

107TH CONGRESS
1ST SESSION

H. R. 1965

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

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2001

Mr. GEKAS introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

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

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Merit Systems Protec-
3 tion Board Administrative Dispute Resolution Act of
4 2001”.

5 **SEC. 2. FINDINGS.**

6 The Congress finds the following:

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

11 (2) The Merit Systems Protection Board (here-
12 after in this Act referred to as the “Board”) has al-
13 ready taken steps to encourage agency use of ADR
14 before appeals are filed with the Board, including
15 extending the regulatory time limit for filing appeals
16 when the parties agree to try ADR, but high levels
17 of litigation continue.

18 (3) The Board’s administrative judges, who de-
19 cide appeals from personnel actions by Federal agen-
20 cies, find that by the time cases are formally filed
21 with the Board, the positions of the parties have
22 hardened, communication between the parties is dif-
23 ficult and often antagonistic, and the parties are not
24 amenable to open discussion of alternatives to litiga-
25 tion.

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

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

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

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) MODIFIED PAY SYSTEM FOR ADMINISTRATIVE
 4 JUDGES.—

5 (1) IN GENERAL.—Subchapter VII of chapter
 6 53 of title 5, United States Code, is amended by in-
 7 serting after section 5372b the following:

8 **“§ 5372c. Administrative judges of the Merit Systems**
 9 **Protection Board**

10 “(a) DEFINITIONS.—For purposes of this section—

11 “(1) the term ‘Board’ means the Merit Systems
 12 Protection Board;

13 “(2) the term ‘administrative judge’ means an
 14 employee of the Board who is authorized by the
 15 Board to hold a hearing or to decide a case without
 16 a hearing, but does not include—

17 “(A) an administrative law judge ap-
 18 pointed under section 3105;

19 “(B) a member of the Board under section
 20 1201; or

21 “(C) an individual appointed on other than
 22 a permanent basis;

23 “(3) the term ‘Chairman’ means the Chairman
 24 of the Board (as described in section 1203(a)); and

1 “(4) the terms ‘pay locality’ and ‘comparability
2 payment’ have the meanings given them by section
3 5302.

4 “(b) PAY SCHEDULE FOR ADMINISTRATIVE
5 JUDGES.—

6 “(1) IN GENERAL.—There shall be 4 rates of
7 basic pay (designated as AJ-1, 2, 3, and 4, respec-
8 tively) for administrative judges, and each adminis-
9 trative judge shall be paid at 1 of those rates in ac-
10 cordance with the provisions of this section.

11 “(2) RATES.—

12 “(A) IN GENERAL.—The 4 rates of basic
13 pay referred to in paragraph (1) shall be as fol-
14 lows:

“For:	The rate is equal to the following percentage of the rate described in subparagraph (B):	
AJ-1	70.	
AJ-2	80.	
AJ-3	90.	
AJ-4	92.	

15 “(B) RATE DESCRIBED.—The rate de-
16 scribed in this subparagraph is the rate of basic
17 pay (including any comparability payment) pay-
18 able to a member of the Senior Executive Serv-
19 ice who—

20 “(i) is being paid at the second high-
21 est rate of basic pay established under sec-
22 tion 5382; and

1 “(ii) holds a position, in or under the
2 Board, within the pay locality of the ad-
3 ministrative judge involved.

4 “(c) INITIAL APPOINTMENT AND ADVANCEMENT.—

5 “(1) INITIAL APPOINTMENT.—A new appoint-
6 ment to an administrative judge position shall be
7 made at the AJ-1 rate. However, under regulations
8 prescribed by the Chairman which provide for such
9 considerations as the existing pay or unusually high
10 or unique qualifications of an individual, or a special
11 need of the Board for an individual’s services, the
12 Chairman may (instead of the rate that would other-
13 wise apply under the preceding sentence) fix that in-
14 dividual’s pay at such higher rate (under subsection
15 (b)) as the Chairman considers appropriate.

16 “(2) ADVANCEMENT.—An administrative judge
17 who has not reached the highest rate under sub-
18 section (b) shall be advanced in pay successively to
19 the next higher rate following the completion of—

20 “(A) 104 weeks of service at the AJ-1
21 rate,

22 “(B) 104 weeks of service at the AJ-2
23 rate, and

24 “(C) 52 weeks of service at the AJ-3 rate,

1 subject to the condition that the work of the judge
2 exceeds the fully successful level throughout the pe-
3 riod involved (as determined based on the judge's
4 performance appraisals of record over such period).

5 “(3) REVIEW BOARD.—If paragraph (2) cannot
6 be applied, due to the adoption of a pass-fail stand-
7 ard or any other modification in a performance ap-
8 praisal system, advancement to the next higher level
9 shall instead occur following—

10 “(A) completion of the requisite number of
11 weeks under subparagraph (A), (B), or (C) of
12 paragraph (2) (as appropriate), subject to the
13 condition that the work of the judge is of an ac-
14 ceptable level of competence throughout the pe-
15 riod involved (as determined based on the
16 judge's performance appraisals of record over
17 such period); and

18 “(B) approval of such advancement by a
19 review board (appointed by the Chairman from
20 among senior employees of the Board), in ac-
21 cordance with such regulations as the Chairman
22 shall prescribe consistent with the purposes of
23 this paragraph.

1 “(d) REGULATIONS.—Any regulations necessary to
 2 carry out this section shall be prescribed by the Chair-
 3 man.”.

4 (2) CLERICAL AMENDMENT.—The table of sec-
 5 tions for chapter 53 of title 5, United States Code,
 6 is amended by inserting after the item relating to
 7 section 5372b the following:

“5372c. Administrative judges of the Merit Systems Protection Board.”.

8 (3) EFFECTIVE DATE.—Except as provided in a
 9 succeeding provision of this section, the amendments
 10 made by this subsection shall apply only in the case
 11 of an individual first appointed (as an administrative
 12 judge) on or after the first day of the first pay pe-
 13 riod of the first calendar year beginning at least 3
 14 months after the date of the enactment of this Act.

15 (b) PROVISIONS RELATING TO ADMINISTRATIVE
 16 JUDGES FIRST APPOINTED BEFORE EFFECTIVE DATE.—

17 (1) IN GENERAL.—An administrative judge who
 18 is serving on the effective date described in sub-
 19 section (a)(3) (other than a judge described in sub-
 20 section (a)(3)) shall remain subject to the pay provi-
 21 sions that (but for this section) would otherwise
 22 apply, unless and until converted to the pay system
 23 established by section 5372c of title 5, United States
 24 Code (as added by subsection (a)) in accordance
 25 with the following:

1 (A) If, as of such effective date—

2 (i) the administrative judge would
3 (disregarding this section) be entitled to be
4 paid at a rate of pay for grade GS-15 of
5 the General Schedule, and

6 (ii) the judge's last 3 performance ap-
7 praisals of record (as such a judge) exceed
8 the fully successful level,

9 such judge shall, effective as of such date, be-
10 come subject to such section 5372c, at the rate
11 that would then apply if—

12 (I) such section had been in effect
13 since the time of such judge's original ap-
14 pointment, and

15 (II) advancements had been made
16 (since that time) in accordance with sub-
17 section (c)(2) of such section (disregarding
18 the matter after subparagraph (C) there-
19 of).

20 (B) If, as of such effective date, the ad-
21 ministrative judge—

22 (i) is entitled to be paid at a rate of
23 pay for grade GS-15 of the General
24 Schedule, but

1 (ii) does not satisfy the requirement
2 under subparagraph (A)(ii),
3 such judge shall, upon satisfying such require-
4 ment (including, to the extent appropriate, by
5 taking into account up to the judge's last two
6 performance appraisals of record), become sub-
7 ject to such section 5372c, effective as of the
8 first day of the first applicable pay period be-
9 ginning after the date as of which such judge
10 satisfies such requirement, at the same rate as
11 if first appointed on such first day.

12 (C) If, as of such effective date, the admin-
13 istrative judge is entitled to be paid at a rate
14 of pay for a grade below grade GS-15 of the
15 General Schedule, such judge shall—

16 (i) upon satisfying the requirement
17 under subparagraph (A)(ii),

18 (ii) taking into account only perform-
19 ance appraisals for service performed, at a
20 rate of pay for grade GS-15 of the Gen-
21 eral Schedule, on or after such effective
22 date,
23 become subject to such section 5372c, effective
24 as of the first day of the first applicable pay pe-
25 riod beginning after the date as of which such

1 judge so satisfies such requirement, at the same
 2 rate as if first appointed on such first day.

3 (D) If subparagraph (B) or (C) cannot be
 4 applied, due to the adoption of a pass-fail
 5 standard or any other modification in a per-
 6 formance appraisal system, eligibility for con-
 7 version (to the rate specified in such subpara-
 8 graph (B) or (C), as appropriate) shall instead
 9 be determined in accordance with procedures
 10 which the Chairman shall by regulation pre-
 11 scribe based on subsection (c)(3) of such section
 12 5372c.

13 (2) REEMPLOYMENT CASES.—In the case of an
 14 individual who—

15 (A) is first appointed as an administrative
 16 judge before the effective date described in sub-
 17 section (a)(3),

18 (B) is not serving as an administrative
 19 judge on such effective date, and

20 (C) becomes reemployed as an administra-
 21 tive judge after such effective date,
 22 paragraph (1) shall be applied by substituting the
 23 date as of which such individual becomes so reem-
 24 ployed for “the effective date described in subsection

1 (a)(3)” each place it (or any other reference to such
2 effective date) appears.

3 (3) SPECIAL AUTHORITIES.—Notwithstanding
4 any other provision of this section, the Chairman
5 may—

6 (A) in exceptional cases, provide for the
7 conversion of an administrative judge to the ap-
8 propriate rate for such judge under paragraph
9 (1) or (2) (as applicable), without regard to any
10 conditions of eligibility otherwise required for
11 such conversion; and

12 (B) in any case described in subparagraph
13 (B) or (C) of paragraph (1) (or the cor-
14 responding case under paragraph (2)) or a
15 similar case under subparagraph (A), exercise
16 the authority described in the second sentence
17 of section 5372c(e)(1) of title 5, United States
18 Code (as added by subsection (a)), if the Chair-
19 man (in his or her sole discretion) determines
20 that the circumstances so warrant.

21 (c) PHASE-IN AUTHORITY.—

22 (1) IN GENERAL.—Notwithstanding any other
23 provision of this section, if the Chairman (in his or
24 her sole discretion) determines that the cir-
25 cumstances so warrant, the rate of basic pay payable

1 to an administrative judge converted to the new pay
2 system pursuant to subsection (b) shall, during the
3 period described in paragraph (3), be determined in
4 accordance with the following:

5 (A) Instead of the rate of pay to which
6 otherwise entitled under section 5372c of title
7 5, United States Code (as added by subsection
8 (a)), such individual shall continue to be paid in
9 accordance with the provisions of law that
10 would otherwise apply (if this section had never
11 been enacted), subject to subparagraph (B).

12 (B) Instead of any adjustment in pay to
13 which such individual would otherwise be enti-
14 tled during such period under sections 5303
15 and 5304–5304a of title 5, United States Code,
16 such individual shall receive (as of the date the
17 adjustment under such section 5303 would oth-
18 erwise be scheduled to become effective in the
19 year involved)—

20 (i) a percentage adjustment under
21 such section 5303 equal to the same per-
22 centage adjustment taking effect in such
23 year under section 5382(c) of such title in
24 the case of a member of the Senior Execu-

1 tive Service described in section
2 5372c(b)(2)(B) of such title,

3 (ii) the same comparability payment
4 (expressed as a percentage) as the percent-
5 age taking effect in such year under sec-
6 tions 5303–5304a of such title in the case
7 of a member of the Senior Executive Serv-
8 ice described in section 5372c(b)(2)(B) of
9 such title, and

10 (iii) an additional \$3,000,
11 not to exceed the limitation under paragraph
12 (4)(B).

13 (C) The provisions of this subsection shall
14 continue to apply (in the case of each adminis-
15 trative judge described in the matter before
16 subparagraph (A)) until such time as—

17 (i) this subsection terminates in ac-
18 cordance with paragraph (3); or

19 (ii) if earlier, the pay for such judge
20 equals the rate that would then (but for
21 this subsection) otherwise be payable to
22 such judge under such section 5372c.

23 (2) CONDITION FOR APPLICABILITY.—This sub-
24 section shall apply only if the Chairman, not later
25 than 1 month before the effective date described in

1 subsection (a)(3), determines (by order published in
2 the Federal Register) that the phase-in authority
3 under this subsection is necessary.

4 (3) DURATION.—If the Chairman makes a de-
5 termination under paragraph (2), this subsection
6 shall apply for the period—

7 (A) beginning on the effective date de-
8 scribed in subsection (a)(3), and

9 (B) ending—

10 (i) at the close of the year in which
11 the Chairman determines (by order pub-
12 lished in the Federal Register) that the
13 phase-in authority under this subsection is
14 no longer necessary; but

15 (ii) in no event later than at the close
16 of the 7-year period beginning on the effec-
17 tive date described in subsection (a)(3).

18 (4) LIMITATIONS.—In no event may the rate of
19 pay of an administrative judge (described in para-
20 graph (1) in the matter before subparagraph (A)
21 thereof)—

22 (A) at any time while this subsection re-
23 mains in effect, be less than the rate that would
24 then otherwise apply if this section had never
25 been enacted; or

1 (B) be increased, as a result of this sub-
2 section, to a rate higher than would then other-
3 wise apply pursuant to this section, absent this
4 subsection.

5 (5) EXCEPTION.—The Chairman may at any
6 time provide that an administrative judge serving as
7 a chief administrative judge—

8 (A) be excluded from the application of
9 this subsection; and

10 (B) instead be treated as if this subsection
11 had never been enacted.

12 (6) IRREVOCABILITY.—A determination under
13 paragraph (2), (3)(B)(i), or (5) shall be irrevocable.

14 (d) DEFINITIONS.—For purposes of this section, the
15 terms “administrative judge” and “Chairman” have the
16 meanings given them by section 5372c of title 5, United
17 States Code (as added by subsection (a)).

○