

106TH CONGRESS
2^D SESSION

H. R. 3312

AN ACT

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Merit Systems Protec-

5 tion Board Administrative Dispute Resolution Act of

6 2000”.

7 **SEC. 2. FINDINGS.**

8 The Congress finds the following:

9 (1) Workplace disputes waste resources of the

10 Federal Government, take up too much time, and

11 deflect managers and employees from their primary

12 job functions.

13 (2) The Merit Systems Protection Board (here-

14 after in this Act referred to as the “Board”) has al-

15 ready taken steps to encourage agency use of ADR

16 before appeals are filed with the Board, including

17 extending the regulatory time limit for filing appeals

18 when the parties agree to try ADR, but high levels

19 of litigation continue.

20 (3) The Board’s administrative judges, who de-

21 cide appeals from personnel actions by Federal agen-

22 cies, find that by the time cases are formally filed

23 with the Board, the positions of the parties have

24 hardened, communication between the parties is dif-

25 ficult and often antagonistic, and the parties are not

1 amenable to open discussion of alternatives to litiga-
2 tion.

3 (4) Early intervention by an outside neutral,
4 after the first notice of a proposed action by an
5 agency but before an appeal is filed with the Board,
6 will allow the parties to explore settlement outside
7 the adversarial context. However, without the en-
8 couragement of a neutral provided without cost,
9 agencies are reluctant to support an early interven-
10 tion ADR program.

11 (5) A short-term pilot program allowing the
12 Board, upon the joint request of the parties, to in-
13 tervene early in a personnel dispute is an effective
14 means to test whether ADR at that stage can re-
15 solve disputes, limit appeals to the Board, and re-
16 duce time and money expended in such matters.

17 (6) The Board is well equipped to conduct a
18 voluntary early intervention pilot program testing
19 the efficacy of ADR at the initial stages of a per-
20 sonnel dispute. The Board can provide neutrals who
21 are already well versed in both ADR techniques and
22 personnel law. The Board handles a diverse work-
23 load including removals, suspensions for more than
24 14 days, and other adverse actions, the resolution of
25 which entails complex legal and factual questions.

1 **SEC. 3. MERIT SYSTEMS PROTECTION BOARD ALTER-**
2 **NATIVE DISPUTE RESOLUTION PILOT PRO-**
3 **GRAM.**

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

7 **“§ 585. Establishment of voluntary early intervention**
8 **alternative dispute resolution pilot pro-**
9 **gram for Federal personnel disputes**

10 “(a) IN GENERAL.—

11 “(1) The Board is authorized under section 572
12 to establish a 3-year pilot program to provide Fed-
13 eral employees and agencies with voluntary early
14 intervention alternative dispute resolution (in this
15 section referred to as ‘ADR’) processes to apply to
16 certain personnel disputes. The Board shall provide
17 ADR services, upon joint request of the parties, in
18 matters involving removals, suspensions for more
19 than 14 days, other adverse actions under section
20 7512, and removals and other actions based on un-
21 acceptable performance under section 4303.

22 “(2) The Board shall test and evaluate a vari-
23 ety of ADR techniques, which may include—

24 “(A) mediation conducted by private
25 neutrals, Board staff, or neutrals from appro-
26 priate Federal agencies other than the Board;

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

4 “(C) non-binding arbitration.

5 “(b) EARLY INTERVENTION ADR.—

6 “(1) AUTHORITY.—The Board is authorized to
7 establish an early intervention ADR process, which
8 the agency involved and employee may jointly re-
9 quest, after an agency has issued a notice letter of
10 a proposed action to an employee under section
11 4303 or 7513 but before an appeal is filed with the
12 Board.

13 “(2) NOTICE IN PERSONNEL DISPUTES.—Dur-
14 ing the term of the pilot program, an agency shall,
15 in the notice letter of a proposed personnel action
16 under section 4303 or 7513—

17 “(A) advise the employee that early inter-
18 vention ADR is available from the neutral
19 Board, subject to the standards developed pur-
20 suant to subsection (c)(1)(A), and that the
21 agency and employee may jointly request it; and

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

1 “(3) REQUEST.—Any agency and employee may
2 seek early intervention ADR from the Board by fil-
3 ing a joint request with the Board pursuant to the
4 program standards adopted under subsection
5 (c)(1)(A). All personnel dispute matters appealable
6 to the Board under section 4303 or 7513 shall be
7 eligible for early intervention ADR, upon joint re-
8 quest of the parties, unless the Board determines
9 that the matter is not appropriate for the program
10 subject to any applicable collective bargaining agree-
11 ment established under chapter 71.

12 “(4) CONFIDENTIALITY AND WITHDRAWAL.—
13 The consent of an agency or an employee with re-
14 spect to an early intervention ADR process is con-
15 fidential and shall not be disclosed in any subse-
16 quent proceeding. Either party may withdraw from
17 the ADR process at any time.

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

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

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

5 “(C) a claim that the agency’s action is or
6 would be, if effected, not in accordance with
7 law.

8 “(c) IMPLEMENTATION.—

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

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

14 “(B) take such actions as may be nec-
15 essary upon joint request of the parties, includ-
16 ing waiver of all statutory, regulatory, or Board
17 imposed adjudicatory time frames; and

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

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

23 “(3) ADVOCACY AND OUTREACH.—The Board
24 shall conduct briefings and other outreach, on a non-
25 reimbursable basis, aimed at increasing awareness

1 and understanding of the ADR program on the part
2 of the Federal workforce—including executives,
3 managers, and other employees.

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

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

17 “(6) REGULATIONS.—The Board is authorized
18 to prescribe such regulations as may be necessary to
19 implement the ADR program established by this sec-
20 tion.

21 “(d) EVALUATION.—

22 “(1) CRITERIA.—The Board’s Office of Policy
23 and Evaluation shall establish criteria for evaluating
24 the ADR pilot program and prepare a report con-
25 taining findings and recommendations as to whether

1 voluntary early intervention ADR is desirable, effective,
2 and appropriate for cases subject to section
3 4303 or 7513.

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

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

9 “(B) a comprehensive analysis of the effectiveness
10 of the program, including associated
11 resource and time savings (if any), and the effect
12 on the Board’s caseload and average case
13 processing time;

14 “(C) a survey of customer satisfaction; and

15 “(D) a recommendation regarding the desirability
16 of extending the ADR program beyond the prescribed
17 expiration date and any recommended changes.
18

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

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

1 (b) APPROPRIATIONS.—

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

8 (2) NO REDUCTIONS.—The authorization of ap-
9 propriations by paragraph (1) shall not have the ef-
10 fect of reducing any funds appropriated for the
11 Board for the purpose of carrying out its statutory
12 mission under section 1204.

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

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

“585. Establishment of voluntary early intervention alternative dispute resolu-
tion pilot program for Federal personnel disputes.”.

1 **SEC. 4. MERIT SYSTEMS PROTECTION BOARD ADMINISTRA-**
2 **TIVE JUDGES.**

3 (a) AMENDMENT TO CHAPTER 53 OF TITLE 5.—
4 Chapter 53 of title 5, United States Code, is amended by
5 adding immediately after section 5372a the following:

6 **“§ 5372b. Merit Systems Protection Board administra-**
7 **tive judges**

8 “(a) DEFINITIONS.—For the purposes of this
9 section—

10 “(1) the term ‘administrative judge (AJ)’
11 means an employee of the Merit Systems Protection
12 Board appointed to an administrative judge position
13 and paid under the MSPB Administrative Judge
14 Schedule established by subsection (b); and

15 “(2) the term ‘administrative judge (GS)’
16 means an employee of the Merit Systems Protection
17 Board appointed to an administrative judge position
18 and paid under the General Schedule described in
19 section 5332 of this title.

20 “(b) IN GENERAL.—There is established the MSPB
21 Administrative Judge Pay Schedule which shall have 4 lev-
22 els of pay, designated as AJ-1, AJ-2, AJ-3, and AJ-4.
23 Each administrative judge (AJ) shall be paid at one of
24 those levels in accordance with subsection (c).

25 “(c) RATES OF PAY.—

1 “(1) BASIC PAY.—The rates of basic pay for
2 the levels of the MSPB Administrative Judge Pay
3 Schedule established by subsection (b) shall be as
4 follows:

5 “(A) AJ–1: 70 percent of the next to high-
6 est rate of basic pay for the Senior Executive
7 Service.

8 “(B) AJ–2: 80 percent of the next to high-
9 est rate of basic pay for the Senior Executive
10 Service.

11 “(C) AJ–3: 90 percent of the next to high-
12 est rate of basic pay for the Senior Executive
13 Service.

14 “(D) AJ–4: 92 percent of the next to high-
15 est rate of basic pay for the Senior Executive
16 Service.

17 “(2) LOCALITY PAY.—Locality pay as provided
18 by section 5304 shall be applied to the basic pay for
19 administrative judges (AJ) paid under the MSPB
20 Administrative Judge Pay Schedule.

21 “(d) APPOINTMENT AND ADVANCEMENT.—

22 “(1) INITIAL APPOINTMENT.—Except as pro-
23 vided in paragraph (5), an initial appointment of an
24 administrative judge (AJ) to the AJ pay schedule
25 shall be at the AJ–1 level.

1 “(2) CONVERSION TO MSPB ADMINISTRATIVE
2 JUDGE PAY SCHEDULE.—An administrative judge
3 (GS) who is serving as of the effective date of this
4 section shall be eligible for conversion to the MSPB
5 Administrative Judge Pay Schedule and appoint-
6 ment as an administrative judge (AJ) in accordance
7 with subparagraph (A), (B), or (C) below:

8 “(A) If the administrative judge (GS) oc-
9 cupies a position at the grade 15 level of the
10 General Schedule and has served for 3 or more
11 years as of the effective date of this section, the
12 judge shall be converted to the MSPB Adminis-
13 trative Judge Pay Schedule and appointed as
14 an administrative judge (AJ) on the effective
15 date of this section so long as the judge’s last
16 3 performance appraisals of record are at the
17 ‘exceeds fully successful’ level or higher. An ad-
18 ministrative judge (AJ) so converted shall be
19 placed in the appropriate pay level prescribed in
20 paragraph (3), based on the amount of time the
21 administrative judge (AJ) has served as an ad-
22 ministrative judge (GS).

23 “(B) If the administrative judge (GS) oc-
24 cupies a position at the grade 15 level of the
25 General Schedule and has served for less than

1 3 years as of the effective date of this section,
2 the judge shall be converted to the MSPB Ad-
3 ministrative Judge Pay Schedule and appointed
4 as an administrative judge (AJ) on the date the
5 judge completes 3 years of service at the grade
6 15 level so long as the judge’s overall perform-
7 ance appraisal ratings for the 3-year period are
8 at the ‘exceeds fully successful’ level or higher.

9 “(C) If the administrative judge (GS) oc-
10 cupies a position at a level below grade 15 of
11 the General Schedule on the effective date of
12 this section and is subsequently advanced to
13 grade 15 of the General Schedule, the judge
14 shall, after serving for 3 years at the grade 15
15 level, be converted to the MSPB Administrative
16 Judge Pay Schedule and appointed as an ad-
17 ministrative judge (AJ) so long as the judge’s
18 overall performance appraisal ratings for the 3-
19 year period at the grade 15 level are at the ‘ex-
20 ceeds fully successful’ level or higher.

21 “(3) ADVANCEMENT.—An administrative judge
22 (AJ) shall be advanced to the AJ–2 pay level upon
23 completion of 104 weeks of service with an appraisal
24 rating for such weeks at the ‘exceeds fully success-
25 ful’ level or higher, to the AJ–3 pay level upon com-

1 pletion of 104 weeks of service at the next lower
2 level with an appraisal rating for such weeks at the
3 ‘exceeds fully successful’ level or higher, and to the
4 AJ-4 pay level upon completion of 52 weeks of serv-
5 ice at the next lower level so long as the judge’s
6 overall performance appraisal ratings for the period
7 are at the ‘exceeds fully successful’ level or higher.

8 “(4) REVIEW BOARD.—If at any time the
9 MSPB establishes a pass-fail or other performance
10 appraisal system that does not include an overall
11 performance appraisal rating of ‘exceeds fully suc-
12 cessful’, upon completion of the applicable qualifying
13 time-in-service requirement and receipt of a ‘pass’ or
14 equivalent performance appraisal rating for the 3
15 most recent rating periods, an administrative judge
16 (AJ) shall be eligible for consideration to advance-
17 ment to the next pay level subject to the approval
18 of a review board made up of senior MSPB officials,
19 as designated by the Chairman.

20 “(5) EXCEPTIONS.—

21 “(A) Notwithstanding paragraph (1), the
22 Chairman of the Merit Systems Protection
23 Board may provide for initial appointment of
24 an administrative judge (AJ) at a level higher

1 than AJ-1 under such circumstances as the
2 Chairman may determine appropriate.

3 “(B) Notwithstanding paragraph (2), the
4 Chairman of the Merit Systems Protection
5 Board may, in exceptional cases, provide for the
6 conversion of an administrative judge (GS) to
7 the MSPB Administrative Judge Pay Schedule
8 under such circumstances as the Chairman may
9 determine appropriate.”.

10 (b) TRANSITION PROVISIONS.—

11 (1) LIMITATION ON PAY INCREASES.—Notwith-
12 standing the rates of basic pay prescribed under sec-
13 tion 5372b(c) of title 5, United States Code, as
14 added by subsection (a), the Chairman of the Merit
15 Systems Protection Board may, on the effective date
16 of this section and each year for a period of 7 years
17 thereafter, limit the pay increase for each adminis-
18 trative judge (AJ) to an adjustment equal to—

19 (A) the percentage pay adjustment re-
20 ceived by members of the Senior Executive
21 Service under section 5382(c) of this title, if
22 any;

23 (B) locality pay under section 5304; and

24 (C) an additional \$3,000.

1 The Senior Executive Service percentage pay adjust-
2 ment, if any, shall be included in basic pay. Annual
3 adjustments in pay after the effective date of this
4 section will be made on the first day of the first pay
5 period of each calendar year. The limitation on pay
6 increases under this subsection may continue during
7 the time period prescribed by this subsection until
8 such time as the pay of each administrative judge
9 (AJ) reaches the appropriate rate of basic pay under
10 section 5372b(c) of title 5, United States Code, as
11 added by subsection (a). The Chairman may waive
12 any limitation on pay under this subsection in the
13 case of an administrative judge (AJ) serving as a
14 chief administrative judge.

15 (2) PAY IN RELATION TO GRADE 15 OF THE
16 GENERAL SCHEDULE.—In no case shall an adminis-
17 trative judge (AJ) who is converted in accordance
18 with section 5372b(d)(2) of title 5, United States
19 Code, or whose pay increase in any year is limited
20 under paragraph (1), be paid after the effective date
21 of this section at a rate that is less than the admin-
22 istrative judge's (AJ) rate of pay would have been
23 had the administrative judge (AJ) remained as an
24 administrative judge (GS) occupying the grade 15
25 level of the General Schedule.

1 (3) DEFINITIONS.—For purposes of this
2 subsection—

3 (A) the term “administrative judge (AJ)”
4 means an employee of the Merit Systems Pro-
5 tection Board appointed to an administrative
6 judge position and paid under the MSPB Ad-
7 ministrative Judge Pay Schedule established by
8 the amendment made by subsection (a); and

9 (B) the term “administrative judge (GS)”
10 means an employee of the Merit Systems Pro-
11 tection Board appointed to an administrative
12 judge position and paid under the General
13 Schedule described in section 5332 of title 5,
14 United States Code.

15 (c) APPROPRIATIONS.—

16 (1) IN GENERAL.—There are authorized to be
17 appropriated such sums as are necessary for the
18 purpose of carrying out this section.

19 (2) NO REDUCTION.—The authorization of ap-
20 propriations by paragraph (1) shall not have the ef-
21 fect of reducing any funds appropriated for the
22 Board for the purpose of carrying out its statutory
23 mission under section 1204 of title 5, United States
24 Code.

1 (d) EFFECTIVE DATE.—This section shall take effect
2 on the first day of the first pay period of the calendar
3 year immediately following the date of enactment of ap-
4 propriations authorized by subsection (c)(1).

5 (e) CONFORMING AMENDMENT.—The table of sec-
6 tions for subchapter VII of chapter 53 of title 5, United
7 States Code, is amended by adding after the item relating
8 to section 5372a the following new item:

“5372b. Merit Systems Protection Board administrative judges.”.

Passed the House of Representatives October 24,
2000.

Attest:

Clerk.

106TH CONGRESS
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AN ACT

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