Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • What is ADR?
  • What are common methods of ADR?
    • Mediation
    • Arbitration
    • Minitrials
  • Why do agencies engage in ADR?
  • What are the advantages of ADR?
    • Time
    • Litigation Costs
    • Increased satisfaction of the parties involved
Informal Agency Processes and Actions

- Alternative Dispute Resolution
  - Administrative Dispute Resolution Act
    - Amendment to the APA
    - Designed to authorize and encourage federal agencies to use mediation, conciliation, arbitration and other techniques for the prompt and informal resolution of disputes. Pub.L 101-552, 104Stat. 2736
  - Allows disputing parties to use ADR methods to help settle a dispute so long as all parties consent
  - Requires each agency to develop an ADR plan and train its employees accordingly
Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • Settlement
    • Why settle a dispute?
    • Effect of a negotiated agreement
    • Confidentiality agreement
    • Can involve a “settlement judge” to preside over the case
    • Judge acts as a mediator
    • No mandated procedures
    • Agency does not have to approve the settlement agreement
Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • APA Section 554(c)
    • The agency shall give all interested parties opportunity for:
      • The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
      • To the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.
Informal Agency Processes and Actions

• Alternative Dispute Resolution

• Federal Energy Regulatory Commission Example

  • The Federal Energy Regulatory Commission, or FERC, is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas pipelines as well as licensing hydropower projects.

• http://www.ferc.gov/about/ferc-does.asp
Informal Agency Processes and Actions

- Alternative Dispute Resolution
  - Federal Energy Regulatory Commission Example
    - Does FERC have a track record of using settlement techniques to reduce its overall caseload?
      - Is this the case for most agencies?
    - Can any party request a settlement conference?
    - Can a settlement judge be requested by the parties in lieu of a standard ALJ?
  - The presiding ALJ may ask the Chief Administrative Judge to appoint a settlement judge
  - May be a formal or informal process
Informal Agency Processes and Actions

• Alternative Dispute Resolution

  • Federal Energy Regulatory Commission Example
    • Settlement orders must be certified by the presiding officer and the Commission must approve. 18 CFR 385.602(g)(3)
      • Why is this important?

  • What happens if a settlement offer is contested?
    • The Commission may still approve it if the record contains substantial evidence upon which a reasoned decision can be based or the Commission finds that no general issue of material fact exists. 18 CFR 385.602(h)
Informal Agency Processes and Actions

- Alternative Dispute Resolution
  - Federal Energy Regulatory Commission Example
    - What happens if a party to the negotiated settlement agreement is severed?
      - Will the Commission proceed with the settlement agreement as if it was uncontested?
    - What benefit does this provide to the severed party?
    - The Commission may also sever specific issues in the settlement agreement, but this is rarely used
Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • Environmental Protection Agency Example
    • Why does the EPA value ADR techniques?
    • What benefits does it provide the EPA, and interested parties?
    • What type of ADR processes does the EPA typically use to settle disputes?
      • Mediation
      • Non-binding arbitration
      • Minitrials
      • Fact-finding
Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • Environmental Protection Agency Example
    • What factors does the EPA consider when engaged in ADR techniques?
      • Actual or potential deadlock in the negotiation process
      • Agency experience with the specific facts of the case
        • Case of first impression?
        • Existence of well-settled law on the issue at hand?
      • Will the parties agree to use ADR procedures?
Informal Agency Processes and Actions

• Alternative Dispute Resolution
  • Mediation
    • Neutral third party
    • Helps multiple parties communicate with each other to help move them closer to a settlement agreement
    • Does not necessarily “judge” like an ALJ or arbiter
    • Mediators may try to influence both sides to settle, but must remain neutral and cannot force a decision on the participating parties
    • Help parties identify where they are willing to make concessions
Informal Agency Processes and Actions

• **Alternative Dispute Resolution**
  - **Minitrials**
    - A “trial-run” to see how well your case holds up in a mock adversarial situation
    - Usually involves complex cases
    - Executives from both companies will typically be present to assess the strength of their case and relative bargaining power
      - Is the evidence as strong as you think?
      - Do witnesses come across as credible?
      - Proceedings are confidential
      - More costly than mediation, but not as much as an all-out trial