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THE DEPARTMENT OF THE NAVY'S EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT DISPUTE RESOLUTION PROCESS PILOT PROGRAM: A BOLD EXPERIMENT THAT DESERVES FURTHER EXPLORATION

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Time is neutral and does not change things. With courage and initiative, leaders change things.[2]

I. Introduction

The Department of the Navy (DON) recently completed the first phase of testing on an innovative pilot program (Pilot Program) designed to improve the way equal employment opportunity (EEO) workplace complaints are processed. The Pilot Program was the result of over a year of thorough research by the DON into complaints by employees and managers regarding perceived problems with the current EEO complaint system.[3]

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2. About: The Human Internet, *Quotations*, *at* http://quotations.about.com (last visited Aug. 22, 2001) (quoting Jesse Jackson, date and location of statement unknown).

Designed to offer a voluntary-participation alternative to the traditional EEO complaint procedure, the Pilot Program offers DON employees a significantly revamped procedure that dramatically reduces complaint processing time and encourages cooperative resolution of complaints in an attempt to build and maintain working relationships.[4] To achieve these benefits, the Pilot Program requires that participants voluntarily waive their right to "opt-out" of the program, and limits the participants' appeal rights. Testing of the Pilot Program yielded dramatic improvements in processing times for EEO complaints, and was widely regarded by those utilizing the Pilot Program as a success.[5]

The Pilot Program was not, however, universally applauded, and met significant resistance from the Equal Employment Opportunity Commission (EEOC).[6] The first phase of testing ended with the EEOC ordering the DON to suspend the use of the Pilot Program, citing concerns with the legality of a number of the Pilot Program's innovative procedures.[7] Among the concerns cited were the requirements to waive the right to opt-out of the Pilot Program, the manner in which investigations are conducted under the Pilot Program, and the waiver of certain EEOC appeal rights.[8] Undeterred, the DON initially attempted to rework the Pilot Program to address the EEOC's concerns[9] and formulated a Revised Pilot Program. The Revised Pilot Program allowed participants to opt-out of the Program and return to the traditional EEO complaint-processing procedure at any time, and issued amplifying guidance addressing other concerns of the EEOC.[10]

Before DON implemented testing of the Revised Pilot Program, Congress initiated legislation that would have allowed a further three-year test-

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3. *See infra* notes 13-14 and accompanying text.

4. *See infra* Section II.B.2 (discussing in detail the Pilot Program's procedures); *infra* Section II.B.1.a (discussing Pilot Program goals); *infra* Section II.B.1.c (discussing the Pilot Program's advantages).

5. *See infra* notes 130–37 and accompanying text.

6. *See infra* Section II.C.1 (discussing the EEOC's concerns).

7. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110, at *11-12 (June 8, 2000).

8. *Id.*

9. *See Alternative Dispute Resolution—Navy Proceeds with ADR Pilot Program Despite EEOC Order*, FED. HUM. RES. WK., Aug. 14, 2000 [hereinafter *Proceeds Despite EEOC Order*] ("The Navy is proceeding with phase two of its pilot civilian alternative dispute resolution program despite an Equal Employment Opportunity Commission order to suspend it.").

10. *See infra* text accompanying note 196.

ing period of the DON's Pilot Program in its original form.[11] In its final version, however, the legislation that passed authorized the Secretary of Defense to select "at least three agencies" to institute pilot programs in the equal employment opportunity arena, but did not specifically mandate that the DON's Pilot Program be one of these programs.[12] To date, no selections have been made, and the DON Pilot Program is currently on hold awaiting the Secretary of Defense's decision.

This article argues that the time has come to continue testing of this worthwhile Pilot Program in its original form. Background material is provided in Section II explaining the traditional EEO complaint procedure and the ongoing effort to improve this cumbersome process. Next, the article explores DON's Pilot Program and compares it to the traditional EEO complaint procedure; it further examines the conflict between the DON and the EEOC over the Pilot Program's legality. The Navy's reaction to the EEOC's ruling to suspend the program, and the subsequent introduction of legislation mandating the establishment of DOD pilot programs are then detailed. Section III addresses the legal arguments surrounding the Pilot Program, examining first other longstanding legal procedures that allow similar waivers of rights in exchange for legal consideration, and then the countervailing arguments put forth by the EEOC against the Pilot Program. Section III then moves from legal considerations to policy considerations, examining whether such a dramatic change as is involved in the Pilot Program is necessary instead of continuing with the current, less controversial course of gradual improvements. The section lastly addresses the potential effects of the recent legislation requiring the establishment of EEO pilot programs by the Secretary of Defense. The article concludes in Section IV that the nation's leadership has been presented with an ideal opportunity to take the initiative and allow the continued testing of a courageous experiment in the EEO complaint-processing arena. As the article will fully explain, the current EEO system is flawed beyond the point of being fixed by minor changes. The time has come to legislatively approve the DON's Pilot Program and allow the DON to fully explore the Program's potential.

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11. *See infra* Section II.D.
12. *See infra* notes 210-15 and accompanying text.

II. Background

To understand fully the DON's Pilot Program, a comparison between the traditional EEO complaint-processing procedure and the DON's Pilot Program is necessary. This section first explores the traditional EEO complaint procedure, its complexities and problem areas, and the limited success to date of ongoing government efforts to improve it. Additionally, as the DON's Pilot Program relies heavily on the use of alternative dispute resolution (ADR), this section specifically examines the increased use of ADR in federal employment relations to improve the traditional EEO complaint procedure. It then examines DON's Pilot Program, looking at why it was developed, its history, and its processes. Next it explores the conflict that arose between the EEOC and the DON over the legality of the Pilot Program, and specifically where the EEOC found the Pilot Program to be faulty. This background section concludes by addressing the results of the EEOC's ruling suspending the Pilot Program, looking at both the DON's reaction and legislation introduced to continue the Program.

A. The Traditional EEO Complaint Process and the EEOC's Efforts to Improve It

The DON's move to improve its EEO complaint process is part of a larger push by the federal government to fix an unpopular federal EEO complaint process.[13] Throughout the federal government, employees and managers commonly view the traditional EEO complaint system as unnecessarily cumbersome, tedious, and disruptive to the work environment.[14] There has been a continuing government effort to improve this process, backed by both the executive[15] and legislative branches, but this effort has

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13. *See, e.g.*, *Federal Agencies Must Comply With New EEO Regulations*, FED. EEO ADVISOR, Dec. 16, 1999 ("Employee groups complained the old system was unfair and inefficient and put pressure on the EEOC to make changes.").

14. *See, e.g.*, K. C. Swanson, *No Way Out—The Discrimination Complaint Process is a Bureaucratic Maze that Often Punishes the Innocent and Lets the Guilty Go Free*, GOV'T EXEC., Nov. 1996.

> Both management and employees are equally dissatisfied with the current EEO system. On the employee side, federal employees are 10 times more likely than nonfederal employees to file complaints because of the ease of filing, lack of any cost to do so, and increased knowledge of their rights. However, the resolution process is lengthy, expensive (nearly $100 million in fiscal 1994 in the federal government), confusing, and perceived as weighted against employees due to the investigation being

yet to yield significant overall results, leading to popular and congressional dissatisfaction with the rate of improvement.[16]

1. The "Traditional EEO Complaint Process"—29 C.F.R. Part 1614

To understand the current dissatisfaction with the complicated and burdensome Part 1614[17] EEO complaint process, as well as the conflict

14. (continued)

> being conducted by the agency. On the management side, there is a consensus of feeling trapped by frivolous complaints, often adversely constraining managers attempting to correct or fire under-working employees. Additionally, many management decisions are done simply to appease complainants in an effort to avoid damaging publicity regardless of the merit of the claim . . . . The spiraling number of EEO complaints has increased the amount of time it takes to resolve cases. Between fiscal 1991 and fiscal 1994, the backlog of requests for EEOC hearings increased by 65 percent. The most recent statistics reveal the average time from the filing of a complaint to the commission's decision on an appeal was more than 800 days.

Id. at 46. *See also* Brian Friel, *EEOC Asserts Itself*, GOV'T EXEC., Oct. 8, 1997 (EEOC's part 1614 revisions were "developed in response to complaints by federal agencies, employees, and civilian rights groups that the federal discrimination complaint process is unfair and inefficient."), *available at* http://www.govexec.com.

15. *See, e.g.*, Kellie Lunney, *Navy EEO Overhaul Saves Time, Money*, GOV'T EXEC., Aug. 1, 2000 (discussing President Clinton's October 1999 task force initiative to study and recommend ways to improve the federal EEO complaint process), *available at* http://www.govexec.com; Susannah Zak Figura, *Power Shift*, GOV'T EXEC., Nov. 1, 1999 (discussing EEOC Chairperson Ida Castro's August 1999 Comprehensive Enforcement Program establishing a task force in conjunction with the National Partnership for Reinventing Government that will examine various aspects of the federal complaint process), *available at* http://www.govexec.com.

16. *See, e.g.*, Kellie Lunney, *EEOC Gets Grilled For Slow Complaint Processing*, GOV'T EXEC., Mar. 30, 2000 (discussing House subcommittee meetings on ways to reform the EEO complaint process and legislative dissatisfaction with the current process), *available at* http://www.govexec.com (last visited Feb. 2, 2001).

17. Equal Employment Opportunity Commission Regulations on Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1999). The Part 1614 regulations establish the processes by which federal EEO complaints are governed. These processes are commonly referred to as the "Part 1614 process."

between the EEOC and the DON over the legality of the Pilot Program, an exploration of the Part 1614 EEO complaint process is required.[18]

The EEO complaint procedure is actually comprised of two distinct processes. One is referred to as a "pure EEO complaint process," where the complainant's primary remedy is sought through the EEOC.[19] The other is commonly referred to as a "mixed case complaint process," where the complainant may have a remedy via either the EEOC or the Merit Systems Protection Board (MSPB).[20] A thorough understanding of the very complicated mixed complaint process is beyond the scope of this article, and unnecessary as the Pilot Program is not being used for mixed complaints. In comparing the EEO Part 1614 complaint process to the DON's Pilot Program, this article focuses on the processing of a pure EEO complaint.

In a pure EEO complaint processed under the EEOC's Part 1614 process, a complainant has forty-five days from the date of an alleged act of discrimination to contact an equal employment opportunity counselor with a complaint.[21] Once contact is made, an initial meeting is held between the complainant and the EEO counselor wherein the EEO counselor informs

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18. As an aid in exploring this process, the reader may find it useful to refer to a flow-chart depiction developed by the "*The Administrative EEO Complaint Process*", Air Force Central Labor Law Office, entitled The Administrative EEO Complaint Process Flow(continued) Chart, version 5.0 (Mar. 2000), *available at* https://aflsa.jag.af.mil (Labor/Equal Employment Opportunity Commission/EEO Flowchart) (Air Force FLITE Electronic Database).

19. *See, e.g.*, AIR FORCE CENTRAL LABOR OFFICE, 2001 EEO DISMISSAL PRIMER 3 (2001), *available at* http://www.af.adr.mil (last visited Jan. 9, 2001).

20. *See generally* Equal Employment Opportunity Commission Regulations on Federal Sector Employment Opportunity, 29 C.F.R. § 1614.302(a)(1) (1999). This provision defines a mixed complaint as "a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board." *Id.*

21. *Id.* § 1614.105(a)(1). The period begins on the date of the discriminatory conduct, or when the complainant knew or should have known of the conduct. The period may be tolled, however, if the complainant can show they were not notified or otherwise aware of the time limits, or were unaware of the discriminatory event. *Id.* The forty-five day time limit may be extended by the agency or the EEOC for good cause. *Id.* § 1614(a)(2).

the complainant of his rights and responsibilities.[22] If ADR is offered by the agency, the counselor will explain this procedure to the complainant as well.[23] The complainant then chooses between ADR and the traditional counseling procedure.[24] Should the complainant elect ADR, he has ninety days in which to resolve the complaint.[25] If the complainant chooses the traditional counseling procedure, he has thirty days[26] to resolve the complaint, with a sixty-day extension possible.[27] At the end of the ADR or counseling period, if the matter is unresolved, the counselor conducts a final interview,[28] during which the complainant receives notice of the right to file a formal complaint.[29] At any point in the process, the complainant may also choose to withdraw the complaint.

Once the complainant receives notice of the final interview, he has fifteen days to file a formal complaint.[30] If a formal complaint is filed, the agency must dismiss the complaint in whole,[31] investigate the entire complaint, [32] or notify the complainant that it will not investigate some portions of the complaint but will investigate the remainder of the complaint.[33]

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22. *Id.* § 1614.105(b)(1). At this meeting the counselor will inform the complainant of the investigative process, the complainant's right to a hearing or an immediate final decision at the investigation's conclusion, the complainant's right to file a notice of intent to sue, the complainant's duties to mitigate damages and to keep the agency informed of their current address, and the fact that only matters raised during this counseling or related to the same issues may be alleged in a subsequent complaint filed with the agency. The counselor will also gather facts and names of primary witnesses from the complainant.

23. *Id.* § 1614.105(b)(2). An agency is required to have an ADR program or to have one available to its employees, but the agency is not required to offer the use of ADR in every case.

24. *Id.*

25. *Id.* § 1614.104(f).

26. *Id.* § 1614.105(d).

27. *Id.* § 1614.105(e).

28. *Id.* § 1614.104(f) (ADR process); *id.* § 1614.105(d) (counseling process).

29. *Id.* § 1614.106. A formal complaint: must be based upon some act of discrimination; must be filed with the agency that committed the discrimination; must contain a statement describing the actions that were the basis for the alleged discrimination; and can be amended at any time prior to the conclusion of the agency's investigation.

30. *Id.* § 1614.106(b) (complainant or his attorney must sign the formal complaint).

31. *Id.* § 1614.107(a); *see also id.* § 1614.110(b) (requiring that a dismissal of a complaint by an agency contain an explanation for the dismissal).

32. *Id.* § 1614.108.

33. *Id.* § 1614.107(b). This procedure replaces what was formerly known as a "partial dismissal." The agency is now required simply to notify the complainant that it believes some portions of the complaint qualify as dismissible, their rationale, and that they will not investigate this matter. This decision is not immediately appealable, but is later subject to review by the administrative judge (AJ) if the case ultimately involves a hearing. *Id.*

Agencies can dismiss complaints for a number of reasons. Common reasons include failure to state a claim or to comply with applicable time limits, filing a complaint that is already a pending civil action, or filing a complaint that is also being considered by the MSPB. [34] Additional reasons include mootness, failure to prosecute the complaint or to cooperate in the EEO process, filing a frivolous claim or abusing the EEO process, and filing complaints about the EEO process itself.[35] The complainant can appeal a dismissal of its complaint to the Office of Federal Operations (OFO),[36] then the EEOC itself,[37] and ultimately to federal district court,[38] any of which can reverse the agency's decision to dismiss the complaint and order the agency to conduct an investigation.

For any accepted complaints, the agency has 180 days to complete an impartial and appropriate investigation.[39] Should the complainant file an amendment to their complaint, the agency's 180-day clock is restarted, but in no case may the investigation take more than 360 days from the date of the original complaint.[40] At the conclusion of the investigation, the complainant is provided a copy of the investigative file.[41]

The complainant then has thirty days to choose one of three options: (1) drop the complaint; (2) request a final decision from the agency; or (3) request a hearing with the EEOC.[42] If the complainant chooses option 2, to request a final decision, the agency must issue a final decision within sixty days.[43] After the final decision has been issued, if the complainant is unhappy with the decision, he has thirty days to appeal to the OFO, and

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34. *Id.* § 1614.107.

35. *Id.*

36. *Id.* § 1614.404 (providing that the OFO's review is de novo, but based solely on the record and without a hearing).

37. *Id.* § 1614.405. The OFO decision is considered final unless a party requests reconsideration by the full EEOC. The EEOC has discretion in requests for reconsideration. The requesting party must show that there was a clearly erroneous interpretation of material fact or law; or will substantially impact on the policies or operations of the agency. *Id.*

38. *Id.* §§ 1614.407-.408.

39. *Id.* § 1614.106(e).

40. *Id.*; *see also id.* § 1614.108(e) (allowing a ninety-day extension to complete the investigation if mutually agreed upon).

41. *Id.* § 1614.108(g). The agency must also provide notice of the complainant's right to request a hearing by an EEOC AJ or to request an immediate agency decision at this point. *Id.*

42. *Id.* §§ 1614.108(f)-.108(g).

43. *Id.* § 1614.110(b).

then request reconsideration of the OFO's decision by the EEOC.[44] After the EEOC decides the appeal, or fails to decide the issue within 180 days, the complainant may file suit in federal district court within ninety days of receipt of the EEOC's decision or the lapsing of the 180-day period.[45]

If the complainant chooses option 3, to request a hearing with the EEOC, the agency has fifteen days from notification to get the agency file to the EEOC.[46] The EEOC will appoint an administrative judge (AJ) to hear the case[47] and then issue a decision.[48] The AJ must issue this decision within 180 days of receiving the agency file, or the complainant may proceed directly to federal district court.[49] Where the EEOC decision makes a finding of no discrimination, the agency then issues a final order[50] implementing the AJ's decision within forty days.[51] The complainant may appeal this final order to the OFO within thirty days, request reconsideration of the OFO's decision by the EEOC, and ultimately file suit in federal district court within ninety days.[52] The complainant may also choose to skip the OFO-EEOC appeal and go directly to federal district court.[53]

Where the AJ makes a finding of discrimination, within forty days the agency must either accept the decision and issue a final order implementing the decision, or issue a final order not fully implementing the decision, grant interim relief,[54] and appeal the AJ's decision to the OFO.[55] If the OFO rules against the agency, the agency may also request reconsideration

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44. *Id.* §§ 1614.404-.408.

45. *Id.* §§ 1614.407-.408.

46. *Id.* § 1614.108(g).

47. *Id.* § 1614.109(a). The AJ may review any agency decision to dismiss any portions of the complaint; dismiss a complaint on his or her own initiative; dismiss a complaint pursuant to an agency motion; make a decision on the merits without a hearing; or hold a hearing prior to issuing a decision. *Id.*

48. *Id.* § 1614.109(i).

49. *Id.* § 1614.407(d).

50. Note that a "final order" is an agency's final action on an AJ decision, while a "final decision" is the final action taken in all cases not involving a hearing. Both are final agency actions.

51. *Id.* § 1614.110(a); *see also id.* § 1614.109(i) (indicating that a failure to issue a final order within forty days by an agency results in the AJ's decision automatically becoming the final action of the agency).

52. *Id.* §§ 1614.404-.408.

53. *Id.* §§ 1614.407-.408.

54. *Id.* § 1614.505.

55. *Id.* § 1614.110(a).

from the EEOC.[56] If either the OFO or the EEOC reverses the AJ, the complainant may again appeal to the EEOC (if the OFO reversed), or take the case to federal district court. An agency, on the other hand, may not appeal beyond the EEOC, and is bound by the decision at this point.

Processing a complaint under the Part 1614 process from start to finish, including federal court and appeals, can lead to total processing times which are often measured in years rather than months.[57] This inordinate delay in bringing closure to a complaint was the impetus behind the EEOC's recent modifications to the Part 1614 process, and the development of the DON's more aggressive attempt to correct the problem: its Pilot Program.[58]

2. EEOC's Effort to Improve the Part 1614 Process

As part of an ongoing government effort to improve the Part 1614 EEO complaint process, the EEOC[59]—the federal government's executive agency responsible for implementing and supervising the federal com-

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56. Under the old Part 1614 process, an agency unhappy with an AJ decision could simply issue a final decision that was contrary to the AJ's decision. One of the significant changes to Part 1614 was making the AJ decision final, though appealable. *See infra* notes 64-65 and accompanying text.

57. For example, a complaint might result in the following time frame: forty-five days for the complainant to file an informal complaint; ninety days for ADR and counseling; fifteen days for complainant to file a formal complaint; 180 days for the agency investigation (up to 360 days if complaint is amended); thirty days for the complainant to request an EEOC hearing; AJ issues a decision within 180 days of receipt of file from the agency; the final order is issued by the agency within forty days; the complainant has thirty days to appeal the final order to the OFO/EEOC; there is no limit on potential delay for the EEOC to issue a decision on appeal; ninety days for the complainant to file suit in federal district court after the EEOC appeal is decided; unknown delay in awaiting a federal court hearing; and ultimately the possibility of further delay in pursuing a federal appeal. In total, this example case could take over 700 days, *not including* the delays in awaiting the EEOC appeal decision, the federal court hearing, or any federal appeal. *See also infra* notes 104-05 and accompanying text (describing the DON's experience in averaging 781 days to the issuance of a final decision, with the possibility of an average of 540 additional days for appeals to the EEOC).

58. *See infra* note 61 and accompanying text (discussing the EEOC's rationale for modifying the process); *infra* Section II.B.1.a (discussing the DON's rationale for developing its Pilot Program).

59. *See generally* Equal Employment Opportunity Commission, *About the EEOC*, *at* www.eeoc.gov (last visited Aug. 24, 2001). The EEOC was established by Title VII of the Civil Rights Act of 1964 and began operating on 2 July 1965. It is comprised of five com-

plaint resolution process—issued new regulations on 9 November 1999.[60] These regulations were designed to address problems commonly appearing under the former Part 1614 process, and to streamline the way federal agencies handle EEO complaints.[61] In revising the Part 1614 EEO complaint process, the EEOC made some significant improvements. The

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59. (continued) missioners and a general counsel, each of whom is appointed by the President and confirmed by the Senate. Its mission is to "promote equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance." *Id.* In doing this, the EEOC:

> [E]nforces the principal federal statutes prohibiting employment discrimination by providing a forum for individuals to bring charges alleging discrimination by an employer. If the charges are substantiated, the EEOC first attempts to reach a voluntary resolution between the charging party and the respondent. If unsuccessful, the EEOC may bring suit in federal court against the discriminating party, or the discriminating party may bring suit on their own behalf. The EEOC also issues regulatory and other guidance interpreting the laws it enforces, and is responsible for the federal sector employment discrimination program. In this capacity, in 1998 the EEOC conducted 12,218 administrative hearings and 7494 appeals of final agency decisions for federal employees. Lastly, the Commission also ensures that federal departments and agencies maintain required EEO programs, and provides leadership and coordination to all federal departments and agencies on EEO law.

Id.

60. 64 Fed. Reg. 37,644, 37,655 (July 12, 1999) (codified at Equal Employment Opportunity Commission Regulations on Federal Sector Employment Opportunity, 29 C.F.R. pt. 1614 (1999)).

61. *See generally* Press Release, Equal Employment Opportunity Commission, EEOC Issues Regulations Streamlining the EEO Complaint Process for Federal Employees (July 12, 1999), *available at* http://www.eeoc.gov. The push to revise the Part 1614 procedure was part of a broader effort to improve the effectiveness of the EEOC's operations, implemented in conjunction with Vice President Gore's National Partnership for Reinventing Government initiative. The EEOC lauded the improvements in Part 1614 for making the complaint process "more efficient, expedient, and fair for federal employees and agencies alike. In particular, we have improved and streamlined the process by eliminating unnecessary layers of review and addressing perceptions of unfairness in the system." *Id. See also* Press Release, Equal Employment Opportunity Commission, EEOC Chairwoman Announces Comprehensive Efforts to Improve Federal Government EEO Process (Aug. 10, 1999), *available at* http://www.eeoc.gov. The revised Part 1614 procedures are part of the EEOC's overarching Comprehensive Enforcement Program initiative designed to improve overall agency operations. *Id. See also* Press Release, Equal Employment Opportunity Commission, EEOC Proposes Regulations To Streamline the EEO Complaint Process For Federal Employees (Feb. 20, 1998) (discussing the two year effort in revising Part 1614 to remove unnecessary layers of review and delegate decision-making to front-line employees), *available at* http://www.eeoc.gov.

improvements involved all aspects of the EEO complaint process and were designed primarily to speed the process and avoid redundancy.[62]

The most significant change gave more weight to the AJ's decision in cases involving a hearing.[63] Under the old Part 1614 process, an agency could issue a final decision that was contrary to the AJ's recommended decision, making the AJ's recommended decision merely advisory in nature.[64] Under the revised Part 1614 procedure, the AJ's decision is now binding on the agency, though appealable.[65] The agency must either adopt the AJ's decision and issue its final order within forty days—down from the previous sixty days—or, if the agency does not fully implement the AJ's decision, the agency must appeal the decision concurrently with issuing its final order.[66]

A second important change, and one of particular interest for comparison of the traditional and Pilot Program processes, is the increased importance placed on the use of ADR. As addressed in more detail below, the DON's Pilot Program relies exclusively on various forms of ADR to resolve complaints. The EEOC, Congress,[67] and the executive branch

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62. *See, e.g.*, Figura, *supra* note 15 (the Part 1614 revisions are designed to create a fair and efficient process and were motivated in part by the fact that federal complaints take nearly five times as long as private-sector cases to resolve (paraphrasing EEOC Chairwoman Ida Castro)).

63. *See generally EEOC's Reform Proposal Gets Flak From All Sides*, FED. EEO ADVISOR, May 1998 (discussing some of the controversy surrounding the various proposed changes to the Part 1614 process, and specifically the proposal to give the AJ decision's binding authority); Friel, *supra* note 14 (most significant change in new Part 1614 regulations would eliminate agencies' power to make final decisions in discrimination cases by giving AJs' decisions binding authority); Zak Figura, *supra* note 15, at 2 ("Of the changes, the most significant—and controversial—is the new power of administrative judges to issue final decisions").

64. *See, e.g.*, Friel, *supra* note 14 (part of the EEOC's rationale for changing this rule was agencies' perceived abuse of this power, citing the rate of agency reversal of administrative judge decisions as 62.7% when the decision is adverse to the agency vice only 10% when favorable to the agency); Figura, *supra* note 15, at 2 ("[F]rom fiscal 1996 to 1998, agencies rejected about two-thirds of EEOC administrative judge decisions against them . . . .").

65. 29 C.F.R. § 1614.110; *see also id.* § 1614.109(i) (AJ decision not adopted by the agency within forty days automatically becomes the agency's final action). To date, agency appeals of AJ decisions have been very limited. For example, as of 31 January 2001, the Department of the Army had only appealed one such decision in the previous two years. Interview with Mr. James Szymalak, Labor and Employment Division, Office of the Judge Advocate General, United States Army, in Charlottesville, Va. (Jan. 31, 2001).

66. 29 C.F.R. § 1614.110.

have been pushing for the increased use of ADR to avoid cases reaching the formal complaint stage.[68] Building on the trend in the civilian[69] and federal[70] sectors toward the increased use of ADR to minimize the use of unwieldy formal complaint systems, the EEOC sought to adapt the lessons-learned in this field to its revised EEO complaint process.[71] The

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67. *See, e.g.*, The Administrative Dispute Resolution Act of 1996, 5 U.S.C.A. § 571 (West Supp. 1996). In promulgating this Act, Congress specifically found ADR to be a prompt, expert, and inexpensive means of resolving disputes that is more efficient and less contentious than costly and lengthy administrative proceedings. It further cited ADR's success in the private sector; its wide applicability; and the widespread availability of experts in the area that can be easily used by the federal sector. Further, Congress intended that its "explicit authorization of the use of well-tested dispute resolution techniques . . . eliminate ambiguity of agency authority under existing law . . . ." *Id.* Congress also intended that federal agencies not only receive the benefit of techniques that developed in the private sector, but take the lead in further developing and refining such techniques. *Id.* (citing Congressional Findings for Pub. L. No. 101-552, § 2 (1996)).

68. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MANAGEMENT DIR. 110, app. H (1999) [hereinafter EEOC MD-110].

> The . . . EEOC is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminate working discrimination, as well as in Commission operations.

Id.

> Agencies and complainants have realized many advantages from utilizing ADR. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes. . . . The agency can avoid costs . . . [and] employee morale can be enhanced . . . through ADR.

Id. ch. 3. *See also* Memorandum, President William J. Clinton, to Agencies, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (1 May 1998) (standing up interagency committee to study ADR uses in the federal sector).

69. *See, e.g.*, *Alternative Dispute Resolution Programs in the Federal Sector*, DIG. OF EEO L., Jan. 2000 (outlining the revised EEOC regulatory requirements), *available at* http://www.eeoc.gov/digestxii-13.html. The EEOC employed ADR in private-sector cases with great success during Fiscal Year 1999, when it successfully resolved 4833 private sector charges of discrimination through voluntary mediation, amounting to a 65% success rate. *Id.*

revised complaint process mandated the establishment or accessibility of ADR in each federal agency for both the pre-complaint and the formal complaint process, where no ADR program was required at all under the old rules.[72] While the EEOC has been pushing since 1994 to increase ADR use in resolving workplace complaints, *mandating* ADR availability to all federal employees is one of the most significant changes made to the Part 1614 process.[73] The revised regulations required agencies to establish or make available an ADR system by 1 January 2000.[74] To date, federal agencies have employed different means of complying with this requirement, with varying degrees of success.[75] The DON has tested and

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70. *See id.* (The EEOC, in providing guidance to federal agencies seeking to establish ADR programs, specifically cites the dramatic increase in the use of ADR in the federal sector EEO process, and the congressional encouragement of such ADR use exemplified in the Civil Rights Act of 1991); *see also* U.S. ATT'Y GEN., REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP 6 (2000) (reporting that in the federal government 410 employees now work full time on ADR, and ADR programs receive $36 million in dedicated funds annually, plus an indiscernible amount from general operating budgets), *available at* http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm

71. *See generally* Captain Drew Swank, Note from the Field: *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., 1998, at 46 (tracking the growing use of ADR in the federal government); Swanson, *supra* note 14, at 46 (discussing growing momentum for change from both sides of the complaint process, and initiatives underway to improve the EEO complaint process: twelve congressional hearings held between 1986 and 1996; task force at the EEOC studying issue; President Clinton's February 1996 executive order for agencies to review their adjudicatory processes with an eye to speeding up resolution and to encourage the use of alternative dispute resolution (ADR); and yearly proposals for changes in EEO complaint processing regulations).

72. 29 C.F.R. § 1614.102.

73. For a more complete history of the EEOC's push toward implementing ADR, see Press Release, Equal Employment Opportunity Commission, Commission Adopts Policy on Alternative Dispute Resolution as First Step In Implementing Agency ADR Programs (July 17, 1995), *available at* http://www.eeoc.gov. The EEOC began studying ADR in 1994 with a Task Force on Alternative Dispute Resolution as part of the EEOC's push to reinvent and streamline the EEOC's operating procedures. The Task Force's findings were unanimously approved by the full EEOC in April 1995. In July 1995, the EEOC issued a policy statement publicly pledging its commitment to the use of ADR. The statement indicated that the Commission found ADR to be fair, effective, timely, and innovative. Further, the EEOC was to be a leader among federal agencies seeking to implement ADR programs. *Id.*

74. *Id.*

75. *See, e.g.*, *infra* Section III.C (*Policy Issues*) for an analysis of the successful Post Office and Air Force ADR programs. While all federal agencies have not been as proactive and successful as these two programs, the author is unaware of any enforcement action taken to date by the EEOC against a federal agency for failure to comply with this deadline. *See also* REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP, *supra* note 70 (discussing the status of various federal agency ADR programs).

employed various ADR programs in addition to the Pilot Program to fulfill this requirement.[76]

Other significant changes appear throughout the Part 1614 process. The new rules allow the complainant to amend a complaint at any time before the investigation is finished to include issues or claims that are like or related to the original complaint, even allowing the complainant to ask the AJ to amend the complaint after the hearing has begun.[77] Under the old rules, a new complaint was required for each new allegation, resulting in duplicitous complaints.

The new rules no longer have a "partial dismissal."[78] Where formerly the agency dismissed part but not all of the complaint, under the new rules the agency now notifies the complainant in writing of: its determination that some portion of the complaint is not appropriate and would rate a dismissal if filed alone; its rationale; and that this portion of the complaint will not be investigated.[79] A copy of this notice is placed in the investigative file and is reviewable by an AJ at any subsequent hearing.[80]

The revised Part 1614 process also gives AJs the power to dismiss a complaint on their own initiative,[81] removes their power to remand issues that are like or related (replacing it with the power to amend the complaint at the hearing),[82] and requires an AJ decision within 180 days of receipt of the file from the agency.[83]

Lastly, the new process also allows the OFO to accept witness statements or parties' briefs not longer than ten pages by fax[84] and to draw adverse inferences or take other evidentiary actions where either party fails, without good cause, to comply with the appellate provisions of Part

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76. *See, e.g.*, U.S. DEP'T OF NAVY, REGION SOUTHWEST DISPUTE RESOLUTION CENTER, AN ADR SUCCESS STORY (1999) (discussing the success of San Diego Mediation Program within DON), *available at* http://www.bop.gov/hrmpg/lmr/hrmlmryx.pdf.

77. 29 C.F.R. § 1614.106.

78. *Id.* § 1614.107(b).

79. *Id.*

80. *Id.*

81. *Id.* § 1614.109(b).

82. Formerly found in 29 C.F.R. § 1614.109.

83. *Id.* § 1614.109(i).

84. *Id.* § 1614.403(f).

1614.[85] Together these changes act to reduce some of the unnecessary delays and redundancy practiced under the old rules.[86]

These changes also have a second—less obvious, but nonetheless significant—effect on federal sector EEO complaint processing that is important to consider as background for the current conflict between the EEOC and the DON. By making AJs' decisions binding on agencies, the new rules shift power away from federal agencies to the EEOC.[87] This shift of power was very controversial, and many federal agencies opposed it as unnecessary and illegal.[88]

The revised EEO Part 1614 complaint process, while improved, remains confusing, elaborate, time-consuming, and unwieldy. The latest available statistics, covering fiscal year 2000, show some improvements over fiscal year 1999 levels, with the number of pending federal sector EEOC appeals decreasing by 14%, and the number of federal sector cases awaiting hearings decreasing by 13%.[89] Given the gravity of the problems with the traditional system, however, where total processing times have been known to extend to over three years,[90] these improvements are just minor tweaks to a system in need of a major adjustment. Even with the significant changes to the Part 1614 process, processing times can still be measured in years rather than days.[91] To truly fix the EEO complaint pro-

85. *Id.* § 1614.404(c).

86. *See supra* note 61 and accompanying text (discussing the EEOC's rationale for reducing delays).

87. *See generally* Figura, *supra* note 15 (discussing the shift of control to the EEOC that the new rules create).

88. *Id.* at 3. *See also EEOC's Reform Proposal Gets Flak From All Sides*, FED. EEO ADVISOR, May 1998. The Council of EEO and Civil Rights Executives voiced concern to the EEOC during the comment stage of the proposed 1614 modifications that the EEOC is not granted original decision authority under Title VII and therefore has no authority to have administrative judges issue final decisions.

89. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2002 BUDGET REQUEST AND ANNUAL PERFORMANCE PLAN tbl. 4 (2001), *available at* http://www.eeoc.gov.

90. *See infra* Section II.B.1.a for an examination of the typical processing times in the DON under the Part 1614 process.

91. Under the revised Part 1614 process, most of the significant timeframes responsible for the overall length of the processing time remain unchanged. *See supra* note 57 and accompanying text.

cess, a more substantial step was needed. The DON's Pilot Program took such a step.

B. The Department of the Navy Pilot Program

In 1997, three years before ADR became required for federal agencies, and two years before the EEOC implemented its revised Part 1614 process, the DON took the initiative in attempting to improve the EEO complaint processing system. It did so by developing a dramatically different complaint process as an alternative to the Part 1614 process. The Pilot Program employed ADR techniques and significantly shortened and strictly enforced processing times, to create a dramatically shortened process. The objective was resolution of a dispute within ninety days.

At four test locations within DON, employees were given the option of voluntarily using the Pilot Program or following the traditional EEO complaint route found in Part 1614. If electing to use the Pilot Program, a participating complainant waived his right to an EEOC hearing before an AJ, his right to opt-out of the program, his right to remain anonymous, and his right to a formal agency investigation.[92] In exchange, the employee benefited from a significantly quicker resolution of their complaint, and a process designed to build and maintain working relationships rather than the often-combative environment caused by Part 1614.[93]

On its face, the Pilot Program appeared to be a "win-win" program, and it enjoyed significant success in its initial testing.[94] The program was not universally applauded, however, and the first phase of testing ended when the first two appeals of cases handled under the Pilot Program were decided by the EEOC.[95] Using these cases as an opportunity to review the Pilot Program itself, the EEOC cited numerous concerns with the program's legality, and the EEOC ordered the DON to suspend the Program immediately.[96]

Shortly thereafter, Congress passed legislation originally intended to allow the continued testing of the Pilot Program, thus legislatively bypass-

92. *See* Appendix C for an example of the contract entered into by a complainant electing the Pilot Program.

93. *See infra* notes 135-36.

94. *See infra* Section II.B.1.c.

95. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

96. *Id.* at *11.

ing the EEOC's order.[97] In its final version, however, the language of the legislation failed to specifically name the DON's Pilot Program, and instead merely required that the Secretary of Defense select at least three agencies to establish EEO pilot programs.[98] The controversy is thus currently unresolved, but the opportunity for further testing still exists.

1. History of the Pilot Program

The mission of the DON is to "maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas."[99] Given its war-fighting mission, the DON is not normally looked to as a leader in innovative employment law procedures. Nonetheless, currently the DON finds itself embroiled in a controversy with a sister executive agency, the EEOC, over just such an innovation. The history of the Pilot Program, and the controversy it has generated, requires close examination to understand better the current status and the potential future of the Pilot Program.

a. Rationale for Developing the Program[100]

In February 1997, before the revision of Part 1614, the DON, lead by the Deputy Assistant Secretary of the Navy for Civilian Personnel and Equal Employment Opportunity, undertook a major review of its personnel programs, including its handling of EEO complaints.[101] In reviewing the EEO complaint process, a consensus among those who were involved in various aspects of the process became immediately apparent: The EEO complaint process did not work to anyone's satisfaction.[102] Many personnel within the DON viewed the traditional EEO complaint process as labor-intensive, time-consuming, and inordinately lengthy.[103] The average

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97. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106-398, 114 Stat. 1654A-144, § 1111 (2000) [hereinafter 2001 Defense Authorization Act].

98. *See infra* Section II.D (*Legislative Intervention*) for a complete examination of this legislation.

99. 10 U.S.C. § 5062 (2000). *See also* U.S. Dep't of Navy, *Navy Organization: Mission of the Navy, at* http://www.chinfo.navy.mil/navpalib/organization/org-top.html (last visited 24 Aug. 2001).

100. Like all federal agencies, the DON is required to have ADR programs established or available to its employees. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.13, ALTERNATIVE DISPUTE RESOLUTION (11 Dec. 1996).

processing time to issue a DON final agency decision on a formal complaint under the traditional process was 781 days.[104] Add to that the possibility of an average 540 days of processing time for appeals to the EEOC, and the total processing time was more than three and a half years.[105] Recognizing the seriousness of the problem, the DON created a Reengineering Project Team (RP Team) to explore the underlying problems with the EEO complaint process and to recommend improvements.

The RP Team gathered data and information for development of the Pilot Program through a survey of 1,400 DON employees that included managers, non-supervisory personnel, human resource professionals, and union representatives. The team also conducted over 100 interviews with senior military and civilian managers.[106] The data collected confirmed the initial DON determination that there was a general opinion among all participants in the complaint process that the system needed streamlining.[107]

There was a clear consensus that the number of formal EEO complaints needed to be reduced, as did the processing time for filed complaints.[108] The data indicated support for eliminating redundancy in the process, reinforcing local management and chain-of-command accountability, and providing the parties involved in disputes with early

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101. Telephone Interview with Mr. Adalberto Bernal, Director, Department of the Navy EEO Reengineering Project (Feb. 1, 2001) [hereinafter Interview with Mr. Bernal]. Mr. Bernal is the DON's official spokesman for the Pilot Program, and has been involved in the development and testing of the program since its inception. Mr. Bernal is a labor and personnel specialist with thirty-two years of government service, including thirty years specifically in the labor and personnel field. He has served as an EEO complaint investigator, and has been involved in various stages of EEO complaint appeals for four different federal agencies. Attempts to interview other personnel within the DON on this program were redirected to Mr. Bernal as the spokesman. *Id.*

102. *See generally* Figura, *supra* note 15, at 1-2. Throughout the federal sector, complaints rose nearly 60% from 1991 to 1998 despite 300,000 jobs being cut. Requests for EEOC administrative judge hearings went up 112%, appeals to the commission rose 61%, and the caseload of administrative judges jumped from 133 to 192. In fiscal year 1998, the crushing backlog had reached the point where a case took almost 1200 days to work from complaint to final appeal. *Id.*

103. Interview with Mr. Bernal, *supra* note 101.

104. U.S. Dep't of Navy, *Civilian Human Resources*, *at* http://www.donhr.navy.mil (last visited Aug. 24, 2001) [hereinafter The DON Civilian Human Resources Web page].

105. Interview with Mr. Bernal, *supra* note 101.

106. The DON Civilian Human Resources Web page, *supra* note 104.

107. *Id.*

108. *Id.*

opportunities to attempt resolution.[109] The program's lengthy delays often fostered distrust between management and employees, with managers complaining of the burdens that a repetitive, frivolous filer could create, and employees fearing reprisals for initiating complaints.[110] Additionally, due to the extraordinary burden the lengthy complaint processing time put on the agency, there was added incentive to settle cases regardless of merit, a clear indication that the process needed overhauling.[111]

Based upon this research, the RP Team concluded that the concerns of both the supervisors and the complainants could only be met by radically redesigning the complex, multi-step procedure found in Part 1614.[112] The RP Team's goal was to create a more effective, efficient program that reduced the redundant layers, and used various forms of ADR procedures to give DON employees several alternatives.[113]

Remaining within the bounds of the applicable DOD regulations,[114] the RP Team proposed significant changes to, and compression of the EEO complaint process. These changes included reducing the seven steps in the traditional process to four steps: an intake stage (ten days); a dispute resolution and fact-finding stage (forty-five days); a request for final agency decision stage (five days); and an issuance of a final agency decision (thirty days).[115]

By compressing this process, the RP Team also proposed eliminating duplicative layers found in the counseling, investigation, and hearing stages of the traditional EEO process.[116] Additionally, the RP Team proposed delegating authority to the lowest level by giving the local com-

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109. *Id. See also* Interview with Mr. Bernal, *supra* note 101 (citing as a clear indication of the dissatisfaction a number of responses to a focus group question of, "On a scale of 1 to 6 how would you rate the EEO complaint Program?," responses that included "0" and even negative numbers).

110. *Id*.

111. *Id.*

112. The DON Civilian Human Resources Web page, *supra* note 104.

113. Interview with Mr. Bernal, *supra* note 101.

114. *See* U.S. DEP'T OF DEFENSE, DIR. 1440, DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM (21 May 1987) (requiring that the EEO complaint process be fair and impartial, provide timely investigations and resolution, and meet EEOC requirements).

115. The DON Civilian Human Resources Web page, *supra* note 104. *See infra* Section II.B.2 and Appendices A and B (providing an in-depth explanation of the process).

116. *Id.*

manding officer or commanding general the authority to issue a Final Agency Decision for the DON.[117]

b. Liaison with EEOC During Development and Testing of the Pilot Program

Recognizing the importance of its groundbreaking change in EEO complaint processing, the DON attempted to work closely with the EEOC throughout the development and later testing of the Pilot Program.[118] The DON wanted to ensure that the EEOC was aware of what the DON was testing.[119] The DON requested the EEOC's input on the legality of the Pilot Program and any modifications that were needed to ensure compliance with the applicable employment laws.[120] Additionally, during later testing, the DON wanted to keep the EEOC aware of the success rate of the program.[121]

The Director of the OFO, Ronnie Blumenthal, and her policy manager were briefed on the Pilot Program on 25 March 1998.[122] Ms. Blumenthal indicated her belief that the Pilot Program could proceed so long as the employees were in fact making a fully informed election of their rights when choosing between the Part 1614 and the Pilot Program processes.[123] In April 1999, Ms. Blumenthal also attended a mid-stream evaluation of the program.[124] The DON additionally briefed the Interagency Council on

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117. *Id. See also* Interview with Mr. Bernal, *supra* note 101. Under the traditional Part 1614 process, all final agency decisions that found discrimination were signed at the Deputy Assistant Secretary of the Navy (Civilian Personnel/Equal Employment Opportunity) level. Allowing a local commander, closer to the scene but often without a significant background in employment law, to sign the FAD was viewed by the Pilot Program as one of the more significant revisions to the process. It was deemed an important change as it significantly sped up the system, and ensured that the complainant saw that the local commander was involved in the decision-making process instead of some unknown person at a higher headquarters. *Id.*

118. Interview with Mr. Bernal, *supra* note 101.

119. *Id.*

120. The DON also had the Pilot Program reviewed for legality by the Office of General Counsel for the Department of the Navy itself. *See* Memorandum, Mr. John E. Sparks, Principal Deputy Designee, Office of the General Counsel, for the Deputy Assistant Secretary (Civilian Personnel/Equal Employment Opportunity) (Apr. 19, 1999) (copy on file with author) ("It is my opinion that this [Pilot Program] complies fully with law and regulation, and it has the complete and unequivocal support of this office.").

121. *Id*.

122. A copy of the slide presentation presented to the EEOC is on file with the author.

Administrative Management (ICAM) in March 1998, with the EEOC legal counsel present, again ensuring that all relevant agencies were aware of what the DON was doing.[125] No objections to the program were voiced, though there was some discussion about how to ensure that case files developed during the process were adequate.[126] Labor unions at the test sites were also contacted and briefed on the process, and all approved of the test.[127]

c. Testing the Program

The Pilot Program went into effect on 29 June 1998, with participating sites at the Marine Corps Air Station, Cherry Point, North Carolina; the Naval Medical Center, Portsmouth, Virginia; and the Norfolk Naval Shipyard, Portsmouth, Virginia.[128] In March 1999, an additional site was added

123. The DON elaborated that these concerns are fully discussed between the Dispute Resolution Specialist and the employee before the employee makes the election to participate in the Pilot Program and before signing the Agreement to Use DON Pilot Dispute Resolution Procedures form. Interview with Mr. Bernal, *supra* note 101. *See also* Appendix C (reproducing a copy of this form).

124. Interview with Mr. Bernal, *supra* note 101.

125. *Id.* Among other speakers present at this ICAM meeting was Ms. Ellen Vargyas, Legal Counsel to the EEOC. During this presentation, the DON speaker used a slideshow that graphically and clearly depicted the Pilot Program's complaint process, including its timelines, as well as the significant changes made to the complaint process under the Pilot Program. *Id.*

126. *Id.* The concerns voiced with the development of the case file revolved primarily around the potential problems that might result from no longer having investigations conducted by the Office of Command Investigations, and what steps would be taken to ensure that the case file developed would include all relevant and required materials. These concerns were later echoed in the EEOC's *Philips and Littlejohn* opinion. 2000 EEOPUB LEXIS 4110 (June 8, 2000). See Section II.C.1 for a more complete examination of the EEOC's concerns regarding the investigation and development of the case file.

127. *Id*. *See also* Memorandum of Agreement Between the Commander, Navy Region Southeast, and Affiliated Labor Council, subject: Regional EEO Pilot and Alternative Dispute Resolution Programs (Jan. 21, 2000) (copy on file with author) (written agreement between commanding officers of naval bases utilized as Pilot Program test locations and local unions).

128. The DON Civilian Human Resources Web page, *supra* note 104.

at Marine Corps Base, Camp Lejeune, North Carolina.[129] Testing was conducted until June 2000.

The field-testing results were favorable in each category examined, including process selection rates, case resolution rates, processing times, and cost savings.[130] Field-test data indicated wide acceptance of the new process, with eligible participants choosing the Pilot Program over the Part 1614 process by a margin of 60% to 39%.[131] Case resolution rates improved under the Pilot Program to 89%, with the Part 1614 process continuing to average only 58%.[132] Case processing times for Final Agency Decisions were shortened from an average of 781 days under the Part 1614 process to an average of only 111 days for the Pilot Program.[133] Cost savings under the Pilot Program included a drop of an average of $40,000 per case from the Part 1614 process, to a mere $5,800.00 per case.[134]

Additionally, testing indicated improved workplace morale where the Pilot Process was used, with better lines of communication and feelings of trust fostered by the Pilot Program.[135] Commanding officers, managers, supervisors, unions, and non-supervisory personnel from the installations where the program was tested soundly endorsed the program.[136] Based

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129. *Id.* The DON is comprised of both the United States Navy and the United States Marine Corps, so testing was designed to include bases belonging to each service.

130. *Id.*

131. *Id.*

132. *Id.* Some test locations experienced tremendous results using the Pilot Program. *See, e.g.*, Letter, Brigadier General T. A. Bratten, U.S. Marine Corps, Commanding General, to Equal Employment Opportunity Reengineering Pilot Team (1999) (copy on file with author) (during the first six months of testing at the Marine Corps Air Station, Cherry Point, the resolution rate was 100% for the Pilot Program versus 33.3% for complaints processed under the Part 1614 process, with ten of thirteen complaints choosing the Pilot Program over the Part 1614 process); Letter, Captain M. Balsam, U.S. Navy, Commander, Naval Medical Center (Mar. 31, 1999) (copy on file with author) (during the first six months, the Portsmouth Navy Hospital reported a resolution of 100% for the Pilot Program).

133. The DON Civilian Human Resources Web page, *supra* note 104.

134. *Id.*

135. *Id*. *See also* Letters, Brigadier General Bratten and Capt. Balsam, *supra* note 132 (both specifically citing increased morale, and better communication between management, supervisors, and employees).

136. The DON Civilian Human Resources Web page, *supra* note 104. *See also* Letter, Brigadier General Bratten, *supra* note 132. The Commanding General, Marine Corps Air Station, Cherry Point, stated, "[t]he Pilot Process has resulted in improved communications between management, supervisors and employees, and raised morale in a non-adversarial setting, much to the satisfaction of all parties involved, thereby saving the Command both time, money, and lost productivity." *Id.*

upon the overall input received from field offices, the DON believed the Pilot Program process was a huge success.[137]

2. How the DON's Pilot Program Works[138]

The Pilot Program is a purely voluntary program.[139] DON employees may choose to pursue their complaint through the Part 1614 process or the Pilot Program. Upon initially contacting an EEO counselor, DON employees are briefed in detail on the differences between the two processes, are allowed to ask questions, and then choose a process.[140] If they choose the Pilot Program, the employees must sign an agreement waiving their rights to remain anonymous, to request a hearing before an EEOC AJ, and to "opt out" of the Pilot Program (in other words, they must stay with the program once started).[141] An *Agreement to Use DON Pilot Dispute Resolution Procedures* form is then completed, recording the employee's election.[142]

Once in the program, the individual meets with a Dispute Resolution Specialist (DRS) to begin the intake process stage. The development of the case file then begins with a clear definition of the issues involved and an immediate attempt to resolve the dispute. If the case is resolved, it is documented and copies are provided to each party.[143] If resolution attempts fail, the complainant is notified within eight days of his right to request a dispute resolution option from four forms of ADR: conciliation,

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137. The DON Civilian Human Resources Web page, *supra* note 104; *see also* Interview with Bernal, *supra* note 101.

138. A *Time Schedule For Processing under the Pilot Program* is included at Appendix B, and a graphical comparison between the Part 1614 process and the Pilot Program is included at Appendix A. These documents are provided to assist the reader in understanding the Pilot Program's processes, and may be useful during the reading of this section of the article.

139. The DON Civilian Human Resources Web page, *supra* note 104.

140. *Id.*

141. *Id.* Note that this agreement to waive these rights is where the EEOC finds primary fault with the Pilot Program. *See infra* Section II.C.1 for a more complete examination of the EEOC's position regarding this waiver of rights.

142. An *Agreement to Use DON Pilot Dispute Resolution Procedures* form is appended to this article at Appendix C.

143. The DON Civilian Human Resources Web page, *supra* note 104.

mediation, early neutral inquiry, or a settlement conference.[144] By the tenth day, the complainant must make an election or withdraw the case.[145]

The dispute resolution stage follows the election. The Pilot Program

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144. The DON's Draft Pilot Dispute Resolution Guidelines define the types of ADR processes as:

> 1. Conciliation. An informal process in which a neutral third party facilitates agreement between disputants by strengthening relationships, lowering tension, improving communications, interpreting issues and providing technical assistance. There are no specific rules of engagement with regards to conciliation. The parties set the pace with the assistance of the third party. DRS will keep a written record of conciliation efforts and outcomes.
>
> 2. Mediation. The intervention into a dispute of a neutral impartial third party that has no decision-making authority. The objective of the intervention is to assist the parties in voluntarily reaching an acceptable resolution to the issues in dispute. This is a facilitative process and the mediator makes primarily procedural suggestions regarding how parties can reach agreement. The mediator role is that of a catalyst which enables the parties to discuss issues and progress toward a mutually acceptable resolution. No written record is kept of what transpires during this process except whether or not an agreement was reached. If agreement is reached, the agreement is written and copies provided only to those which a need to know, i.e., the parties and agency personnel who are involved in ensuring the terms of the agreement are carried out.
>
> 3. Early Neutral Inquiry. An internal inquiry that utilizes a neutral third party to provide a non-binding evaluation of the facts in dispute. The neutral provides the parties an objective perspective of the strength and weaknesses of their respective cases. The neutral may facilitate settlement by clarifying truly disputed areas and identifying non-essential issues. The DRS will keep a written record and prepare a summary report, which addresses the facts in dispute, and include documentation collected during the inquiry.
>
> 4. Settlement Conferences. The DRS conducts a conference attended by opposing parties and/or their representatives. The purpose of the conference is to reach a mutually acceptable settlement of the matter in dispute prior to litigation or formal proceeding. The DRS will keep a written record of the proceedings and prepare a summary report that addresses the facts in dispute, includes relevant documentation and settlement options explored during the conference.

U.S. DEP'T OF NAVY, DRAFT PILOT DISPUTE RESOLUTION GUIDELINES app. B (1999) [hereinafter DRAFT PILOT DISPUTE RESOLUTION GUIDELINES] (copy on file with author).

145. The DON Civilian Human Resources Web page, *supra* note 104.

provides for a thirty-day period to achieve resolution, during which a DRS will concurrently develop a "factual record." The parties are not limited to any one type of ADR, and may in fact use all four means (conciliation, mediation, early neutral inquiry, or a settlement conference), or any combination of these means if deemed appropriate by the DRS. The goal of the Pilot Program is to resolve the dispute during this phase.[146]

If the parties fail to resolve satisfactorily the dispute during the dispute resolution stage, the agency must collect and incorporate any documentation to complete the record upon which a Final Agency Decision (FAD) can be made should the individual request one. The complainant is notified of the right to request a FAD by the thirty-fifth day after initiation of the dispute resolution stage. Once notified of his right to request a FAD, the complainant has five days from receipt of notice to request a FAD or withdraw the allegation. Failure to request a FAD results in dismissal of the complaint. During the request for FAD stage, the local Human Resources Office (HRO) compiles the case file and decides, on behalf of the agency, whether the complaint will be accepted or dismissed. Notes, settlement offers, or any other information obtained during the ADR proceedings are not included in the file unless the complainant agrees. The HRO office then notifies the complainant within five days whether his claim has been accepted or dismissed.[147]

Accepted complaints then move into the investigation and case-file development stage in preparation for the issuance of the requested FAD. During this stage, fourteen days are allotted for the HRO to conduct a thorough and objective investigation. The complainant may request within the first seven days that specific items of evidence be obtained as part of the investigation's evidence. By the fifteenth day, the investigation is sent to the Naval Complaints and Administrative Review Division (NAVCARD), with a copy to the complainant. The NAVCARD drafts a proposed FAD, which is returned to the command for review by the commanding general or commanding officer. The command may approve the proposed FAD as drafted, modify it, or rewrite the FAD locally. The command then issues the FAD. If dissatisfied with the FAD, the individual may appeal to the EEOC to review the case, or may choose to file a civil action in federal dis-

146. *Id.*
147. *Id.*

trict court.[148] If the complainant elects an EEOC appeal, the appeal is limited to the record and does not include an AJ hearing.[149]

As discussed above, the Pilot Program significantly changes the EEO Part 1614 process.[150] These changes involve all aspects of the process, including: a shortened and strictly enforced timeline; a different form of investigation and construction of a pre-FAD case-file; and an agreement waiving the employee's rights to remain anonymous, to request a hearing before an EEOC AJ, and to "opt out" of the Pilot Program. Despite the DON's attempts to maintain coordination with the EEOC throughout the development and testing phase of the Pilot Program, and the success demonstrated during the Program's field-testing, significant opposition arose over some of the changes.

C. The Conflict Between the EEOC and the DON Comes to a Head

In *Philips and Littlejohn v. Danzig*,[151] the EEOC held that the DON's Pilot Program failed to comport with the Part 1614 process and ordered the DON to suspend its use.[152] *Littlejohn* was the EEOC's first opportunity to comment formally on the DON's Pilot Program, but it was not the first time the EEOC told the DON that it believed there were problems with the program.[153] Though the DON had repeatedly included the Director of the OFO in its planning and evaluation of the Pilot Program, this attempt at interagency cooperation met serious resistance when a new Director took the helm of the EEOC in the fall of 1999.[154]

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148. *Id.*; *see* Appendix A.

149. The DON Civilian Human Resources Web page, *supra* note 104.

150. For a graphical comparison of the differences between the Pilot Program and the Part 1614 process, refer to Appendix A.

151. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

152. *Id.* at *11.

153. *See supra* note 59. Given its mission and practice, the EEOC is commonly regarded as a "watchdog agency" for EEO law, often assisting in training and assisting federal agencies with their EEO programs, and always on the alert for violations of EEO law. *See generally* Major Michele E. Williams, *Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions*, ARMY LAW., July 1999, at 13 (detailing analysis of the EEOC's mission, role, statutory powers, origins, and whether it has the power to change regulations and make these changes binding on other agencies).

154. Interview with Mr. Bernal, *supra* note 101.

By November 1999, Carlton Hadden had become the new acting OFO Director. Mr. Hadden requested a meeting with the DON to discuss what he perceived as problems with the Pilot Program.[155] Over the next few months, various meetings and correspondence took place between Mr. Hadden and DON personnel, during which the DON attempted to brief Mr. Hadden fully on the Pilot Program and its history to get his approval, as DON had for Mr. Hadden's predecessor. Mr. Hadden, in turn, continued to point out perceived problems in the Pilot Program's process.[156] By March 2000, Mr. Hadden told the DON that he believed the Pilot Program process failed to comply with the requirements of the newly revised Part 1614.[157]

Meanwhile, another significant change in federal EEO law occurred that also adversely impacted the DON and its Pilot Program. In April 2000, the Interagency ADR Working Group[158] published its Core Principles of ADR.[159] The Department of Defense, and thus the DON, signed on to these principles.[160] These newly published principles created more problems for DON's Pilot Program as the program's process appeared to conflict with several of these core principles.[161] Specifically, the core principles of confidentiality, neutrality, and preservation of rights all raised problems when the Pilot Program was evaluated.[162] Due to the combined effects of the rising EEOC opposition to the Pilot Program and the newly discovered problems derived from the publication of the Working Group's Core Principles, the controversy over the Pilot Program was increasing.[163] By this time, the first two appeals of Pilot Program cases were about to be decided by the EEOC,[164] and the conflict between the EEOC and the DON over the Pilot Program's legality had come to a head.[165]

Littlejohn involved two complaints brought by disgruntled DON employees who had volunteered to participate in the Pilot Program at the pre-complaint counseling stage, and had ultimately appealed the FAD issued upon failure to reach resolution through ADR. The EEOC, finding that the Pilot Program failed to comport with 29 C.F.R. Part 1614, vacated the FAD in both employees' cases, remanded both complaints for further

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155. *Id.*

156. *Id.*

157. *Id. See also* Letter, Carlton Hadden, Acting Director, Office of Federal Operations Equal Employment Opportunity Commission, to Betty S. Welch, Deputy Assistant Secretary of the Navy (Civilian Personnel/EEO) (Mar. 31, 2000) (expressing opinion that original Pilot Program does not conform with critical requirements of federal sector complaint processing regulations) (on file with author).

processing, and ordered the DON to suspend the use of its Pilot Program.[166]

1. Where the EEOC Sees the Pilot Program as Deficient

In *Littlejohn*, the EEOC held that the Pilot Program actually serves as a substitute procedure for the federal sector EEO process, and as such violates the policies, procedures, and guidance the EEOC set out in its management directive EEO MD-110, which implements the revised 29 C.F.R. Part 1614.[167] The EEOC explained that the Pilot Process is fundamentally flawed as an ADR system because it detracts from, rather than augments a

158. The Interagency ADR Working Group was established to coordinate, promote, and facilitate the effective use of dispute resolution processes within federal agencies as mandated by the Administrative Dispute Resolution Act of 1996 and the White House Memorandum For Heads of Executive Departments and Agencies, dated May 1, 1998. The Working Group consists of representatives of the heads of all participating federal agencies. Its mission is to:

> [F]acilitate, encourage, and provide coordination for agencies in such areas as development of programs that employ alternative means of dispute resolution; training of agency personnel to recognize when and how to use alternative means of dispute resolution; development of procedures that permit agencies to obtain the services of neutrals on an expedited basis; and record keeping to ascertain the benefits of alternative means of dispute resolution.

Memorandum, President William J. Clinton, to Heads of Executive Departments and Agencies, subject: Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998), *available at* http://www.financenet.gov/financenet/fed/iadrwg.

159. INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, CORE PRINCIPLES (2000) [hereinafter ADR WORKING GROUP CORE PRINCIPLES], *available at* http://www.financenet.gov/financenet/fed/iadrwg/coreprin.htm. The Working Group defined the following as the core principles of ADR:

> Confidentiality: All ADR processes should assure confidentiality consistent with the provisions in the Administrative Dispute Resolution Act. Neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask neutrals to reveal confidential communications. Agency policies should provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

person's rights guaranteed under Part 1614.[168] The EEOC stated that,

159. (continued)

> Neutrality: Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. For example, they should not also serve as counselors or investigators in that particular matter. Participants in an ADR process should have the right to reject a specific neutral and have another selected who is acceptable to all parties.
>
> Preservation of rights: Participants in an ADR process should retain their right to have their claim adjudicated if a mutually acceptable resolution is not achieved.
>
> Self-determination: ADR processes should provide participants an opportunity to make informed, uncoerced, and voluntary decisions.
>
> Voluntariness: Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be given appropriate information and guidance to decide whether to use ADR processes and how to use them.
>
> Representation: All parties to a dispute in an ADR process should have a right to be accompanied by a representative of their choice, in accordance with relevant collective bargaining agreements, statutes, and regulations.
>
> Timing: Use of ADR processes should be encouraged at the earliest possible time and at the lowest possible level in the organization.
>
> Coordination: Coordination of ADR processes is essential among all agency offices with responsibility for resolution of disputes, such as human resources departments, equal employment opportunity offices, agency dispute resolution specialists, unions, ombuds, labor and employee relations groups, inspectors general, administrative grievance organizations, legal counsel, and employee assistance programs.
>
> Quality: Agencies should establish standards for training neutrals and maintaining professional capabilities. Agencies should conduct regular evaluations of the efficiency and effectiveness of their ADR programs.
>
> Ethics: Neutrals should follow the professional guidelines applicable to the type of ADR they are practicing.

Id.

160. Interview with Mr. Bernal, *supra* note 101.

while its revised Part 1614 regulations pushed for the development of ADR programs, the ADR programs were meant to operate within the Part 1614 process, not to replace that process.[169] The EEOC cited three primary problems with the Pilot Program: voluntariness, neutrality, and confidentiality.[170] Interestingly, each of these problem areas is also one of the core principles defined two months earlier by the Interagency ADR Working Group.[171]

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161. ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159. At the time of the development and implementation of the Pilot Program the core principles had not yet been agreed upon. When the Interagency Working Group, with DOD participation, signed on to these as core principles, the DON found itself having to re-evaluate its program in light of this change. Interview with Mr. Bernal, *supra* note 101.

162. *See infra* notes 167-89 and accompanying text (providing more in-depth analysis of these conflicts).

163. Interview with Mr. Bernal, *supra* note 101.

164. Phillips filed his appeal in February of 1999. Littlejohn filed his appeal in November of 1999. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

165. *See generally Proceeds Despite EEOC Order*, *supra* note 9 (discussing the conflict between the DON and the EEOC).

166. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *11. *See also infra* note 192 (discussing the EEOC's order).

167. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *1. Note that EEO MD-110 is not a statute, but rather is the EEOC's interpretation of the requirements set forth in 29 C.F.R. Part 1614. EEOC MD-110, *supra* note 68. There is a great deal of debate, beyond the scope of this article, about how binding or persuasive such an interpretation is on federal agencies.

168. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *4. A basic premise of ADR in EEO law is that it is always designed as a means of augmenting, rather than detracting from a person's rights. *See generally* ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159 and accompanying text. One of the core ADR principles is that of "preservation of rights." Under this principle, participants in an ADR process retain their rights to have their claim adjudicated via the customary resolution process if a mutually acceptable resolution is not achieved via ADR. *Id.*

169. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2.

170. *Id.* These three problem areas are also among the core principles defined by the Interagency ADR Working Group. *See supra* notes 158-59 and accompanying text.

171. *See supra* notes 158-59 and accompanying text. With these core principles being adopted in April 2000, and the *Philips and Littlejohn* decision following in June 2000, the similarities do not appear coincidental. In the author's opinion, the evidence indicates that the EEOC was well aware of the ADR Working Group's Core Principles, and incorporated them into their *Philips and Littlejohn* rationale.

a. Voluntariness

In Littlejohn, the EEOC held that the Pilot Program unlawfully diminished an individual's rights by requiring that an individual agree not to opt-out of the program and by taking away many of the procedural safeguards found in the traditional Part 1614 process.[172] The EEOC stated that the Pilot Program's fundamental requirement that employees give up their right to opt-out of the program runs contrary to the very spirit and intent of ADR in that it detracts from, rather than adds to a complainant's rights.[173] The EEOC's primary concern was not the actual election of the Pilot Program as a voluntary choice, but rather what happens when a failed ADR complainant is interjected back into the EEO complaint process.[174]

The EEOC reasoned that Part 1614 mandates that, should ADR fail, the complainant retains all Part 1614 rights, including an EEO counselor's final interview and report, an agency investigation, and a hearing before an AJ or to request a FAD.[175] The EEOC's rationale was that the ADR process is intended to be an additional step in the revised 1614 process.[176] If

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172. *Id*. Additional support for this position also exists. *See, e.g.*, Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 (1996) (ADR is to be voluntary and "supplement rather than limit other available agency dispute resolution techniques"); Letter from Carol Houk, Deputy Dispute Resolution Specialist, Department of the Navy, to Principal Deputy General Counsel, Department of the Navy, at 10, (Apr. 2, 1999) (on file with author) (The legislative history of this act indicates that some congressmen had specific concerns about ADR being employed to "railroad" EEO disputants through a process outside the normal EEO complaint process and without its safeguards.).

173. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2 (June 8, 2000). *See supra* note 159 and accompanying text.

174. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *10. *See also* Telephone Interview with Ms. Carol Houk, Deputy Dispute Resolution Specialist, Dep't of Navy (Nov. 29, 2000). The whole idea behind using ADR in workplace disputes is that a voluntary, cooperative spirit often resolves workplace issues that oftentimes are not "true" discrimination issues, but are rather communication problems that can be worked out in the proper environment. *Id.*

175. *See generally* EEO-MD-110, *supra* note 68, app. H ("The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court.").

176. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2 - 5.

ADR fails, all other rights should be retained, and the complainant should be interjected back into the 1614 Process at the EEO counseling stage.[177]

The EEOC cited additional specific problems associated with voluntariness, including the lack of a developed EEO counselor's report, the lack of an impartial and appropriate agency investigation, the lack of notification of the right to request a hearing before an EEOC AJ, and the avoidance by the agency of a binding decision by such an AJ.[178] *Littlejohn* states clearly the EEOC's position that a complainant may not voluntarily waive these rights because they are mandated by the EEOC's regulations.[179]

b. Neutrality

The EEOC noted that the role of the DRS crosses many boundaries and inherently cannot be done with full neutrality, thus violating another of the core principles of ADR.[180] According to the EEOC's analysis of the Pilot Program,[181] the DRS is responsible for conducting the pre-complaint counseling and may subsequently participate in three of the four forms of ADR (conciliation, early neutral inquiry, and settlement conference, but not mediation). Ultimately, the DRS conducts the investigation and development of the record should ADR fail.[182] The EEOC noted that, while

177. *Id* at *10. *See also* Interview with Ms. Houk, *supra* note 174 (the EEOC's rationale is consistent with the historical underpinnings of ADR in that ADR was developed from the very start to function as an addition to, rather than an alternative for, rights afforded to an individual under another process). In the author's opinion, part of the controversy surrounding the DON's Pilot Program could have been avoided by characterizing the Pilot Program's process as something other than ADR. Given the historical underpinnings of ADR—requiring, *inter alia*, that ADR always act as an addition to underlying rights, adopted by both the Interagency ADR Working Group's Core Principles and the EEOC's *Philips and Littlejohn* opinion—the phrase "alternative dispute resolution" carries with it certain expectations that the Pilot Program never intended to meet. Had the Pilot Program been characterized as an alternative complaint resolution procedure more similar to a settlement procedure, *see infra* note 254 and accompanying text, some of the controversy generated would likely have been avoided. The fact that the Pilot Program labels itself ADR leads inevitably to negative evaluations applying the fundamental criteria of ADR, and thereby prevents a broader scope of analysis of the program as done in Section III (*Discussion*) below.

178. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *4 5 (*citing* EEO MD-110, *supra* note 68, at 3-2).

179. *See infra* note 256 and accompanying text (providing an in-depth explanation of the EEOC's position regarding non-waiverable employee rights).

180. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6. *See supra* note 159 (discussing neutrality as a core principle).

conducting the pre-complaint counseling, the DRS is supposed to be assisting the complainant in resolving the problem. During ADR, the DRS should be neutral and assist each side in coming to a mutual agreement. Then ultimately, during the investigation and development of the record, the DRS answers to the agency, having literally jumped the fence to the opposing side.[183] In the EEOC's view, these roles are inherently contradictory, and do not promote trust between the parties.[184]

c. Confidentiality

Lastly, the EEOC cited the DRS's multiple roles as inevitably breaching the confidentiality principle.[185] The EEOC reasoned that, under the Pilot Program, mediation is the only form of ADR that is done strictly by a third-party neutral without a record or notes generated from the proceeding.[186] The other three forms of ADR involve various degrees of record building by the DRS.[187] In conciliation, early neutral inquiry, and settlement conferences, the DRS is *responsible* for ensuring that a written record is built.[188] The EEOC's reasoning continued that this process of requiring that the DRS be present during three of the four ADR proceedings and then personally completing the investigation and factual record, inevitably

181. Note that this is an area of contention with the DON, as the DON believes strongly that the EEOC misread the *Philips and Littlejohn* case files in this regard. According to the DON, under the Pilot Program, the DRS that conducts the intake and develops the case file was never intended to be the same DRS that acts as the neutral or is present in the dispute resolution process, nor were they the same person in these two actual cases. There were two different individuals acting as DRS for the intake and case file stage vice the neutral stage in both the *Philips and Littlejohn* cases. It would appear from the EEOC ruling, however, that this fact went unnoticed. Interview with Mr. Bernal, *supra* note 101.

182. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6.

183. *Id*.

184. *Id*. at *7.

185. *Id*. *See also* ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159 and accompanying text. It should be noted that the Pilot Program makes no attempt to hide this lack of confidentiality. Complainants electing to participate in the Pilot Program are told that there is no confidentiality in the program by the very nature of the way the program works, and are again told when selecting their type of ADR process that three of the four processes are not confidential. DRAFT PILOT DISPUTE RESOLUTION GUIDELINES, *supra* note 144 (unpaginated).

186. *Philips and Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6 - 7.

187. *Id.*

188. *Id*.

leads to the disclosure of information that the confidentiality principle is meant to protect.[189]

2. EEOC's Littlejohn Order

In *Littlejohn*, the EEOC remanded both complaints for processing in accordance with Part 1614.[190] The ruling also required that the DON notify all affected employees of their right to file a formal complaint under Part 1614 procedures.[191] The EEOC went further, however, and ordered the DON to suspend immediately the Pilot Program.[192] This suspension

189. *Id.*

190. Interestingly, to date neither Philips nor Littlejohn has filed a formal complaint with the Navy via the Part 1614 process. Interview with Mr. Bernal, *supra* note 101.

191. *Philips and Littlejohn*, 2000 EEOPUB LEXIS 4110, at *12.

192. *Id*. The Commission ordered the DON to take the following action:

> (1) The agency shall process the remanded claims separately in accordance with 29 C.F.R. § 1614.105(d). Each complainant shall be informed in writing by an EEO Counselor, no later than the thirtieth day after this decision becomes final, of his right to file a formal EEO discrimination complaint. The notice shall inform complainant of the right to file his complaint within fifteen days of receipt of the notice, of the appropriate official with whom to file a complaint and of complainant's duty to inform the agency if he retains counsel or a representative.
>
> (2) Upon receipt of this decision, the agency shall immediately suspend the Pilot Program. The agency shall deem all complaints which are currently being processed through the Pilot Program as unresolved, and no later than the thirtieth day after this decision becomes final, the agency shall notify all affected individuals whose complaints are currently being processed through the Pilot Program of their right to file a formal EEO discrimination complaint pursuant to 29 C.F.R. § 1614.105(d).
>
> (3) Any ADR program which the agency establishes pursuant to 29 C.F.R. § 1614.102(b)(2) must satisfy the requirements of 29 C.F.R. Part 1614 and comport with EEO MD-110, Chapter 3 (November 9, 1999).
>
> (4) The agency is directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include evidence that the corrective action in paragraphs (1) and (2) has been implemented.

order brought the controversy between the EEOC and the DON to a critical juncture.

3. DON's Response to Littlejohn

After the *Littlejohn* ruling, the DON indicated that it intended to proceed with the second phase of its Pilot Program despite the EEOC's cease and desist order.[193] The DON maintained its belief that the program fully complied with the EEOC's regulations and guidelines and "does not work to disadvantage employees."[194] Further, the DON claimed it was surprised at the EEOC ruling because the DON had worked with the EEOC throughout the development of the program.[195] However, and perhaps most importantly, the DON clarified and modified the Pilot Program's procedural guidance since *Littlejohn* to emphasize three important points: (1) employees will be allowed to opt-out of the Program if they are dissatisfied; (2) employees are assured of confidentiality in the Pilot Program; and (3) the DRS must and will remain neutral at all times.[196] Thus, in effect, the most controversial provision, the no opt-out provision, was conceded. The DON sent the EEOC this clarifying information, requesting that the EEOC review the program with this clarification to see if the revised program complied fully with EEOC regulations.[197]

Shortly thereafter, the DON suspended the Pilot Program altogether while it awaited clarification from the EEOC.[198] The EEOC reviewed the

193. *See Proceeds Despite EEOC Order*, *supra* note 9.

194. *Id*.

195. *Id*. The EEOC does not share this view, however. *See, e.g.*, *Diligence on Disputes*, FED. TIMES, Oct. 16, 2000 (letter to the editor from Carlton M. Hadden, Director, Office of Federal Operations, Equal Employment Opportunity Commission) ("We shared our concerns with the Navy [about the Pilot Program] in the hope we could reach an agreement on how the program could be configured to address our concerns. However, this was to no avail."); Tim Kauffman, *Navy Amends Complaint Process to Mollify EEOC*, FED. TIMES, Aug. 28, 2000 ("[T]he EEOC flatly denies any involvement in the Navy's program. 'EEOC did not bless this program,' the EEOC spokesman said. 'They pretty much did this on their own despite out concerns.'").

196. *Proceeds Despite EEOC Order*, *supra* note 9.

197. *Id*. *See also* Kellie Lunney, *EEOC Challenges Navy On Discrimination Complaints*, GOV'T EXEC., Aug. 3, 2000, *available at* http://www.govexec.com. "Phase two addresses the recommendations made by the EEOC and complies with the federal requirements noted by EEOC. Our goal is to press ahead with the pilot and continue to improve upon the success we experienced in phase one" *Id.* (quoting Navy spokesperson Lt. Jane Alexander).

198. Interview with Mr. Bernal, *supra* note 101.

newly revised program, recommended a number of minor changes in September 2000, and in October 2000 gave the DON approval to restart the program.[199] Under this revised Pilot Program process (Revised Pilot Program), the timing of complaint processing was increased from ninety to 115 days, still a significant shortening of the process, but the employee is allowed at any point in the process to opt-out of the Program and return to the Part 1614 process at the agency investigation stage. As such, the Revised Pilot Program offers the employee a more traditional ADR program that adds a stage to the 1614 process, but from which they may withdraw at any time and still maintain all of their Part 1614 rights.

To date, the DON has chosen not to implement this Revised Pilot Program.[200] According to the DON, while the Revised Pilot Program may appear to be a reasonable compromise, the fact that the DON employees may return to the Part 1614 process at any time means that, in effect, the Revised Pilot Program has lost many of its teeth, and may in fact do little to shorten the backlog of cases.[201] As such, the DON has chosen instead to await implementation of recent groundbreaking legislation that may resanction the original Pilot Program.[202]

D. Legislative Intervention

During this ongoing controversy between the DON and the EEOC, Congress took note of the events.[203] Congress expressed concern over the EEOC's backlog of cases and inefficient processing of complaints, and was pushing the EEOC to streamline the system.[204] By August 2000, the House version of the Defense Authorization Act for fiscal year 2001 contained a provision that would have specifically authorized the DON's Pilot Program.[205] Members of Congress who believed that the EEOC's revisions to the 1614 process were simply not a big enough step toward fixing the problem, drove this legislative event.[206] The acting OFO Director was

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199. Letter from R. Edison Elkins, Director, Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission, to David Neerman, Staff Director, Civilian Personnel and Equal Employment Opportunity, Dept. of the Navy (Oct. 23, 2000) (copy on file with author).

200. Interview with Mr. Bernal, *supra* note 101.

201. *Id.*

202. *Id.*

203. *See generally* Lunney, *supra* note 16.

204. *Id.*

205. *See infra* notes 212-13 and accompanying text.

questioned in March 2000 regarding the EEOC's efforts to fix the complaint process system, and apparently failed to satisfy many concerns.[207] The House Government Reform Subcommittee on the Civil Service had heard testimony from the Associate Director of Federal Management and Workforce Issues at the General Accounting Office. The official testified that the rise in discrimination complaints had "overwhelmed the capabilities of the EEOC and federal agencies to process cases in a timely fashion," citing the EEOC's backlog as getting worse rather than better.[208]

During this same period, the Assistant Secretary of the Navy for Civilian Personnel and Equal Employment Opportunity was asked to testify before congressional subcommittees about the Navy's personnel programs, including the Pilot Program.[209] Touting the Pilot Program's significant success both in open sessions and in private conferences, the Assistant Secretary was ultimately asked by staff members of both the House Armed Services Committee and the House Government Reform Committee's Civil Service Subcommittee to propose legislation that would specifically authorize the DON's Pilot Program.[210] In effect, members of Congress proposed a legislative bypass of the EEOC's concerns with the Pilot Program's legality, one that specifically gave congressional

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206. Interview with Bernal, *supra* note 101.

207. *See generally* Lunney, *supra* note 16 (describing Congresswoman Eleanor Holmes-Norton, a former head of the EEOC, as "interrogating" the OFO Director, and blasting his agency for not doing more to fix the fatally flawed EEO process).

208. *Id.*

209. *See* Testimony of Ms. Betty Welch Before the Military Readiness and Civil Service Subcommittee of the House Armed Services Committee (Mar. 9, 2000), *available at* http://www.house.gov/hasc/testimony/106thcongress/00-03-09welch.htm. Ms. Welch testified:

> [T]he pilot process has already saved the [DON] more than three million dollars, and we are just beginning to see the savings. Perhaps more important than the dollar savings, the real result of the EEO Reengineering pilot is the empowerment of employees to take an active role in the resolution of their complaints—the opportunity for participants to state their cases in a neutral forum, which protects employee rights and saves the taxpayers' money.

Id.

210. Interview with Mr. Bernal, *supra* note 101.

approval to the Pilot Program, and ended the EEOC-DON controversy by legislative intervention.[211]

Ultimately, the legislative bypass was only partly effected, as the House bill was modified before passage. The bill passed as proposed in the House,[212] but no matching provision was included in the Senate version.[213] After the conference committee met to merge the House and Senate bills, the final version of the Defense Appropriations Act of 2001 (Act) contained only a watered-down version of the initial congressional support.[214] Section 1111 of the Act required that the Department of Defense select a "minimum of three agencies" to set up and test EEO pilot programs for a period of three years and then report back the results, but the section failed to specifically name the DON's Pilot Program as one of those to be selected.[215] To date, the testing agencies have not yet been selected, and the DON is awaiting word on whether its Pilot Program will be one of the programs congressionally approved.[216]

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211. 2001 Defense Authorization Act, *supra* note 97.

212. H.R. 4205, 106th Cong. (2000).

213. H.R. 5408, 106th Cong. (2000). On 13 July 2000, the Senate approved their version of the bill without a Pilot Program clause. On 27 July 2000, the Speaker of the House appointed conferees to resolve discrepancies between the House and Senate bills. The conference report dated 6 October 2000 indicates:

> The House bill contained a provision (sec. 1106) that would authorize the Secretary of the Navy to carry out a five-year pilot program to demonstrate improved processes for the resolution of equal employment opportunity complaints. The Senate amendment contained no similar provision. The Senate recedes with an amendment that would require the Secretary of Defense to conduct a three-year pilot program to demonstrate improved processes for the resolution of equal employment opportunity complaints in a minimum of one military department and two defense agencies, and would require a report to the Committees on Armed Services of the Senate and the House of Representatives not later than two years after initiation of the pilot program.

H.R. CONF. REP. ON H.R. 5408, FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001, at 1 (2000).

214. 2001 Defense Authorization Act, *supra* note 97.

215. *Id*.

216. Interview with Mr. Bernal, *supra* note 101.

III. Discussion & Analysis

The primary issues presented by the Pilot Program can be broken into two categories: legal issues and policy issues. First, from a legal perspective, does the Pilot Program actually conflict with existing law? Is the EEOC correct in its interpretation that the original Pilot Program conflicts with applicable EEO law? And if it does, can selecting the original Pilot Program as one of the legislatively sanctioned test programs correct the problem? Second, from a policy perspective, is there really a need for such a drastic step? Is the EEO complaint system so broken that such dramatic change is necessary? And if so, is the original Pilot Program the best step, or would it suffice to allow the implementation of the EEOC-approved Revised Pilot Program? This discussion section addresses each of these concerns in turn.

A. Legal Issues: Can an Employee Bargain Away EEO Rights?

The starting point in the analysis of the Pilot Program's legality begins with some foundation questions: What is wrong with bargaining away these types of rights in the first place? Is there really anything wrong with offering an employee an opportunity to participate in a program where he knowingly and voluntarily waives some rights in exchange for some benefits? Do not people, in effect, have a right to bargain? Do not employees have a right, in fact, to simply waive rights if they so choose? If an employee may waive the right altogether, why should he be limited in exercising only part of it? On their face these are simple questions, and the evidence explored below points to the inescapable conclusion that, as a general rule, there is nothing wrong with this concept of allowing someone to knowingly and voluntarily waive or bargain their rights in exchange for adequate legal consideration.[217] The issue then remaining is whether some other interest demands an exception to this general principle.

The evidence supporting the general principle that an employee should be able to waive or bargain some rights in exchange for some benefits is plentiful. People bargain away their rights all the time. Examples

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217. Legal consideration is defined as, "Something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee. Consideration . . . is necessary for an agreement to be enforceable." BLACK'S LAW DICTIONARY 300-01 (7th ed. 1999). Under basic contract law, consideration is required prior to an agreement to be considered enforceable. "To constitute consideration, a performance or a return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1998).

that will be discussed below include: (1) defendants entering into plea bargains with the government in criminal trials; (2) employees covered by collective bargaining agreements being forced to choose between the negotiated grievance procedure and the Part 1614 EEO procedure; (3) employees being bound by arbitration agreements they voluntarily entered into but which infringe on their EEO rights; and (4) settlement agreements in EEO complaints where employees waive their rights to pursue their complaints higher in exchange for some consideration.

1. Criminal Trials

Looking first at the criminal law arena, the proposition that people should be allowed to waive and bargain away personal rights in exchange for consideration finds telling support in the plea agreement negotiation process. Criminal defendants regularly waive various rights.[218] Rule 11 of the Federal Rules of Criminal Procedure specifically allows negotiated pleas of guilty in federal courts,[219] and state courts have similar provisions.[220] In military courts, Rule for Courts-Martial 910 specifically allows a plea of guilty.[221] Under the Rules for Courts-Martial, a military judge is required to conduct a somewhat extensive inquiry before accepting the plea of guilty to ensure the accused understands the gravity of a guilty plea.[222] The military judge must address the accused personally and ensure he fully understands the nature and effect of a guilty plea, the maximum penalty for the offenses to which he is pleading guilty, and his rights to plead not guilty and to have a full-blown jury or judge-alone trial.[223] The military judge must also ensure the guilty plea is being done voluntarily, and ask whether a pretrial agreement is involved.[224] Lastly, the military judge must satisfy himself that the accused has in fact committed the offense to which he is pleading guilty.[225] Once satisfied, the plea is

218. *See, e.g.*, Reed Harvey, Note, *Waiver of the Criminal Defendant's Right to Testify: Constitutional Implications*, 60 FORDHAM L. REV. 175 n.4 (1991) (discussing constitutional standards for waiver of a criminal defendant's rights across jurisdictions throughout the country); *see also* Roland Acevedo, Note, *Is a Ban On Plea Bargaining An Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 987 (1995) ("Plea Bargaining is an essential and important component of the American criminal justice system . . . account[ing] for ninety percent of all criminal convictions in the United States.").

accepted and the accused may find himself in the brig for up to life without parole.[226]

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219. Rule 11 of the Federal Rules of Criminal Procedure provides:

> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and
>
> (4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
>
> (5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and
>
> (6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.
>
> (d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

FED. R. CRIM. P. 11.

220. *See, e.g.*, NEB. REV. STAT. § 29-1819 (2000); MD. CODE ANN., CTS. & JUD. PROC., § 4-242 (1999); MASS. ANN. LAWS, RULE FOR CRIMINAL PROCEDURE 12 (2000) (each of these statutes is a rule of criminal procedure which allows guilty pleas with various amounts of judicial inquiry into the basis of the plea).

221. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2000).

222. *Id*.

223. *Id*.

224. *Id.*

225. *Id.*

Persons accused of a crime generally only plead guilty when they believe it is in their best interests, usually hoping for some leniency in sentencing either from the judge or through some sort of plea-bargain.[227] Persons entering into such plea agreements are bargaining away their constitutional rights to a trial by a jury of their peers, to have the government prove the case against them beyond a reasonable doubt, to call witnesses in their own behalf, and other important rights.[228] In exchange, they receive some type of consideration or benefit, usually in the form of a lesser sentence, a lesser charge, or the dismissal of additional charges.[229]

Are these constitutional rights that individuals bargain away somehow less important than a federal employee's statutory rights in being free from workplace discrimination? The question begs the response: No. How can a property interest in one's job be more important than a liberty interest in one's very freedom?[230] The U.S. Constitution imposes procedural safeguards such as proof beyond a reasonable doubt and the requirement of a jury of one's peers for a criminal conviction, yet makes no such provisions for the protection of an individual's job or working environment. Of the two, clearly an individual's rights during a criminal proceeding are more sacred than one's right to be employed fairly. If individuals can waive their most important rights, they should also be allowed to waive less important ones.

Plea agreements in criminal trials are but one example of a situation where a person's rights may be knowingly and voluntarily waived. Similar examples that are more specific to EEO law also exist, including collective bargaining agreements (CBAs), arbitration agreements, and settlement

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226. In capital cases, guilty pleas are not allowed in the military system. *See* UCMJ art. 45(b) (2000); United States v. Wheeler, 28 C.M.R. 212 (C.M.A. 1959).

227. *See generally* Acevedo, *supra* note 218, at 991 ("The popularity of plea bargaining stems from its 'mutuality of advantage' – the process offers advantages to defendants, prosecutors, defense counsel, judges, victims, and the public alike.").

228. *See generally id.*; Harvey, *Waiver of a Criminal Defendant's Right*, *supra* note 218.

229. *See generally* Acevedo, *supra* note 218, at 991-92 ("Plea bargaining allows defendants, in exchange for the surrender of certain constitutional rights, to gain prompt and final disposition of their cases, avoid the anxieties and uncertainties of a trial, and escape the maximum penalties authorized by law.").

230. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (In this cornerstone document, our founding fathers stated, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The right to maintain one's employment is not listed as one of our inalienable rights.).

agreements. Each of these examples further supports the notion that there is nothing wrong with an employee waiving rights, or bargaining rights away in exchange for consideration.

2. Collective Bargaining Agreements

Collective bargaining agreements offer more support for the proposition that a person should be allowed to knowingly and voluntarily waive or bargain with their rights. The Civil Service Reform Act of 1978 ("CSRA") explicitly allows the CBA process.[231] The CSRA was passed as part of an effort to increase the efficiency of the federal government by allowing collective bargaining in the federal workplace.[232] The CSRA requires federal employees covered by a CBA who have a potential EEO complaint to choose between the Part 1614 process and the negotiated grievance procedure under the CBA.[233] Once an option is selected, the employee is strictly bound by the choice.[234] Thus the notion that an employee can be given an option of selecting an alternative to the Part 1614 procedure, which, if selected, forfeits the right to use the Part 1614 procedure as a backup, is not without precedent. In fact, it is done on a daily basis throughout the nation,[235] and is in effect very similar to the option given to employees under the DON Pilot Program.

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231. Pub. L. No. 95-454, 92 Stat. 111 (codified in scattered sections of, *inter alia*, 5 U.S.C.).

232. Facha v. Cisneros, 914 F. Supp. 1142, 1147 (E.D. Penn. 1996) (quoting Cornelius v. Nutt, 472 U.S. 648, 666 (1985) (Marshall, J., dissenting)). *See also* 5 U.S.C. § 7101(a) (2000) (describing the findings and purpose of the Act).

233. 5 U.S.C § 7121(d) ("An aggrieved employee affected by a prohibited personnel practice under . . . this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both."). *See also* Smith v. Kaldor, 869 F.2d 999, 1005 (6th Cir. 1989) (employee must chose either the statutory procedure or the negotiated procedure).

234. 5 U.S.C § 7121(d). *See also Facha*, 914 F. Supp. at 1148 (quoting Vinieratos v. United States, 939 F.2d 762, 768 (9th Cir. 1991)).

235. *See generally* Federal Labor Relations Authority, *Home Page*, *at* http://www.flra.gov (last visited Aug. 27, 2001) (providing background information on the CSRA, the FLRA, CBAs, statutory authority for providing choice of negotiated grievance procedure under the CBA or the Part 1614 process, and case law upholding the legality of allowing such a choice).

3. Arbitration Agreements

Arbitration agreements are a second example of a knowing and voluntary waiver of rights in the employment arena, and offer further support for allowing such waivers and bargaining of rights. Federal courts have repeatedly held that arbitration agreements voluntarily entered into are enforceable. For example, in *United States v. Gilmer*,[236] the Supreme Court heard a challenge to a compulsory arbitration agreement mandated as part of a securities registration application. Gilmer brought suit under the Age Discrimination in Employment Act (ADEA) against his former employer, who in turn moved to compel arbitration under the application provision. The district court denied the motion to compel arbitration, but the court of appeals reversed. The Supreme Court affirmed the appeals court, holding that an ADEA claim can be subjected to compulsory arbitration. The Court reasoned, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[237] The Court found no such legislative intent in the ADEA.[238] The Court looked specifically to the effect that allowing such agreements would have on the ADEA's intent of furthering important social policies, and on the potential effect it might have in undermining the EEOC's role in enforcing the ADEA, and was unpersuaded.[239] The Court noted specifically that such arguments are rebuffed by the fact that an employee can still file a charge (instead of an individual claim) with the EEOC.[240] Additionally, "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement."[241]

An important consideration in the *Gilmer* case that is directly applicable to the DON's Pilot Program is that, due to the parallel or overlapping remedies against discrimination, taking the EEOC out of the process does not leave the employee without a final appeal.[242] The Supreme Court had ruled years before *Gilmer* that, while an employee may choose to vindicate his contractual employee rights through the CBA procedure instead of using the EEOC, the employee nonetheless retains the right to bring suit in

236. 500 U.S. 20 (1991).
237. *Id*. at 26.
238. *Id*.
239. *Id*.
240. *Id*. at 28.
241. *Id*. (citing Coventry v. U.S. Steel Corp., 856 F.2d 514, 522 (3rd Cir. 1988)).
242. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).

federal district court for non-contractual, statutory rights.[243] Under the DON's Pilot Program, employees also retain this same right to bring suit in federal district court.[244]

4. Settlement Agreements

Settlement agreements are yet another example of employees being able to waive or bargain away rights. Further, settlement agreements are perhaps the most important of the examples explored in this section, as they can be compared directly to the rights bargained away under the DON's Pilot Program. In both the Pilot Program and a typical settlement agreement, employees agree to resolve their complaint with the agency. In a settlement agreement, the terms of the resolution are usually already defined. In the Pilot Program, the employee is one step removed from this final settlement agreement, and has agreed to enter the Pilot Program as a *means* of achieving the final settlement. The Pilot Program can thus be viewed as a settlement mechanism, and by participating in the various forms of ADR offered under the program, the employee is simply attempting to negotiate and formalize the terms of the settlement.

The EEOC has long maintained a policy of encouraging the voluntary settlement of cases concerning rights under Title VII.[245] Federal courts have also upheld such voluntary settlements.[246] Settling a Title VII claim does not violate public policy, which favors the voluntary settlement of such claims.[247] The courts have limited this policy in two ways. First, only

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243. 500 U.S. 20, 28 (1991).

244. *See, e.g.*, *Part 1614 Procedure Versus Pilot Program* flowchart at Appendix A (showing that the Pilot Program process retains the identical right to file a civil action in a U.S. District Court following a FAD found under the Part 1614 process).

245. *See infra* note 281 and accompanying text.

246. *See, e.g.*, Runyan v. Nat'l Cash Register, 782 F.2d 1039, 1040 (6th Cir. 1986) (holding that a privately negotiated, unsupervised settlement agreement waived an employee's right to a private action under the Age Discrimination in Employment Act so long as it was a voluntary and knowing waiver of rights); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986) (absent a showing of fraud, deceit, or overreaching, no public policy issue against settlement of an ADEA claim); *Coventry,* 856 F.2d at 518 ("[S]ubject to a close evaluation of 'knowing' and 'willful' waiver, employees may execute valid waivers of their ADEA claims.").

247. *See, e.g.*, Rogers v. Gen. Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (upholding EEOC dismissal of charge of an employee who had settled a claim "based on its conclusion that [the employee], by signing the release, had waived all Title VII claims against General Electric.").

claims for actions that already occurred may be properly released, meaning that an employee cannot prospectively waive such claims.[248] Second, the release must be knowing and voluntary.[249] Absent violations of these two conditions, settlements are looked upon favorably.[250]

In applying these two judicially fashioned limitations on settlement agreements to the Pilot Program, no significant problems are apparent. First, all Pilot Program claims are by their very nature for actions which have already occurred and which therefore led to the complaint. Second, the DRS addresses the "knowing and voluntary" prong at significant length in the initial intake stage, thereby ensuring any consent garnered has the prerequisite qualifications.[251] The only foreseeable problem is that the employee may be unaware of the overall scope of the discrimination, and is therefore waiving a right that, if investigated deeper, might uncover more significant issues than are initially apparent.[252] For example, an employee may believe his case is merely a single incident, without realizing the agency has a more widespread or systematic problem, of which the employee is but one victim.[253]

An employee entering the Pilot Program can thus be analogized to an employee entering into a settlement agreement.[254] Upon entering the Pilot Program, the employee is simply agreeing to settle his claim in a different forum, though without the certainty of a finalized outcome. Since it is the

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248. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989).

249. *See, e.g.*, Shaheen v. B.F. Goodrich Co., 873 F.2d 105 (6th Cir. 1989) (employee who received approximately $22,000 in consideration for electing a severance plan which waived rights over plan which did not waive rights made knowing and voluntary choice). *See generally* Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995) (delineating factors to be considered in determining whether waiver is knowing and voluntary); Livingston v. Adirondack Bev. Co., 141 F.3d 434 (2d Cir. 1998) (knowing and voluntary is determined using a totality of the circumstances test).

250. *See, e.g., Coventry*, 856 F.2d at 522.

251. *See* Appendix C and background *supra* Section II.B.2.

252. *See* Interview with Ms. Houk, *supra* note 174 and accompanying text.

253. Decisions on when and how deeply to investigate allegations inherently involve the amount of an agency's limited resources that will be dedicated to conducting investigations. Every incident in the workplace need not be the subject of a full, formal investigation. Such a rule, if it existed, would lead to an inordinate strain on agencies being able to accomplish their mission. Some judgment must be employed on whether an incident rates an investigation, and how deep that investigation must go. Such judgment calls are implicit in both the Part 1614 process as well as the Pilot Program. Neither process requires full investigation of every incident, and allows agencies to dismiss meritless or untimely complaints. As such, the problem created by limited investigations not uncovering every potentially greater problem is not uncommon, and is unavoidable under either process.

employee's right to choose whether to settle and what to accept as a settlement, including simply dropping the case, should not the employee also be allowed to take this rationale a step further and agree to enter into a specific *process* to settle? And if this process of bargaining and waiving rights is accepted in other areas of the law, including criminal trials, as well as in EEO law (as evidenced by collective bargaining agreements, arbitration agreements, and settlement agreements), what is the countervailing argument that it should not be allowed under the Pilot Program? What considerations or policies require an exception to the general rule that people have a right to bargain? Put in its most simple form, who says a federal employee cannot enter into a knowing waiver of some of his rights in exchange for the benefits of a quicker resolution of his problem?

B. Legal Issues: The EEOC's Arguments Against Allowing the Bargaining or Waiving of These Rights

The answer to the ultimate question posed above, "who says a federal employee cannot enter into a knowing waiver of some of his rights in exchange for the benefits of a quicker resolution of his problem," is the EEOC.[255] Their rationale is explained below.

The EEOC's primary argument against allowing the waiver of rights afforded by the Part 1614 process stems from the EEOC's mission of enforcing employment discrimination law.[256] The EEOC has repeatedly

254. In the author's opinion, use of this analogy and terminology could have prevented much of the controversy surrounding the Pilot Program by avoiding the expectations accompanying the label of ADR. *See supra* note 177.

255. Note that the EEOC is not an impartial party in this matter. Given the EEOC's mission, see *supra* note 59, and its controversial shifting of power from the agencies to the EEOC by making AJ decisions binding under the revised Part 1614 regulations, see *supra* notes 63, 87-88 and accompanying text, any procedure which would diminish the EEOC's role in EEO procedures could be expected to meet resistance from the EEOC. Procedures such as the Pilot Program, which effectively settle EEO complaints without EEOC involvement, undermine the EEOC's importance, and are unlikely to be viewed favorably by the agency losing its importance.

256. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES (Apr. 10, 1997) [hereinafter ENFORCEMENT GUIDANCE], *available at* http://www.eeoc.gov/docs/waiver.html ("An employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding" filed under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act.).

stated its belief that employees have certain rights that cannot be waived under the federal civil rights laws, and this position is supported by case law.[257]

To understand the EEOC's position, the very reasons for the EEOC's existence must first be examined. In passing and later modifying Title VII, Congress established the EEOC and gave it the mission of enforcing the nation's employment discrimination laws.[258] The EEOC's functions were diverse. They included investigating claims and charges[259] of employment discrimination; attempting to resolve problems amicably, where possible, through cooperation and voluntary compliance; and, filing suit in federal court against private sector employers with whom no resolution was reached.[260] For federal agencies such as the DON, the EEOC does not bring suit in federal court, but rather refers the case to the Attorney General, who may bring such a suit, though this is highly unusual in practice.[261]

The EEOC was given only limited investigatory[262] and enforcement[263] powers, however.[264] It can only investigate matters brought to its attention through a complaint by either an individual or a class action suit,

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257. *Id.*

258. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2005, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.).

259. There is a significant difference between a "claim" and a "charge." A claim is an individual's action, usually seeking some type of relief such as back pay, reinstatement, or damages. A charge, on the other hand, is an allegation of discrimination that warrants investigation but is not tied to an individual. In fact, someone other than the aggrieved individual can file a charge. A charge therefore goes beyond the individual's rights, and merits investigation for law enforcement purposes. A useful analogy can be made to other types of law enforcement by comparing this process to an assault: the victim may bring a tort suit against the assailant in civil court seeking damages, medical fees, etcetera. Likewise, a prosecutor may then charge the assailant in criminal court for his crime. The fact that the victim chooses to settle the tort suit will not affect the criminal proceeding. *See generally* EEOC v. Cosmair, 821 F.2d 1085, 1089 (5th Cir. 1987) (discussing the difference between charges and claims, and the functions they serve); EEOC v. Shell Oil, 466 U.S. 54, 68 (1984) (discussing functions of charges and claims under Title VII).

260. *See* 42 U.S.C. § 2000e-5 (1964); *see also* Gen. Tel. Co. v. EEOC, 446 U.S. 318, 325 (1980) (In enacting Title VII, Congress had hoped to encourage employers to comply voluntarily with the Act. By 1971, however, Congress had realized that its 1964 Title VII Act lacked the teeth necessary to enforce it. Accordingly, the power to bring suit in federal court by the EEOC was passed in 1972 as part of the amendments to Title VII aimed at more effectively enforcing its provisions. (citing S. REP. NO. 92-415, at 4 (1971)).

261. 42 U.S.C. § 2000e-5(f)(1).

or through its own findings that an employer was statistically discriminating based on data derived from reports the EEOC requires annually.[265] The EEOC is thus a law enforcement agency, but one that relies primarily on employees coming forward with complaints of discrimination before initiating an investigation.[266] Therefore, any agreement or policy that seeks to quiet an employee from notifying the EEOC of an alleged discriminatory act inevitably interferes to some extent with the EEOC's law enforcement capacity.[267]

The EEOC's formal position is fully laid out in their *Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes* (*Enforcement Guid-*

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262. *See, e.g.*, EEOC v. Astra, 94 F.3d 738, 746 (1st Cir. 1996) ("The EEOC has no authority to conduct an investigation based on hunch or suspicion, no matter how plausible that hunch or suspicion may be. The reverse is true: the Commission's power to investigate is dependent upon the filing of a charge of discrimination.").

263. *See, e.g.*, Alexander v. Gardner-Denver, 415 U.S. 36, 44 (1974) ("Title VII does not provide the Commission with direct powers of enforcement . . . . Rather, final responsibility for enforcement of Title VII is vested with federal courts . . . [because] federal courts have been assigned plenary powers to secure compliance with Title VII.").

264. *See, e.g.*, *Editorial*, FED. TIMES, Sept. 18, 2000 (Pat McKee) (providing an example of public recognition that the EEOC's reaction in *Littlejohn* was at least partially motivated out of a fear of losing some of its own limited powers). "[T]he EEOC summarily dismissed the Navy process out of fear that the EEOC role in dispute resolution would be reduced." *Id.*

265. *See* EEOC v. Shell Oil, 466 U.S. 54, 70-71 (1984) (discussing EEOC procedure for checking statistical records for evidence of systematic discrimination).

266. *See Alexander*, 415 U.S. at 34 ("Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendments to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.").

267. *See, e.g.*, *Astra*, 94 F.3d at 744 ("[A]ny agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest."); *Cosmair*, 821 F.2d at 1089 ("an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest").

ance).[268] As this position appears to have been the underlying rationale in the *Littlejohn* ruling, it deserves further attention.

In *Enforcement Guidance*, the EEOC states that certain rights are non-waivable based on its rationale that allowing these rights to be waived is contrary to public policy, and prohibited by the statutes themselves.[269]

First, from a public policy perspective, the potential negative effects that such waivers have on the EEOC's role as the federal law enforcement and investigatory agency for violations of EEO law is evident; if the EEOC is not aware of a problem, it cannot investigate and correct it.[270] The EEOC does more than simply protect aggrieved workers; it is also a watchdog agency enforcing the overriding public interest in EEO law enforcement.[271] Thus, individuals who waive their EEO rights may deprive the EEOC of notice and the opportunity to correct and enforce EEO law, interfering with their role as a law enforcement agency.

Second, looking to the statutes themselves, such agreements to waive these rights violate provisions commonly found in federal employment laws that prohibit reprisals.[272] Agreements to waive these rights generally impose penalties on someone should they choose to break the agreement and exercise a right they previously agreed to waive, but which is also a protected right under one of the federal statutes.[273] Therefore, any penalty

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268. *See supra* note 256.

269. *Id; see also* Press Release, *supra* note 73. In adopting its ADR policy the Commission "reaffirmed its long-held view that mandatory binding arbitration imposed as a condition of employment is contrary to civil rights laws and does not promote the principles of a sound ADR program." *Id.*

270. *See, e.g.*, *Shell Oil*, 466 U.S. at 69 (stating that the EEOC *depends* on the filing of charges to notify it of possible discrimination).

271. *See* ENFORCEMENT GUIDANCE, *supra* note 256, at 2 ("[T]he EEOC is not merely a proxy for the victims of discrimination . . . . Although [it] can secure specific relief, such as hiring or reinstatement . . . on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement . . . . '" (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (quoting 118 CONG. REC. 4941 (1972))).

272. *Id.*

273. ENFORCEMENT GUIDANCE, *supra* note 256, at 3.

imposed by such an agreement is violative of these anti-reprisal provisions, regardless of the agreement's intent.[274]

While the *Enforcement Guidance* paper was geared primarily toward EEO law in the civilian sector, it is equally applicable to the federal sector according to the EEOC.[275] This point, however, is subject to debate.[276]

In considering the EEOC's law enforcement mission, and the effect that an agreement limiting contact by employees with the EEOC might have on this mission, the courts have emphasized the difference between the EEOC's role as a public watchdog rather than its role as a spokesperson for individuals.[277] "[E]very charge filed with the EEOC carries two potential claims for relief: the charging party's claim for individual relief, and the EEOC's claim 'to vindicate the public interest in preventing employment discrimination.'"[278] The EEOC thus protects two sets of interests or rights; one may be properly waived as an individual right, and the other may not be waived, as it is part of a public interest. The EEOC's *Enforcement Guidance* recognizes this difference, citing *EEOC v. Cosmair*[279] for the proposition that an employee may not waive his right to file a charge with the EEOC, but may waive the right to recover in his own lawsuit or one brought by the EEOC on his behalf.[280] The *Enforcement Guidance* indicates that in recognizing this difference, the EEOC furthers its position

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274. *Id.* at 5. ("By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.").

275. *See Alternative Dispute Resolution Programs in the Federal Sector*, *supra* note 69 (Guideline document for federal agencies setting up ADR programs specifically indicates such ADR programs must comply with EEOC's *Enforcement Guidance on Non-Waivable Employee Rights*, though it cites no statutory authority for this proposition.).

276. Given the extensive protections available to federal employees that do not exist in the private sector, the EEOC's reliance on the paramount importance placed on ensuring employees are able to bring charges to the EEOC's attention to ensure it can carry out its law enforcement functions seems less applicable to the federal sector.

277. ENFORCEMENT GUIDANCE, *supra* note 256, at 4 (citing as support EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (7th Cir. 1993); EEOC v. United Parcel Serv., 860 F.2d 372, 374 (10th Cir. 1988); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975)).

278. ENFORCEMENT GUIDANCE, *supra* note 256, at 3 (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980)).

279. 821 F.2d 1085 (5th Cir. 1987).

in support of "post-dispute agreements entered into knowingly and voluntarily to settle claims of discrimination or utilize [ADR] mechanisms."[281]

The EEOC's law enforcement mission is supported by case law. For example, in *Equal Employment Opportunity Commission v. Astra USA Inc.*,[282] the First Circuit Court of Appeals was confronted directly with a question analogous to this article's topic. The *Astra* court weighed the impact of settlement provisions that disrupted cooperation with the EEOC against the impact that outlawing such provisions would have on private dispute resolution. While settlement provisions are somewhat different from waiving procedural rights, the analogy to the DON's Pilot Program bears consideration. In *Astra*, the court considered Title VII's statutory scheme and found that the EEOC's ability to investigate *charges* of systematic discrimination was crucial and outweighed any potential counterargument in support of allowing interference with this right.[283] The court focused primarily on the potential harm to the EEOC's role of vindicating the public interest instead of protecting private interests, and reasoned that any such agreement that interferes with an employee's right to communicate with the EEOC about a potential charge does fundamental damage to the public interest.[284] The court also recognized the important public policy in favor of encouraging voluntary settlement of employee complaints. But in balancing the competing interests, the court found no plausible argument that allowing such agreements to waive the right to file a charge is required to promote voluntary settlements.[285] Thus, the court essentially found the issues to be non-contradictory.[286] The right to file a charge, or to communicate with the EEOC involving a charge, cannot be interfered with; however, settlement of individual claims is not necessarily tied to

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280. ENFORCEMENT GUIDANCE, *supra* note 256, at 4 (citing EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987)) ("[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf.").

281. *Id.*

282. 94 F.3d 738 (1st Cir. 1996).

283. *Id*. at 744.

284. *Id*.

285. *Id*. at 745.

286. *Id*.

this right to file a charge. Ultimately, waiving an individual claim does not, and cannot, affect the right to file a charge.[287]

The EEOC's emphasis on its law enforcement mission, as set out in the *Enforcement Guidance*, makes it clear that one of the primary considerations in looking at the legality of the DON's Pilot Program must be the effect of the Pilot Program provision requiring that an employee waive his right to opt-out of the program. Does this provision limit only the employee's private right to relief, or all rights under Title VII, including the right to file a charge with the EEOC? The Pilot Program is silent on this issue, but a reasonable interpretation of the program indicates that it only deals with an employee's individual claims. The DON surely never intended that the Pilot Program interfere with the EEOC's law enforcement mission, and it would surely concede that an employee maintains the right to file a charge, or to communicate openly with the EEOC in any ongoing investigation into such a charge. Additionally, given the fact that Pilot Program users maintain the right to appeal to the EEOC, albeit without a hearing, and to file suit in federal court, the right to file a charge appears unencumbered by this waiver.[288] As such, it appears that the EEOC's law enforcement mission is unaffected by the Pilot Program's opt-out provision.

With the EEOC's law enforcement mission thus unaffected by the Pilot Program's waiver of rights, the rationale of the *Enforcement Guidance* then breaks down, returning us to the initial question: If rights can be waived in other areas of the law, and can be waived even in analogous situations in EEO law such as arbitration and settlement agreements, why can't they be waived under the Pilot Program? If there is not a legal impediment, is there perhaps a policy consideration that acts as a countervailing consideration to the general proposition that people should be allowed to waive their rights, or bargain them in exchange for adequate consideration? Our last argument to address is thus a policy issue: Given the controversy over the Pilot Program and its potential pitfalls and legality problems, is the program *worth* it? Are the Program's benefits significantly better than those that could be realized utilizing the employment of a more traditional ADR program interjected into the DON's application of the Part 1614 process? As is common with policy considerations, the

287. *Id. See also* ENFORCEMENT GUIDANCE, *supra* note 256.

288. Nonetheless, for the sake of clarity, this is one area in which that the DON should issue amplifying instructions before moving ahead with the Pilot Program.

question becomes not "can we do this," but rather "should we?" Is it worth it?

C. Policy Issues: Assuming An Employee Can Bargain Away These Rights, Are the Benefits of the Pilot Program Worth the Costs? Should the DON Take Such a Dramatic Step when Other ADR Programs Have Been Successful, and Could Be Adapted to the DON?

Exploring this policy argument requires consideration of the question, "Even if the DON can do this, should it?" The EEOC is not alone in its objections to the Pilot Program. Other resistance has been noted from ADR specialists,[289] political groups,[290] and even the Department of Justice.[291] Thus, the question "should we do it" may in fact be just as important as "can we do it?"

There is no question that making available some type of an ADR program in the EEO complaint process is a good thing, and will help to resolve many EEO complaints quickly, relieving some of the strain on the system.[292] One of the fundamental flaws in the current practice of EEO com-

289. Interview with Ms. Houk, *supra* note 174. Ms. Houk echoed many of the arguments put forth by the EEOC in the *Littlejohn* opinion. Additionally, she added her concern that it is simply unjust that the same agency that bears at least partial responsibility for allowing the backlog of cases in the EEO complaint process to grow to the current unmanageable level is the same one asking employees to waive some of their rights to avoid being caught in this same backlog. Ms. Houk explained that had the agency (DON) acted sooner to fix the problem as it escalated, the need for such a dramatic step as the Pilot Program would now be unnecessary. By asking the employee to waive rights to avoid this backlog, the Pilot Program then penalizes the wrong party—it is the agency, and not the employee, that should bear the burden. *See also* Letter from Ms. Houk to Deputy General Counsel, *supra* note 172, at 1 ("[N]o Navy employee should be asked to give up their due process rights by the same entity that is a primary cause of the current unconscionable delay in the administrative complaint process.").

Note that this is a controversial argument. The DON takes the position that the current backlog of cases is more directly attributable to the Part 1614 process itself, and the delays involved in getting cooperation from DOD and the EEOC for investigations and AJ hearings than anything that the DON has done. Interview with Mr. Bernal, *supra* note 101.

290. *See, e.g.*, Tonya N. Ballard, *Civil Rights Leaders Protest New Defense Complaint Processing*, GOV'T. EXEC., Nov. 13, 2000, *available at* http://govexec.com.

291. Interview with Mr. Jeffrey Senger, Counsel, Department of Justice, at The Judge Advocate General's School of the Army, Charlottesville, Va. (Feb. 2000) (The DOJ opposed the Pilot Program, citing concerns similar to those expressed by the EEOC in the *Philips and Littlejohn* opinion).

292. *See, e.g., infra* notes 301-08 and accompanying text (discussing the successes of the Air Force and Post Office ADR programs).

plaint processing is that employees often use the process as a venting mechanism for complaints that really have nothing to do with EEO law.[293] In the federal sector, much as in the private sector, employees often find themselves working for a boss that they simply do not get along with.[294] However, in the federal sector, the employees have a much higher incidence of filing EEO complaints as a means of attempting to rectify issues that are actually not grounded in discrimination.[295] The reasons for this are unclear, but certainly the ready availability of the EEO counselor, the job security of a tenured federal employee, the reprisal protections once a complaint has been filed, and the military's "chain of command" mentality all contribute to this trend.[296] These "communication-gap" complaints are perhaps where ADR shines brightest in resolving complaints.[297] The ADR gives these employees an opportunity to meet face to face with their boss on equal footing, in a manner requiring the boss to pay attention to their concerns, and for which no reprisal is allowed.[298]

Recognizing that some type of ADR program is a good thing brings us back to the initial question: If we *can, should* we be offering a program that requires employees to "opt-out" of their right to return to the 1614 process and stay in the Pilot Program? Why not use a more traditional ADR program, such as those successfully employed by the Air Force and the Post Office?[299] What is the benefit derived from the Pilot Program, and is it worth the price paid over what is available in some of these less controversial systems? And is the Revised Pilot Program, less controversial and already approved by the EEOC, a reasonable compromise? Alternatively, why not offer a more traditional ADR program as an addition to the Part

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293. *See generally EEOC's Reform Proposal Gets Flak From All Sides*, *supra* note 63. The Council of EEO and Civil Rights Executives reported to the EEOC that much of the overburdening of the current caseload came from complaints that resulted from a lack of supervisor-employee communication. *Id.*

294. Interview with Houk, *supra* note 174.

295. *Id.*

296. *Id*.

297. *Id*; *see also* Interview with Ms. Carole Houk, Deputy Dispute Resolution Specialist, Department of the Navy, and Mr. Joseph M. McDade, Deputy Dispute Resolution Specialist, Department of the Air Force, at The Judge Advocate General's School of the Army, Charlottesville, Virginia (Nov. 29, 2000) Many federal EEO complaints are filed under the EEO system simply because there is no alternative way for an employee to voice displeasure. The ADR processes are an effective addition to the EEO process because they provide such an alternative mechanism for an employee to voice their concerns. *Id.*

298. *Id.*

299. *See infra* notes 301-08 and accompanying (providing more information on these programs).

1614 process, but also offer the Pilot Program as a wholly separate settlement procedure?[300]

The less controversial programs adopted by the Post Office and Air Force have achieved significant praise and success.[301] The Post Office uses a workplace mediation program that has mediated more than 12,000 EEO complaints with 81% being closed without the filing of a formal complaint.[302] Complainants report a satisfaction rate with the program of 88% versus 44% under the Part 1614 process.[303] The workplace has benefited from the increased communication, and new complaints dropped 24% over the previous year.[304] These improvements lead to huge cost benefits, as well as increased worker morale and productivity.[305]

The Air Force has enjoyed similar success.[306] Its workplace ADR program, part of a larger ADR program that also covers contract and environmental disputes, uses mediation, facilitation, early neutral evaluation, ombuds, and other techniques to resolve complaints informally.[307] From 1995 to 1999, the Air Force program has averaged resolution rates of 74%, cost savings of $14,000 per case, and labor hour savings of 276 hours per case resolved.[308]

These two programs have received federal awards, and are looked to as models in this developing field, yet neither of them required the controversial procedures employed in the DON's Pilot Program. The question remaining is whether their ADR programs were a significant enough

300. This procedure would comply with the revised Part 1614 regulations requiring that ADR be made available, *see supra* text accompanying note 74, but would additionally allow the Pilot Program to be offered as an alternative means of settling EEO complaints more akin to a settlement or arbitration procedure. *See supra* note 254 and accompanying text.

301. *See, e.g.*, REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP, *supra* note 70 (citing specifically the successes of the Air Force and Post Office programs).

302. *Id.* at 2.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Information on the Air Force ADR program is available at their Web site, http://www.adr.af.mil.

308. *Id.*

change? Should the DON use more dramatic change to push for more dramatic results?

The Pilot Program makes more significant changes than either of these two systems, and its results are more dramatic. The Pilot Program's statistics are significantly better than those of the Air Force and the Post Office, with 61% of complainants choosing the Pilot Program, resolution rates of 89%, average case processing time of thirty-two days, average cost savings per case of $34,200, and improved workplace morale with better lines of communication and feelings of trust under the Pilot Program process.[309] Comparing the three systems yields the following results:

	Resolution Rate	Processing Time	Cost Savings
Pilot Program	89%	32 days	$34,200/case
Air Force	74%	142 days	$14,000/case
Post Office	81%	unavailable	"significant"

These statistics must be viewed in light of another important factor: In practice, any Part 1614 complaint processed in the DON is usually offered ADR at various levels already.[310] The first question asked by an AJ before an EEOC hearing is often "have you attempted ADR?"[311] This is heard again and again throughout the various stages of the proceedings, including before a hearing in federal district court.[312] It is not uncommon for a case processed under the Part 1614 process to go through up to six levels of ADR.[313] What then would another ADR process that allows the employees to walk out at any time add to the process? The key to the Pilot Program is that the employees entering into it make a serious commitment to resolve their complaints quickly and within the program. They understand that they are giving up some of their formal rights, but do so will-

309. *See supra* notes 130-37 and accompanying text for more details. Note, however, that the Navy itself has successfully tested a more traditional ADR program in the Navy Region Southwest Dispute Resolution Center Model ADR Program. This program employs mediation as an add-on to the Part 1614 process, rather than requiring the Pilot Program's no opt-out provision, and has achieved success rates as high as 90% resolution. Letter from Houk, *supra* note 289, at 9; *see supra* note 76 (providing more information on this program).

310. Interview with Major Pete Delorier, Labor Counselor, U.S. Marine Corps, in Charlottesville, Va. (Dec. 15, 2001).

311. *Id.*

312. *Id.*

ingly, and believe that the benefit of a quick resolution of their complaint is worth the bargain.

A last policy consideration that must be weighed is whether pursuing the Pilot Program is in the DON's overall best interest. Given the DON's mission, it is not required to be a leader in the EEO law arena. While exercising initiative and leadership is generally considered beneficial throughout the federal government, the cost generated by the controversy must be weighed against the impact on an agency's mission. The Pilot Program, as developed, has certainly generated an enormous amount of controversy, and if pushed by the DON, could result in significant additional unwanted negative publicity.[314] Civil rights groups, the EEOC, the Department of Justice, and the previous administration[315] have all indicated that they believe the Pilot Program should not continue. Are the benefits worth the cost in continuing to push ahead with it? The answer to this question lies

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313. *Id. See, e.g.*, Office of Complaint Investigation (OCI), *Rapid Resolution Program*, at http://www.cpms.osd.mil/oci/rrt.htm (last visited Mar. 24, 2001) (making facilitation available during the OCI investigation to speed resolution of the EEO complaint); *see also* American Bar Association, *The American Bar Association and ADR*, *at* http://www.abanet.org/dispute/abapolicy.html (last visited Aug. 27, 2001). The ABA has adopted a resolution calling for the expansion of court-annexed ADR programs:

> RESOLVED, That the American Bar Association supports legislation and programs that authorize any federal, state, territorial or tribal court including Courts of Indian Offenses, in its discretion, to utilize systems of alternative dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration.

Id. (citing ABA House of Delegates, Report 112 (1997)). For an example of a local federal court rule offering the use of ADR, see E.D. WIS. LOCAL R. 7.12, *available at* http://www.wied.uscourts.gov/Local_Rules_New.htm (last visited Aug. 27, 2001) (allowing federal district court judge to refer, in their discretion, appropriate cases to ADR procedure).

314. *See, e.g.*, Ballard, *supra* note 290 (quoting members of Blacks in Government as vehemently opposed to section 1111's pilot program, describing it as "the beginning of the end as far as civil rights are concerned").

315. *See, e.g.*, Tony Kreindler, *White House Opposes Proposed Navy ADR Pilot Program*, ADR WORLD, May 23, 2000 (news release covering White House opposition to proposed legislation to allow Navy Pilot Program based on the Program's interference with EEOC's ability to address complainant concerns and its being inconsistent with the administration's policies for ADR program implementation), *available at* http://www.adrworld.com. Note that since passage of the legislation, the Bush Administration has succeeded the Clinton Administration. To date, the Bush Administration has been silent on the issue.

not only in the statistics and the support of those who have used the system successfully, but perhaps most importantly, from Capitol Hill.

D. Did the Legislation Decide the Issue by Overriding EEOC's Concerns?

As discussed in Section II.D (*Legislative Intervention*), the Defense Appropriations Act of 2001 has a provision allowing the Secretary of Defense to select a minimum of three agencies to develop and implement pilot programs for a period of three years and to report the results. The DON was part of the impetus to get the legislation passed in the first place, but the legislation does *not* specifically authorize the DON's Pilot Program in its current form, nor does it explicitly say that the DON is even one of the agencies to have a pilot program. Therefore, there is some debate about whether Congress specifically blessed this particular program.[316] Legislative history is important here, and indicates that the bill was intended to specifically allow the DON's program.[317] Ultimately, the decision will fall on the Secretary of Defense.

Adding to the confusion, President Clinton, upon signing the legislation, sent the Secretary of Defense a memorandum[318] expressing concerns for the minimum procedures he expects such programs to contain, specifically stating that the employees must retain the right to opt-out of the pro-

316. Interview with Mr. Bernal, *supra* note 101.

317. *See, e.g.*, 146 CONG. REC. H9663-9665 (daily ed. October 11, 2000). In debating the conference report on the Appropriations Act of 2001 in the House of Representatives, Congressman Goodling, the chairman of the Education and Workforce Committee, which has jurisdiction over EEO matters, rose and said:

> The legislation also contains a provision establishing a pilot program to reengineer the equal employment opportunity complaint process for Department of Defense civilian employees. This will allow the continuation of a successful alternative dispute resolution (ADR) program already begun by the Navy—which has reduced the average wait for a determination on the merits from 781 to just 111 days. The bill permits the expansion of this model to other defense agencies. This complements our committee's successful effort to have the Equal Employment Opportunity Commission expand use of ADR to expedite the processing of charges of discrimination in the private sector.

Id. See also Press Release, Representative Floyd Spence (Oct. 6, 2000) (indicating that the Act was intended to allow the continuation of the Navy's Pilot Program).

318. White House Memorandum on the Signing of the National Defense Authorization Act, (Oct. 31, 2000), *available at* LEXIS, News Library, News Group File.

gram at any point.[319] Interestingly, this appears directly contrary to the legislative history of the bill,[320] and brings up two interesting issues: First, since this memorandum is not law, and has no binding authority, the Secretary of Defense could choose to ignore it, though at his own peril. Second, and perhaps more significantly, with the passing of power to President Bush, the effect of this memorandum is now unclear. Will it be formally rescinded? Or can the Secretary of Defense disregard it as contrary to the legislative history without fear of losing his job? To date, both the Bush Administration and the Secretary of Defense have remained silent on the issue.

Should the Secretary of Defense select the DON's original Pilot Program with the opt-out provision intact, the DON would then have a legislatively sanctioned process that would in effect be an alternative to the Part 1614 process. As the EEOC created the Part 1614 process and its implementing directions (MD-110) based on various legislation, newer legislation can create exceptions to it. Whether Title VII or some other employment law has a right which is interfered with via section 1111 of the Act is not readily apparent, but nonetheless it is something that will undoubtedly be explored in federal courts should the DON's Pilot Program be selected. This issue is speculative, however, and beyond the scope of this article.

Weighing the pros and cons discussed above leads to the conclusion that the Pilot Program works better than any other established ADR pro-

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319. *Id.* The president explained his misgivings about the pilot program:

> My Administration recently completed a major regulatory initiative to make the Federal equal employment opportunity process fairer and more effective. To operate any pilot program that eliminates the procedural safeguards incorporated in that initiative would leave civilian employees without important means to ensure the protection of their civil rights. For this reason, I am directing that the following steps be taken in the implementation of this provision: First, you must personally approve the creation and implementation of any pilot program created under section 111 of H.R. 4205. Second, you must approve the implementation of this pilot program in no more than one military department and two Defense agencies. Third, in order to ensure that the participation in these pilot programs by civilian employees is truly voluntary, I direct you to ensure that the pilot programs provide that complaining parties may opt out of participation in the pilot programs at any time . . . .

Id.

320. *See supra* notes 203-11 and accompanying text.

gram in a federal agency. And while there are important policy considerations against the program stemming from the negative publicity it has generated, these considerations are outweighed by the legislative push by Congress to allow such a radical change. In passing section 1111 of the Act, Congress intended to allow further testing of the DON's dramatic program. With congressional backing and a new Administration, the DON may have an opportunity to expand its testing further and see how far the Pilot Program can go toward fixing the problem. Restarting the Pilot Program on a larger scale, offered alongside the current Part 1614 process, could provide this testing. Alternatively, the Pilot Program could be offered alongside a more traditional ADR procedure inserted into the Part 1614 process—and offered as an additional way to provide mandated ADR to employees—to directly test the benefits of both systems when offered as alternative choices.[321]

A third option, going forward with the Revised Pilot Program, is not as attractive, but is nonetheless still a step in the right direction. While the Revised Pilot Program will certainly be an improvement over the traditional Part 1614 process as employed in the DON,[322] it is nonetheless too minor of an adjustment to truly correct the deficiencies in the system. The Revised Pilot Program, by allowing the employee to opt-out of the Program and return to the Part 1614 process at any time, adds nothing substantial[323] over the multiple layers of ADR processes already practiced in the Part 1614 process. Without this agreement to waive the right to opt-out (and thus remain in the Pilot Program until the end), the Revised Pilot Program looses its effectiveness by taking away the employee's incentive to resolve their complaint in ADR. It is this knowing and voluntary commitment by the employee to stay with the Pilot Program through its completion that makes it different from other forms of ADR, and which bears further testing.

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321. For example, a system similar to that tested in the Navy Region Southwest, *see supra* note 309, could be offered alongside the Pilot Program to compare head to head which process is more popular and effective.

322. As the Revised Pilot Program has not yet been tested, no data is available on its effectiveness.

323. The only significant change offered by the Revised Pilot Program is the shortened and more strictly enforced processing timelines.

IV. Conclusion

The DON finds itself engaged in battle with the EEOC despite its best efforts to work with it in developing this program. Currently the Pilot Program is in limbo, awaiting a final decision by the Secretary of Defense on the section 1111 selection before moving on with its program. Many in the DON want to continue to use the original Pilot Program, including the no opt-out provision, but realize it can only be done with the blessing of the section 1111 legislation and the Secretary of Defense's selection of the DON as one of the pilots. Add to this the current uncertainty under the new Bush Administration of the effect of former President Clinton's memorandum to the Secretary of Defense requiring that any pilot program not allow such a "no opt-out" provision, and it becomes clear that the future of the Pilot Program is anything but certain.

Based on the legislative intent of the bill, the Secretary of Defense should select the DON's original Pilot Program as one of the section 1111 test programs. This decision to select the Pilot Program, however, will require initiative, courage, and leadership in the face of significant opposition to the Pilot Program. The Bush Administration has been presented with an opportunity to make a bold move to fix the still broken EEO complaint procedure. While the EEOC's recent changes to the Part 1614 process are good steps, they are nonetheless small steps at best. They are merely minor tweaks to a system in need of an overhaul. It is time to try something bold. A courageous leap of faith, so to speak. And given the fact that more important rights are waived every day in other areas of the law, there is no compelling reason against allowing the further testing of such a program.

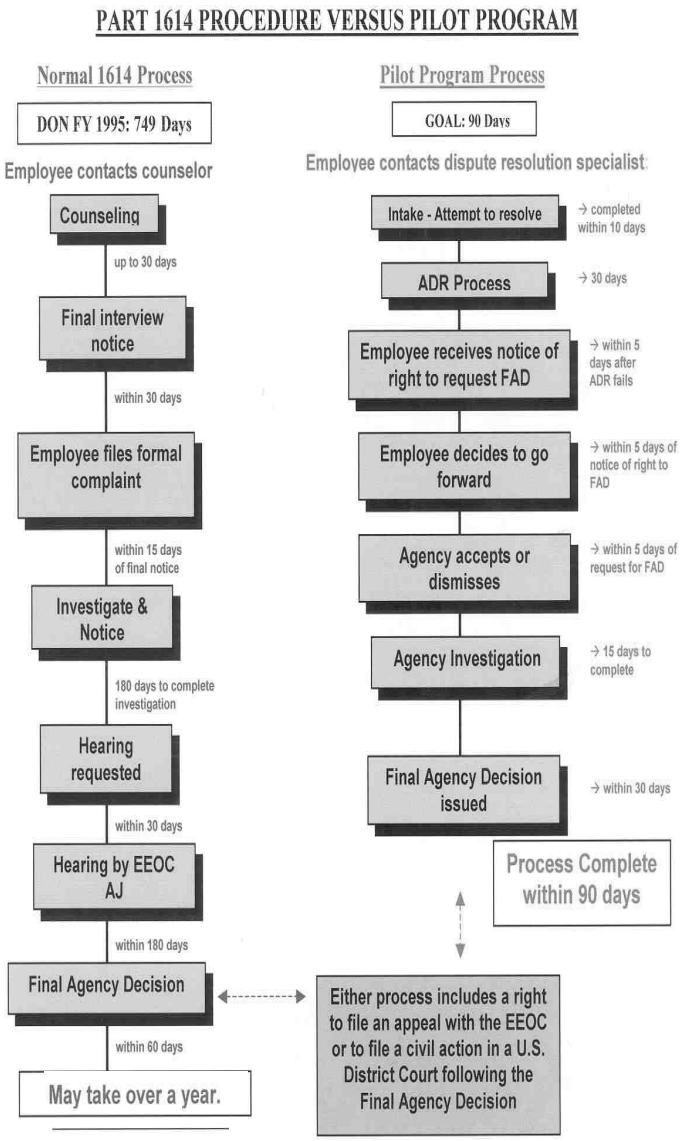
As an alternative, the DON has its Revised Pilot Program that has been specifically evaluated and blessed by the EEOC as being fully in compliance with the Part 1614 process. Under the Revised Pilot Program, the "no opt-out" provision is eliminated, a number of other EEOC concerns such as confidentiality, neutrality, and a more thorough investigation are addressed, and a 115 day timeline is employed as the goal. This Revised Pilot Program gives sufficient guarantees of trustworthiness and due process protection to employees to satisfy the EEOC, and is more in line with the pace of innovation at which the EEOC would like to move. While it is not as bold a step, it is nonetheless a step in the right direction.

By adopting either program, DON employees and managers will be better off for the DON's innovative thinking and leadership in the EEO

complaint-processing arena. After all, the goal of the EEO complaint procedure is to address workplace discrimination in an appropriate manner—timely, accurately, fairly, and efficiently. The current Part 1614 procedures fail to achieve this goal. The DON Pilot Program achieves significantly better results, while ensuring adequate employee rights are preserved. It is time to take the leap of faith and allow this innovative program to be tested further to see how far it can go in fixing the problem.

Appendix A

Part 1614 Procedure versus Pilot Program[324]



324. Chart originally prepared by Mr. Adalberto Bernal, Director, Department of Navy EEO Reengineering Project. It is available at the DON Civilian Human Resources Web page, http://www.donhr.navy.mil.

Appendix B

Time Schedule for Processing under Pilot Program [325]

OCCURRENCE OF INCIDENT/DISPUTE

- Disputant has **45** Calendar days to contact an Intake Dispute Resolution Specialist (DRS) for Resolution.

INTAKE (10 DAYS)

- Disputant meets to discuss dispute and define dispute based on interview and intake form.
- Attempts to resolve dispute are made.
- Resolution attempts fail → disputant must notify DRS in writing within 10 days (of intake process) of his/her wish to pursue dispute to dispute resolution options stage.

DISPUTE RESOLTUION OPTIONS (45 DAYS)

- Menu of options for resolving dispute is provided.
- Option is selected and disputant, management and DRS attempt to resolve dispute.
- Resolution is reduced to written agreement and signed by disputant and management official.
- If attempts to resolve fail→disputant notified in writing within 45 days.

FILE FORMAL (5 DAYS)

- Disputant must make a written request for a final decision after being notified that attempts to resolve have been unsuccessful.
- DRS acknowledge request for final decision and inform disputant of process.

FINAL DECISION (30 DAYS)

- The final decision is issued by the EEOO within 30 calendar days of the disputant's request.
- Final decision includes rights to appeal or to file civil action.

APPEAL TO EEOC (30 DAYS)

- If disputant is dissatisfied with the final decision he/she may file a notice of appeal to the EEOC within 30 calendar days of receipt of the final decision.

RIGHT TO FILE A CIVIL ACTION

- Disputant may file a civil action in an appropriate district court within 90 calendar days of receipt of the final decision or, if no final decision has been issued, after 180 days from the date the formal dispute was filed.

Or

- If an appeal is filed with the EEOC, a civil action may be filed within 90 calendar days of receipt of the EEOC's final appeal decision, or 180 calendar days after the date of the initial appeal to the EEOC if the EEOC has not issued a final decision on the appeal.

325. Draft Pilot Dispute Resolution Guidelines, *supra* note 144, app. A.

Appendix C

Agreement to Use DON Pilot Dispute Resolution Procedures[326]

Encl: (1) Dispute Resolution Process

I, (Name of Disputant), voluntarily agree to have my discrimination dispute processed under the Department of the Navy's Pilot Dispute Resolution Procedures.

I, acknowledge that (Dispute Resolution Specialist's Name), Dispute Resolution Specialist (DRS), has provided me a copy of the procedures which will be used in the processing of the following dispute:

NOTE: The dispute as defined will be inserted here.

I further agree and acknowledge the following:

a. The procedures for processing disputes under 29 CFR Part 1614 and the Pilot Dispute Resolution (DR) process have been explained to me and a copy of the DR process has been provided to me as enclosure (1). I understand that I have one (1) Workday to notify the DRS of my election to pursue the traditional (CFR 1614) process or the DON Pilot Dispute Resolution Process. Failure to notify the DRS of my election will result in no further action. _____(Sign & Date)

b. I understand that by entering into this agreement I agree that the dispute identified above will **NOT** be processed under the provisions of 29 CFR Part 1614;

c. I **WAIVE MY RIGHT TO ANONYMITY** in the processing of the dispute identified above;

d. I **WAIVE MY RIGHT TO A FINAL AGENCY DECISION WITH A HEARING** in the processing of the dispute identified above; and

326. *Id.* app. H (Attachment H).

e. I acknowledge that I **CANNOT** opt out of the Department of the Navy's Pilot Dispute Resolution Procedures upon my signing this agreement.

_____	_____
Disputant's Signature	DRS's Signature
_____	_____
Date	Date