, services and maintenance that requested that a proposing supplier agree to submit a contract award protest to VITA’s ADR process before (but not in lieu of) instituting legal action as allowed by Va. Code §2.2-4360 et seq. of the Virginia Public Procurement Act. VITA adopted a Protest Policy which established ADR as its administrative appeals procedure for hearing protests of a decision to award or an award pursuant to §2.2-4365. This administrative appeal procedure provides for a mediated session between the supplier and VITA which allows the protesting supplier an opportunity to present pertinent information regarding the solicitation. As the Code requires the issuance of a written decision upon the conclusion of an administrative appeal procedure, the

VITA ADR GOALS	HOW THOSE GOALS WERE ACHIEVED
	mediator will be tasked with memorializing the mediation session and the issuance of a written decision.
<ul style="list-style-type: none"> Incorporate the use of Alternative Dispute Resolution into VITA's IT contracts as the required method for resolution of contractual disputes before either party could institute litigation. 	<ul style="list-style-type: none"> VITA included language in its template contracts for hardware, software, services and maintenance which required its contractors to agree to submit any contractual dispute to VITA's ADR procedures before instituting legal action.

HB 2054 (2005)

While implementing ADR into its protest and contractual dispute procedures, VITA has also utilized a broad range of ADR methods such as facilitation, mediation and partnering to resolve protests and disputes during FY2005. Through the use of volunteer state employee mediators, VITA resolved two contract award protests successfully during FY 2005. In incorporating ADR into its administrative appeals procedure for protests, VITA realized that the wording of §2.2-4360 (Protest of Award or Decision to Award) could potentially require a supplier to file suit against VITA to protect their appellate rights even while participating in mediation.

§2.2-4360 provides as follows:

§2.2-4360. Protest of award or decision to award.

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the public body in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in § 2.2-4303. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under § 2.2-4342, then the time within which the protest shall be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 2.2-4342, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible

bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of receipt of the written decision by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

Until such time as VITA had established its ADR procedures to meet the standards of §2.2-4365 to serve as VITA's administrative procedures for appeal of contract awards, protesting suppliers were forced to file suit within ten days of having received a protest denial to preserve their appeal rights. VITA realized that a supplier who was forced to file suit would be hampered in their commitment and ability to resolve the protest collaboratively through ADR. Both parties would be operating under a cloud of possible litigation, thus impacting the free exchange of information, the ability to explore perceived risks or search for shared interests while facilitating solutions using a collaborative, interest-based approach. VITA was desirous of "tolling" the requirement for instituting litigation within ten days of receipt of the protest denial to allow ADR to be utilized proactively to resolve the protest appeal without the umbrella of litigation overshadowing the ADR process.

In 2005, the General Assembly authorized VITA to conduct an alternative dispute resolution project (H 2054) which would allow VITA to promulgate administrative rules allowing for the tolling of the deadlines specified in the Virginia Public Procurement Act for filing procurement protests during the use of ADR.

H 2054 (§1) reads as follows:

Be it enacted by the General Assembly of Virginia:

1. § 1. Notwithstanding the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Virginia Information Technologies Agency is authorized to promulgate administrative rules allowing the use of alternative dispute resolution in procurement protests involving its procurement of information technology and telecommunications goods and services pursuant to § 2.2-2012. Such rules shall provide that deadlines specified in the Virginia Public Procurement Act for filing procurement protests are tolled during the use of alternative dispute resolution.

§ 2. Such rules shall not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review.

§ 3. On or before July 1, 2006, and every July 1 thereafter until the expiration of this act, the Chief Information Officer of the Commonwealth shall submit a report to the Interagency Dispute Resolution Advisory Council (the Council) on the

implementation of the provisions of this act. Pursuant to the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.), the Council shall report on this pilot project and other council alternative dispute resolution programs to the chairs of the House and Senate Committees on General Laws, the House Committee on Science and Technology, and the Joint Commission on Technology and Science.

2. *That the provisions of this act shall expire on July 1, 2008.*

Results

VITA has experienced tremendous success in avoiding costly litigation and resource drains through the insertion of ADR into its protest of contract award appeal procedure and into contractual disputes. In the past four years, VITA has successfully resolved three (3) protests through the use of facilitation. VITA and the protesting supplier were able to discuss complex, often controversial issues in a collaborative, fair and constructive manner with the assistance of a trained volunteer neutral and craft resolutions which were acceptable to both parties. VITA has surveyed the three protesting suppliers which participated in the facilitative process and all three suppliers were supportive of the process, felt that information was shared fairly and openly and even if the resolution was not as they had originally hoped, and were pleased with the result. In addition, VITA was able to establish relationships and open communication with these suppliers which will provide dividends in the future in dealing with these and other suppliers.

Since HB2054 became effective on July 1, 2005, VITA has experienced one appeal of a contract award protest denial. The contract involved was a statewide contract which although optional use, had the potential to be a large dollar contract if utilized by most of the Commonwealth's public bodies. The protest denial was mediated through a volunteer state employee mediator who was able to assist both VITA and the supplier in shaping a resolution in which the supplier would be educated extensively as to why they were not the contract winner and how they could more effectively compete for future Commonwealth contracts. Due to the large dollar amount of the contract, the parties agreed to utilize mediation where they were able to successfully discuss and resolve differences in a confidential setting with the assistance of a trained neutral. This successful resolution saved VITA countless personnel hours and required no out of pocket costs for the Commonwealth.

VITA's insertion of ADR to resolve protests of contract awards and contractual disputes produced significant results such as:

- Better Relationship Building, Open Collaboration
 - Promoted VITA and suppliers on-going relationships and communications.
 - Both parties were vested in achieving a successful resolution through facilitation or mediation and had no expectation of court action.

- Solutions and open communication build consensus and buy-in among agency staff and supplier community.
 - Improves implementation and service delivery by both parties with realization that collaboration can be successful.
 - Increased stakeholder satisfaction with more creative options for resolution and more staying power. Solutions with “buy-in” from both parties are more likely to last and are better for on-going relationships.
 - Both parties retain control and shape outcome.
 - Less controversial and adversarial for all involved.
- **Faster with Less Resources required for successful Resolutions**
 - Protest Appeals of contract awards and contractual disputes settled informally, quickly through use of volunteer facilitators and mediators.
 - Avoids costly litigation, reduces costs, prevents wasteful impasses while awaiting resolution.
 - Expectation among both parties is for quick resolution with less drain on resources.
 - Less formality promotes quicker, creative and practical resolutions.
- **Cheaper for all parties involved:**
 - ADR is much less resource and personnel intensive for VITA than litigation.
 - Trained state employee volunteer mediators have kept VITA and supplier costs to a minimum.
 - Staff resource drain is limited.
 - Conflict is a big waste of time and money – ADR allows VITA to avoid utilizing resources on unnecessary conflict.
 - Increases efficiency while driving down agency administrative costs.

ADR - Changing the way VITA does Business

VITA, like most state agencies has no extra resources to throw away or devote to unnecessary conflict. In the fast paced, ever-changing world of information technology, VITA must continually increase its efficiency efforts while cutting costs and meeting growing demands. ADR has allowed VITA to devote staff and resources to improving the quality and reducing the cost of the information technology goods and services that VITA procures on behalf of the Commonwealth without the drain of threatened litigation. ADR is a proven successful collaborative process for resolving disputes between parties which is shown to increase efficiency and drive down the cost of government. VITA will continue to utilize HB 2054 and other resources to further implement ADR into its processes and procedures to drive successful, low cost results for procurement protests and contractual disputes.

II. Department of Environmental Quality (DEQ)

Community Involvement is no longer considered a “pilot program” at DEQ, but rather an integral part of Agency operations. One of DEQ’s strategic goals is to foster an informed and engaged community, and DEQ has adopted a Community Involvement Policy that pledges early and frequent community involvement in the regulatory process. In support of these commitments, DEQ staff have made many efforts to improve communication with stakeholders and have placed a priority on ensuring clear and effective communication with those who are interested in regulatory actions.

Regional and Central Office staff sponsored several permit public meetings to review issues of concern. These meetings are in addition to the public hearings that may be required by DEQ’s different regulatory programs, and are used to identify community concerns early in the process, to help educate community members on the regulatory requirements and the process that will be followed, and to respond to any questions they may have about potential environmental impacts. DEQ has made a strong effort this year to teach and practice the ADR technique of active and reflective listening to improve the effectiveness of these meetings. DEQ Regional Offices have built and regularly update stakeholder data bases which are used to inform citizens about regulatory actions and identify those who should be invited to any outreach meetings.

DEQ has focused on improving community involvement in the Total Maximum Daily Load (TMDL) program and has utilized ADR techniques to assist. The TMDL program relies upon local stakeholder input to identify strategies to restore impaired rivers and streams. Program staff have used revamped open-house formats, real estate type signs, and other means to increase participation at these local water quality meetings.

In all program areas, staff have made concerted efforts to use lay language in explanations and simplify concepts so that participants understand what is being discussed. DEQ has developed a glossary of terms and published it on the agency website; web based fact sheets have been developed for each significant issue to further clarify scientific and regulatory aspects. Staff have also used large maps and illustrations of technical concepts such as groundwater modeling for explaining landfill leachate, stream water testing locations and impairments and volunteer water monitoring sites. New interactive GIS applications on the DEQ public website have been designed to help citizens access relevant information and pinpoint locations of interest.

DEQ continues to promote ADR through the agency’s Community Involvement Policy and staff in the Office of Environmental Education and Office of Public Affairs. As more staff become aware of the benefits of citizen involvement and ways to mitigate or prevent conflict, they are more willing to conduct outreach initiatives and collaborate with local environmental groups in the process. The three case studies below highlight ADR techniques at DEQ and further illustrate the types of environmental issues and conflicts faced by our agency.

Case Example of ADR Used with Citizen Water Quality Monitoring

DEQ supports a robust volunteer citizen water quality monitoring network. DEQ was able to use ADR to resolve concerns about DEQ's plans to use the data the volunteers had generated in listing streams on the official impaired waters list submitted to the U.S. Environmental Protection Agency. The volunteers strongly disagreed and many did not want their data to be used for regulatory purposes. However, the volunteers had been asking DEQ for several years to validate their work and use citizen generated data. Some of the volunteers squared off with DEQ and said they would not provide their data to DEQ if the information was used in regulatory actions of listing streams on the impaired waters list. DEQ convened several meetings of the volunteers, staff from several agencies, and a neutral facilitator. After three meetings in which all participants were encouraged to actively listen to each other, the issue was positively resolved. DEQ heard and responded to the citizens' concerns and developed 5 choices for use of the citizen generated water quality data. Each monitoring group was given a "Data Use Agreement" form to complete and sign, indicating the group's permission for DEQ to use the data as indicated. By providing choices, DEQ was able to maintain the important relationship with its volunteer citizen monitors. If the volunteers had not been satisfied, DEQ stood to lose hundreds of miles of stream monitoring efforts contributed by over 200 groups across the state. Working collaboratively with the volunteer citizen monitoring groups, DEQ will be more likely to reach the goal of having 3,000 miles monitored by citizens (as directed by the General Assembly). Employing the ADR process helped to make this a success for DEQ.

Case Study of ADR Used as Collaboration tool with Environmental Group and Department of Environmental Quality

The Dan River Basin Association is a citizens' watershed protection and water focused ecotourism group trying to improve the water quality and tourist appeal of the Dan River. Their hopes are to bring more people out to enjoy the river and to help build the local economy. DEQ is involved with water quality assessments on the Dan River and is seeking community input to help restore the streams in the Dan River Basin. Finding common ground is a critical phase of ADR, and until everyone came to the discussions, both parties had unrealistic expectations of each other. Regional staff initiated a formal MOU to solidify the relationship between DRBA and DEQ as they worked collaboratively on common goals. DRBA will help get local people involved and DEQ will help train the water quality monitors, among other mutual agreements. This is one of the Community Involvement "Best Practices," and by clarifying the roles of each group, it captures the essence of early and open involvement. The MOU will be signed in October by the Director of DEQ and the DRBA President at a signing ceremony and river float, which will bring many people out to the Dan River.

Case Study of ADR Processes with Hobson Village

The Hobson Village is a small, low income, minority community in Suffolk that has been using their own well water for 7 generations. Recently development has encroached on both sides of the village, and residents believe that their water supply has been threatened by other wells being permitted in the same aquifer. Two of the residents attended ADR

training offered by the EPA in Philadelphia, and contacted DEQ with concerns about their water supply. Local government and the Public Service Authority have offered funds and the opportunity to tap into city water lines, but the residents want their own historic water supply. DEQ staff have worked with residents to help them understand the entire permitting process and how they can participate most effectively. By meeting with the local Hobson leaders and discussing their concerns, DEQ has been able to help residents to focus their efforts at the local level where land use decisions are made early in the permitting process. DEQ inspectors have visited Hobson on several occasions to walk leaders through the existing air and water permits in their community.

The citizens responded to an Army Corps of Engineers action during the comment period and realize that DEQ is only one of many entities involved in water regulations. Recently the Rural Community Assistance Project obtained a \$50,000 grant to bring Hobson into the city water system. At this point, the residents do not want this alternative and would like to use the money to repair their historic well. ADR process and techniques have kept the community leaders engaged in efforts to solve the problem instead of hiring a lawyer and pursuing court action, although that may be their next step. Proffers from the developers are being explored and Hobson leaders have some difficult decisions to make in the near future.

III. Department of Forestry (DOF)

Pilot Overview

The goal of the DOF ADR Pilot Program is to change the behavior of individuals who have been involved in an enforcement action to the point of civil penalty assessment under the Commonwealth's Silvicultural Water Quality Law. A major goal of the agency is to protect water quality from impacts from timber harvesting. The program was designed through a cooperative effort by John Carroll, Deputy State Forester; Matt Poirot, Water Resources Program Manager; Merri Hanson, Peninsula Mediation and ADR; and Tanya Denkla-Cobb, Institute for Environmental Negotiation at UVA.

Developmental Steps

During the Summer and Fall of 2004, the Department of Forestry with assistance from Merri Hanson with Peninsula Mediation & ADR and Tanya Denkla-Cobb with UVA's Institute for Environmental Negotiation embarked on the development of a Pilot Program for the agency's Water Quality Law Enforcement Program. The process involves the use of a mediator employing a facilitative, non-evaluative style of mediation. Development involved the determination of when to consider the use of mediation in the agency's law enforcement process. Procedures were developed, and forms and letters created to support program implementation. The agency met with the Attorney General's Office to insure that legal requirements of the law were being addressed through this process.

A recruitment process for mediators took place during the winter of 2004 and a training session for interested mediators occurred during February of 2005. The pilot program began in March of 2005.

Supporting Conditions & Challenges

The agency currently has the “Silvicultural Water Quality Law” and procedures in place to support the role of the ADR process to allow mediation as an opportunity to those individuals impacted by the agency’s enforcement of the law. The opportunity for mediation provides an option for water quality issues to be resolved on a specific site as well as the possibility to gain some behavioral changes of the owners and operators in a more constructive manner.

While mediation could lengthen the law enforcement process, which is already quite lengthy, it is offered in a way and time period that adds it as another step in the agency’s law enforcement procedure and really does not add but a very few days to the process. The settlement agreements (if reached) always have a component to correct the original Water Quality violation for every case. Additionally, the agency usually requests that training be taken to avoid future problems, a reduction of what the agency will be seeking in terms of civil penalty, and a component that additional violations of law do not occur for a designated period of time (probation). These things are usually pretty agreeable to all parties.

Implementation of the ADR Process

The agency began implementation of this pilot program in February of 2005. It was decided that the process would be incorporated into the law enforcement procedure after violation of a standing Special Order and prior to a Formal Hearing to prove that the Special Order was not complied with, the Formal Hearing is really the civil penalty assessment hearing. The mediation fits quite nicely into our enforcement within the guidelines of the Administrative Process Act. The agency notifies all parties involved that they did not successfully comply with the Special order to fix the Water Quality problem. The agency notifies all parties that they will be seeking civil penalties of a fixed amount per day of violation. Then the agency offers the opportunity to come to some resolution through the ADR process.

The pilot program was rolled out after gaining approval of the State Forester’s Water Quality Task Force, the main Stakeholders group, and selecting and training of the mediators.

July 1, 2006 – June 30, 2007 Results

The agency had three (3) opportunities to mediate Water Quality Law Violations during fiscal year 2007. Each of these mediated cases resulted in settlement agreements among all parties involved. The basic components of all of the settlement agreements were as follows:

- Reduced civil penalty (usually reduced from a 30 day period to one day of civil penalty)
- Request for written harvest plans on the operators' next 3 jobs.
- Proof that the logger and timber owner have been through BMP educational program or that they will agree to go to educational program on BMPs.
- No more Water Quality Law Special Orders for the next 6 months.

Of the three mediated cases, all of the settlement agreements are in the process of being fully complied with by all parties involved. In one case, portions of the agreed upon terms were complied with, a Civil Penalty of approximately \$52,920 would have been assessed if the settlement agreement had not been reached, the amount of civil penalty agreed to was \$3,528, and payment is being received in monthly installments. In both of the other cases, a settlement agreement had been reached in a prior program year and had been defaulted upon by the individual; it was the same individual in two separate cases. The individual's attorney had met with the agency representatives involved in the original mediation. After a great deal of discussion in the matter, another settlement agreement was reached with the agency to keep the individual out of bankruptcy. Basically the civil penalty assessment of \$116,000 in one case and \$105,000 in the second case were retained by the agency in the form of liens against the individual until payments of one day of penalty, or \$4,939.28 and 4,579.28, respectively, were paid and other stipulations were met.

While the ADR process did not prove to be any better, faster or cheaper to implement, it did provide a reasonable approach to settling the issues involving the enforcement of the Water Quality Law in a proactive manner. It allowed the agency to be somewhat gracious in its enforcement action.

Lessons Learned

The agency has been re-evaluating the use of mediation in this enforcement program. It has been determined that to achieve the desired results of behavioral changes that the agency is seeking, a screening process will have to be created to allow suitable candidates the option for mediation. For example, habitual offenders may be screened out of the program. The Attorney General's Office has been consulted and has indicated that we can enact criteria for the program for this purpose as long as the agency is consistent in the use of the screening criteria. Another option for mediation is after the civil penalty has been assessed; this has proven to be a benefit in the follow-through of the settlement agreement.

In those cases that we have had a successful settlement of the issues, the agency has been quite satisfied with the results. We feel that this option of mediation still provides an opportunity with the right parties to be successful in addressing the behavioral changes that the agency is seeking and needs to remain an option for those individuals.

IV. Board of Accountancy

Goals

- To offer Complainants and Regulants an alternate way to resolve disputes.
- To save time and money for the Agency
- Decrease in Informal Fact-Finding Conferences (IFFs)
- Create better solutions by both parties' participation and a neutral mediator

Participants

Dispute Resolution Coordinator/Enforcement Manager, Jean Grant
Executive Director/Agency Head, Nancy Taylor Feldman
BOA Enforcement Committee
Northern Virginia Mediation Center

Steps Taken

- The continual use of the ADR process, specifically, mediation.
- To utilize the mediation process in carrying out BOA's mission of public protection by continuously improving the enforcement process to ensure prompt investigation and appropriate resolution of these matters.
- Resolution Coordinator attended the recent ADR seminar on Ombudsmen to determine if the Board of Accountancy would benefit and it has yet to be determined.

On Going Challenges and Solutions

- To provide the Complainant and the Regulant with a tool to obtain a resolution to the dispute that is fast and fair.
- To make this process available in the area of the Respondent and Complainant
- The Board has embraced and employed mediation as the first means of resolving its enforcement cases when appropriate. The Board has determined that mediation is an additional effective tool in the enforcement process

Cases During the FY Year of 2007

Case # 1- Complainant felt that the Regulant, a previous employer was unethical for withholding copies of client files for payment of services that the Regulant had previously agreed to release to exiting employee (Complainant). Mediation was successful in working out terms and conditions in a written agreement.

Case # 2-Complainant felt that Respondent was undermining her authority as he sat on her Board of Directors. The case was sent to mediation, the parties could not come to an agreement, the case was remanded back to the Board, the Board found no violation, and the case was closed.

Case #3- Complainant felt that the Regulant overcharged them for services he did not perform. Mediation was successful in working out a written agreement and all have abided by the terms and conditions.

Overall Estimated Benefits

The Virginia Board of Accountancy, through its Enforcement Division, investigates matters involving the conduct of Certified Public Accountants in connection with alleged violations. It is the Board's objective, to utilize the mediation process in carrying out its mission of public protection by continuously improving the enforcement process to ensure prompt investigation and appropriate resolution of these matters.

The Board strongly endorses the fast, fair, and equitable use of mediation in the enforcement process and therefore recommends mediation as the first step in resolving conflicts with the assistance of a neutral facilitator.

V. Department of Charitable Gaming

Goals

To develop a specialized informal process as an alternative to the Administrative Process Act (APA), to resolve controversies involving licensing decisions, as well as statutory and/or regulatory violations, in an expeditious manner to the mutual satisfaction of all parties, and in a regulatory environment that is also customer service oriented for the Department's constituents. To increase the efficiency of the process, and to reduce the Department's costs associated with more formal processes.

Participants

Applicable Department staff and constituents that include charitable organizations that conduct charitable gaming, licensed charitable gaming suppliers, and licensed game managers/callers.

Steps Taken

- Realization of the need to more efficiently address statutory and/or regulatory issues.
- Designated ADR Coordinator and ADR Contact person.
- Provided instruction to meet the educational needs of all Department stakeholders.
- Adopted written policies and procedures.
- Established criteria to determine whether a controversy would be appropriate for ADR after a review and analysis of policy and law.

Supporting Conditions and Impact

- Stakeholders are empowered to control their fate by taking an active role in the resolution of controversies at hand.

- Stakeholders are asked to actively participate in and provide information in an informal environment that expedites resolution.
- Creates a non-adversarial atmosphere.
- Less staff time involved in the resolution using ADR than in utilizing the APA.
- ADR avoids the time involved in the preparation of notices, reports, transcripts, and closing documents.
- Neither party waives any rights under the APA, and there is no risk to stakeholders.
- Allows the Department and the stakeholder to identify and remove together obstacles for the effective use of ADR.

Challenges

- Finding suitable candidates for ADR.
- Making a distinction between an organization that makes a statutory or regulatory mistake versus an organization that purposefully contradicts the statute and regulations.
- Being mindful that not all disputes are appropriate for ADR.
- Timely exercising the Department's rights under the APA as soon as possible when an ADR attempt is not successful.
- The Department must weigh the potential benefit of ADR for each particular stakeholder by conducting a review and analysis of the Department's records, and the organization's history and prior performance.
- The Department must be careful to make certain that stakeholders are sincere participants in ADR versus stalling the inevitable formal process.
- Overcoming the theory that ADR is a soft approach to conflict resolution.

How the ADR Process Works

- At the discretion of the Director, a constituent organization may be afforded an opportunity to participate in a face to face meeting to discuss the issues at hand.
- All stakeholders will establish an agreed upon meeting date that will include the various Department disciplines, the organization's leadership, and if applicable, a third-party mediator.
- A letter is generated to the constituent outlining the controversies at hand and the Department's process in utilizing ADR and confirming the agreed upon date and location.
- The staff member designated by the Director will conduct the meeting, and each party will be afforded an opportunity to present their case and introduce any documents in support of their position. The controversies will be addressed in detail with the goal of reaching an amicable agreement.
- Follow up and monitoring by the Department to ensure that the stakeholder complies with the agreed upon resolution is crucial.

Decision to Utilize the Process

The decision to utilize the process is made on a case by case basis after:

- Thorough discussions with and recommendations from the applicable Department disciplines.
- Thorough review of the statutory and regulatory controversies, and the organization's compliance with its statutory and regulatory obligations to date.
- An analysis of the benefit of (1) the ADR process pertaining to the individual constituent, (2) the cost benefit to the Department, and (3) the potential for settlement.
- The potential customer service benefit to both the Department and the organization after careful review and analysis.

Results

During the period of July 1, 2006 through June 30, 2007, DCG encountered three situations which were resolved through alternative dispute resolution methods. Due to the increased number of inspections and audits which are planned for July 1, 2007 through June 30, 2008, the department believes it will encounter additional opportunities to develop dispute resolution skills.

DCG resolved two incidents involving the denial of registration to be paid for calling and/or managing bingo games. Both of these denials were due to the criminal records of the individuals. Each of these individuals contested the decision and threatened to take legal action against the department. In one case DCG was able to resolve the issue through written correspondence. In the second case, DCG arranged an informal meeting with the individual and gave him the opportunity to express his views. This meeting also allowed DCG to outline the legalities regarding his criminal background and to explain why his application was denied. To date there has been no further action taken by these individuals.

DCG held an informal hearing to address the issue of an organization gaming without a valid permit. This organization had filed a permit amendment. However, the organization took it upon themselves to begin gaming at the amended times prior to the department's approval. The organization claimed to have misinterpreted the "calendar" day formula. At the conclusion of the meeting the organization assured DCG that it would not conduct any future gaming unless it was specified on their permit. No further issues have been encountered with this organization.

In each of these cases the problems were resolved with virtually no cost to the DCG and were resolved in a very short timeframe in relation to the time required when having to resort to the APA.

Lessons Learned

- ADR has clearly helped the Department meet its goal of being more customer service oriented, while still fulfilling its statutory and regulatory responsibilities.
- The Department has learned that its stakeholders would much rather utilize this informal process for the resolution of controversies.

- In most cases, there is a clear distinction between organizations that are better suited for ADR versus those that are more inclined to be litigious.
- ADR is in essence a mutual problem-solving process.

VI. Department of General Services

Goals

- Promotes agency/contractor partnership
- Less formal process resulting in faster and less costly resolution
- Less confrontational
- Parties retain control over outcome

Participants

- All state agencies that follow DGS's Division of Purchases and Supply (DPS) *Agency Procurement and Surplus Property Manual (APSPM)*
- Vendor community that follows the *DPS Vendors Manual*

Steps Taken

- DPS Research – Local governments, Virginia Association of Governmental Purchasing, National Institute of Governmental Purchasing, Federal Acquisition Regulation
- Discussions with the Virginia Information Technologies Agency (VITA)
- Consultation with the Office of the Attorney General
- Policy developed and approved by DPS Policy Committee and Director
- Policy incorporated into the *APSPM* – July 2004 – applicable to non-technology goods/services and non-professional services contracts
- Agencies notified and provided instruction on use of DPS ADR Policy:
 - DPS website
 - DPS statewide procurement forum – December 2004 and December 2005
 - Added to Virginia Contracting Office curriculum – 2005
 Since July 2005 –181 individuals have received training on the ADR process in the *APSPM* – Chapter 11.4. Training was provided by DPS in its Virginia Contracting Officer Training program.
 - ADR training seminar planned for the 2007 statewide procurement forum

Supporting Conditions and Impact

- Prior to DPS Policy, vendors' only option to challenge agency contractual dispute decision was legal action – costly for all involved
- Developed partnerships between agencies and their vendors
- Vendors reluctant to challenge agencies in court – concerned about ramifications

Challenges and Solutions

- Awareness of policy

- Change the business practices of vendors and agency buyers
- Education/Training
 - 181 individuals received training on the ADR process described in the APSPM

How It Works

- Agency denies a contractor's claim
- Contractor decides to challenge the denial of its claim
- Parties encouraged to use ADR
 - Contractor gives written notice to agency purchasing office requesting ADR process to resolve issue
 - Each party appoints senior management official not previously involved in the transaction to negotiate on their behalf
 - Each party shall furnish to the other party all non-privileged documents and information with respect to the dispute that either party believes to be appropriate and germane
 - Informal – attorneys excluded
 - Use of facilitator recommended
 - Resolution agreement must be in writing and signed by authorized representatives of both parties
 - Any compensation paid to facilitator shall be shared equally by the two parties

Roll Out to Stakeholders

- DPS Procurement Forum – December 2004
 - Buyer and Vendor workshops
- *APSPM* and Vendor Manual
- DPS Procurement Forum – November 2005
- 2005 – Added to curriculum of DPS Virginia Contracting Officer training
- ADR training seminar planned for the 2007 statewide procurement forum

Results Expected to Produce

- **Better**
 - Communications between contractors and agencies
 - Less confrontational
 - Parties retain control over outcome
- **Faster**
 - Reduces time to resolve contractual dispute
- **Cheaper**
 - ADR less expensive than legal/court alternative

Lessons Learned

- Different way of thinking – agency buyers and contractors need “Interest-Based Negotiation” training
- Improved agency/contractor relations

- It's still early in the implementation process – but each ADR endeavor is a potential “Win/Win” solution
- Examples of state agency use of ADR for contractual disputes (see also Virginia Information Technologies, Section I above):
 - Department of Transportation: ADR used on three occasions in FY05 to resolve procurement claims or contractual disputes. ADR participants indicated that they were satisfied with the results, the issues were resolved quicker and the costs were cheaper.
 - Department of Labor and Industry: Interest-based negotiation used in 2005, continued from 2004. Ultimately the desired result was achieved; however, in this instance, the more formal, traditional approach may have brought about the desired result more quickly. While this approach seemed to engender genuine cooperation from the contractor, the stimulus of a penalty or potential loss of contract inherent in the formal procurement process for redress could have caused a quicker resolution by contractor.
 - State Board of Elections: The agency and a contractor agreed to use ADR to resolve contractual issues. They successfully resolved the issues and found ADR to be an effective alternative to the formal contract compliance process.

VII. Department of Mental Health, Mental Retardation, and Substance Abuse Services

The original goals of the DMHMRS ADR pilot were to assist a mental health facility in achieving its mission by enhancing the leadership skills and cohesiveness of the management team, improving communication among internal staff, and developing the capacity for achieving important, long-term policy goals and the highest quality service delivery. The facility's ADR pilot has since been folded in with several other initiatives, needs and interests. The initial issues that drove the pilot no longer exist and have been closed out.

APPENDIX

CHAPTER 577

An Act to authorize the Virginia Information Technologies Agency to conduct an alternative dispute resolution pilot project.

[H 2054]

Approved March 22, 2005

Be it enacted by the General Assembly of Virginia:

1. *§ 1. Notwithstanding the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Virginia Information Technologies Agency is authorized to promulgate administrative rules allowing the use of alternative dispute resolution in procurement protests involving its procurement of information technology and telecommunications goods and services pursuant to § 2.2-2012. Such rules shall provide that deadlines specified in the Virginia Public Procurement Act for filing procurement protests are tolled during the use of alternative dispute resolution.*

§ 2. Such rules shall not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review.

§ 3. On or before July 1, 2006, and every July 1 thereafter until the expiration of this act, the Chief Information Officer of the Commonwealth shall submit a report to the Interagency Dispute Resolution Advisory Council (the Council) on the implementation of the provisions of this act. Pursuant to the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.), the Council shall report on this pilot project and other council alternative dispute resolution programs to the chairs of the House and Senate Committees on General Laws, the House Committee on Science and Technology, and the Joint Commission on Technology and Science.

2. That the provisions of this act shall expire on July 1, 2008.

VIRGINIA ADMINISTRATIVE DISPUTE RESOLUTION ACT

§ 2.2-4116. Authority to use dispute resolution proceedings.

A. Except as specifically prohibited by law, if the parties to the dispute agree, any public body may use dispute resolution proceedings to narrow or resolve any issue in controversy. Nothing in this chapter shall be construed to prohibit or limit other public body dispute resolution authority. Nothing in this chapter shall create or alter any right, action, cause of action, or be interpreted or applied in a manner inconsistent with the Administrative Process Act (§ 2.2-4000 et seq.), applicable federal or state law or any provision that requires the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program. Nothing in this chapter shall prevent the use of the Virginia Freedom of Information Act to obtain the disclosure of information concerning expenses incurred in connection with a dispute resolution proceeding or the amount of money paid by a public body or agency to settle a dispute.

B. A decision by a public body to participate in or not to participate in a specific dispute resolution proceeding shall be within the discretion of the public body and is not subject to judicial review. This subsection does not affect or supersede any law mandating the use of a dispute resolution proceeding.

C. An agreement arising out of any dispute resolution proceeding shall not be binding upon a public body unless the agreement is affirmed by the public body.

(2002, c. 633.)

§ 2.2-4117. State agency promotion of dispute resolution proceedings.

A. Each state agency shall adopt a written policy that addresses the use of dispute resolution proceedings within the agency and for the agency's program and operations. The policy shall include, among other things, training for employees involved in implementing the agency's policy and the qualifications of a neutral to be used by the agency.

B. The head of each state agency shall designate an existing or new employee to be the dispute resolution coordinator of the agency. The duties of a dispute resolution coordinator may be collateral to those of an existing official.

C. Each state agency shall review its policies, procedures and regulations and shall determine whether and how to amend such policies, procedures and regulations to authorize and encourage the use of dispute resolution proceedings.

D. Any state agency may use the services of other agencies' employees as neutrals and an agency may allow its employees to serve as neutrals for other agencies as part of a neutral-sharing program.

E. This chapter does not supersede the provisions of subdivision 2 of § 2.2-1001 and subdivision B 4 of § 2.2-3000, which require certain agencies to participate in the mediation program administered by the Department of Employment Dispute Resolution.

(2002, c. 633.)

§ 2.2-4118. Interagency Dispute Resolution Advisory Council.

A. The Interagency Dispute Resolution Advisory Council is hereby created as an advisory council to the Secretary of Administration.

B. The Council shall consist of two dispute resolution coordinators from each Secretariat appointed by each Secretary, the Director of the Department of Employment Dispute Resolution, and three persons who are not employees of the Commonwealth, at least two of whom have experience in mediation, appointed by the Governor. The appointees who are not employees of the Commonwealth may be selected from nominations submitted by the Virginia Mediation Network and the Virginia State Bar and the Virginia Bar Association Joint Committee on Alternative Dispute Resolution, who shall each nominate two persons for each such vacancy. In no case shall the Governor be bound to make any appointment from such nominations. The Secretary of Administration or his designee shall serve as chairman of the Council.

C. The Council shall have the power and duty to:

1. Conduct training seminars and educational programs for the members and staff of agencies and public bodies and other interested persons on the use of dispute resolution proceedings.

2. Publish educational materials as it deems appropriate on the use of dispute resolution proceedings.

3. Report on its activities as may be appropriate and on the use of dispute resolution proceedings, including recommendations for changes in the law to the Governor and General Assembly.

D. Every state agency shall cooperate with and provide such assistance to the Council as the Council may request.

(2002, c. 633.)

§ 2.2-4119. Confidentiality between parties; exemption to Freedom of Information Act.

A. Except for the materials described in subsection B, all dispute resolution proceedings conducted pursuant to this chapter are subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. All memoranda, work products, or other materials contained in the case file of a mediator are confidential and all materials in the case file of a mediation program pertaining to a specific mediation are confidential. Any communication made in or in connection with a mediation that relates to the dispute, including communications to schedule a mediation, whether made to a mediator, a mediation program, a party or any other person is confidential. A written settlement agreement is not confidential unless the parties agree in writing. Confidential materials and communications are not subject to disclosure or discovery in any judicial or administrative proceeding except (i) when all parties to the mediation agree, in writing, to waive the confidentiality; (ii) to the extent necessary in a subsequent action between the mediator and a party for damages arising out of the mediation; (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation; (iv) where communications are sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against the mediator; (v) where a threat to inflict bodily injury is made; (vi) where communications are intentionally used to plan, attempt to commit or commit a crime or conceal an ongoing crime; (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party, nonparty, participant or representative of a party based on conduct occurring during a mediation; (viii) where communications are sought or offered to prove or disprove any of the reasons listed in § 8.01-576.12 that would enable a court to vacate a mediated agreement; or (ix) as provided by law or rule other than the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege. Unless otherwise specified by the parties, no mediation proceeding shall be electronically or stenographically recorded.

(2002, c. 633.)