

Mediation

Introduction

Mediation has proven to be a very effective tool in helping parties reach a finished contract. Legally binding master contracts are provided for in the Public Employment Labor Relations Act, or PELRA. Negotiations and mediation are established as parts of the process which bring the contracts to fruition. Because of the binding nature of these contracts, it is natural that both parties to the agreements exercise extreme caution in the preliminary stages of the bargaining to be sure that the final agreement is acceptable, workable, and palatable to both sides.

Direct negotiations between the parties often go smoothly with mutual trust and accommodation being reached. Often settlements are reached through this preferred process with no need for any outside help. However, it is also very normal for “stumbling blocks” to get in the way, slowing or even preventing progress toward settlement. This is a natural and normal occurrence in the process of bargaining. It may result from several causes. Whatever the cause, the process grinds to a halt and inertia sets in. At this stage it is often very helpful for a neutral third party, a mediator, to be called in to help get the process moving.

What is the function of mediation?

1. To seek a settlement that can be agreed to by both parties.
2. To require both parties to meet and to focus good faith efforts on the resolution of negotiations problems.
3. To provide a forum for confidentiality in which parties can creatively seek solutions.
4. To generate pressure, through the mediator, on one or both parties to modify bargaining positions.
5. To discover and reveal, through the mediator, information about the bargaining adversaries' motives, concerns and objectives.

How do you know when you are ready for mediation?

1. You have met enough to allow each party to have had the opportunity to explain their proposals and positions thoroughly.
2. Neither party seems willing to make any significant movement toward settlement.
3. Your local has begun overt organizing activities designed to bring pressure on the board.
4. You have determined that little or no progress is possible in further face-to-face (direct) negotiations at this time.

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the National Education Association and AFL-CIO.*

Updated December 2021



What is the authority of the mediator?

The responsibility of the mediator is to facilitate the negotiations process, not replace it. Mediators are not decision makers. They should not control the pace and progress, even though both sides may want to empower them to do so.

The mediator:

1. Acts as the agent/representative of the Commissioner of the BMS.
2. Chairs the mediation sessions.
3. Establishes time, place, and frequency of sessions.
4. Has the authority to call the parties into separate or joint sessions.
5. Has the authority to close mediation sessions to the public.
6. Has the authority to subpoena.
7. Has the authority to present recommendations to the parties for their consideration.

What the mediator will not do

1. The mediator will not advocate your position.
2. The mediator will not necessarily seek your version of equity and fairness on the issue in dispute.
3. The mediator will not necessarily seek the "best" settlement from your perspective.
4. The mediator will not force the parties to negotiate. (Remember, "NO" is an answer from the other side. It is not the answer that we want, but it is an answer.)

How does mediation proceed?

1. Both parties are present under the direction of the mediator.
2. Both parties are obligated to have the necessary authority to make a tentative settlement (subject to ratification of the respective bodies).
3. All tentative agreements reached in direct negotiations and open items are discussed.
4. The mediator "explores" the areas of disagreement.
 - a. Initiates suggestions.
 - b. Provides advice and information.
 - c. Carries proposals and counter proposals.
5. Both parties have caucus rights and privileges.
6. Both parties are free to make suggestions to the mediator.
7. Both parties have the right to offer "privileged" (counter) proposals. That is, if a counterproposal is offered and rejected, the offering party is under no obligation to re-offer the counter proposal.
8. All counter proposals offered in mediation are "confidential" if no settlement is reached. All counter proposals can be withdrawn, as if they had never been offered. (It must be remembered, however, that if you moved to a position one time you are likely to be willing to move there again.)

What does the law say about mediation?

If negotiations do not produce agreement, either party may petition the BMS for mediation services as provided for in PELRA. The petition can be found online at www.mnw.gov/bms and requests that the commissioner of the BMS schedule a mediation session. The conducting of the first mediation session triggers the statutory timelines for further dispute resolution mechanisms provided for in the statute (arbitration and strike).

Prepare thoroughly for mediation

When mediation is scheduled, you and your bargaining team should have gathered together all information your team will need to reach settlement. It is only with this information that you will be in a position to make the necessary moves and/or hold firm on issues allowing you to arrive at the best settlement possible in this round of bargaining.

Gather the following information and make copies for the mediator, each of your team and your field representative, so everyone will be able to refer to the same item with the same reference pages.

A. All base year (the last year of the old contract) data.

This information should have been agreed to between the district and the local before this time. If there are disagreements between the parties on these costs, know what the disagreements are and why they have not been resolved.

1. Number of FTE's (full time equivalent staff) for base year and current year.
2. Cost of base year salary schedule.
3. Cost of base year extracurricular salaries (all positions that were filled).
4. Cost of longevity payments or career increments.
5. Base year insurance data.
 - a. Total cost, as well as total district cost, of LTD insurance and the number of bargaining unit participants (FTE's).
 - b. Total cost, as well as total district cost, of life insurance and the number of bargaining unit participants (FTE's).
 - c. Total cost, as well as total district cost, of dental insurance and the number of bargaining unit participating (FTE's) for each plan and option, i.e., family, single, dependent coverage.
6. Base year health insurance data:
 - a. Number of plans and cost of each plan per FTE for each option (single, dependent or family coverage).
 - b. District's contribution toward the premium for each plan and each option within each plan.
 - c. Number of bargaining unit FTE's participating in each plan and each option within each plan.
7. Staff matrix for base year and current year.
8. Internal and external comparables.

B. Itemized list of unresolved contract issues with current proposal and brief explanation of each item.

C. A complete list of all tentative agreements (TA's) reached in direct bargaining.

- D. The cost to the district of each of your proposals.
- E. A copy of the base year (current) contract.
- F. Overview of the fiscal health of the District.

- G. Prepare to stay all day. Bring office supplies and a computer for costing out as well as writing up proposals. Additionally, bring along any snacks, coffee and beverages that you might want during the day and maybe throughout much of the night as well.

- H. Be prepared to explain the actions your local has taken to help reach settlement up until the time of the mediation and what they are prepared to do if settlement is not reached during the mediation session. DO NOT USE IDLE THREATS. SAY ONLY WHAT YOU ARE PREPARED TO DO.

- I. Cooperate with the mediator as much as possible.
 - 1. It is the mediator's job to probe both sides to try to get a settlement. The mediator may sometimes get you angry but you can "just say no" when it is appropriate to do so.
 - 2. Keep in mind that mediators usually continue meetings as long as they can see progress being made. If your meeting runs late it could mean the mediator sees the possibility of a settlement.
 - 3. If you break off the mediation, there will probably need to be an offer of a compromise before another session is scheduled. Be sure it is part of your strategy before breaking off a mediation session.
 - 4. Leave room to move on your proposals to avoid walking into an "impasse" situation.
 - a. If negotiators are unwilling to make further modifications of their positions, they have reached what is known as an "impasse." Because this deadlock cannot go on forever, the law also provides tools for breaking an impasse. The union may strike, or the employer may unilaterally impose their last offer.
 - b. Avoiding the unilateral imposition of a contract by an employer is extremely important. To this end, union negotiators are advised that not only should they never reach a point that does not allow for further movement, they must never use language that states or implies that they have no further room for movement toward settlement. The union should NEVER use words or phrases such as "impasse" or "dead locked" or "stalemate" in either private or public statements and/or written communication.

The mediation process

- A.** The mediator calls the parties to a joint meeting, usually a closed meeting not open to the public. The mediator:
- Chairs the meeting and maintains order.
 - Attempts first to understand the issues.
 - Attempts to determine the parties' respective positions on the remaining issues as well as the TA's already reached.
 - Usually meets with the parties separately after the initial joint meeting to learn positions and possible points of compromise from the parties.
- B.** Mediators use various techniques to narrow the areas of disagreement. The mediator may:
- Meet separately for protracted periods of time.
 - Serve as a conduit for exchange of information and positions.
 - Bring the parties together for assessment of relative strength and determination of the two parties.
 - Probe for "real" issues and "true" positions on each issue.
 - Look for realistic bases upon which to build a settlement.
 - Cajole and "arm twist" the parties toward the positions of the other party.
 - Propose a "mediator's proposal" to end the dispute. Most mediators will do this only as a last resort.
 - Call in other mediators or the commissioner of the BMS for assistance. This is very unusual.
- C.** The mediator documents the mediation progress. The mediator:
- Keeps copious notes of the parties' positions, movements, "hang-ups", etc.
 - Uses notes for guidance when persuading stubborn parties.
 - Records and has the parties' initial agreed-upon language.
- D.** The mediator certifies items of dispute for arbitration.
- E.** The legal authority of the mediator. The mediator:
- Has the power to call mediation meetings.
 - Has subpoena powers to enforce parties' attendance at mediation sessions.
 - Has no authority to compel a settlement.
 - Has no authority to render a decision or award.
 - Is limited to using personal skills and persuasive powers to induce settlement.
- F.** Negotiations may continue during the interim.
- Negotiations can and perhaps should continue between mediation sessions.
 - Negotiations are regulated by timelines in the law. This must be watched carefully to ensure all your options can be played out if your local should decide to use them.

Mediation Quiz

Check your “MQ,” Mediation Quotient.

1. A good mediator will advocate your position T F
2. In mediation, more sessions are better than fewer sessions. T F
3. Either party may petition the director of the Bureau of Mediation Services for mediation and, once notified, the process proceeds. T F
4. Mediation is a good substitute for direct negotiations. T F
5. The mediator becomes the key person and decision-maker in the process. T F
6. Mediation is a good indication that the negotiations process has broken down T F
7. Unrealistic expectations, on either party's part, are a chief reason for stalemate. T F
8. A mediator's proposal must be considered very seriously. T F
9. Mediation sessions are open to the public (upon 24-hour's notice). T F
10. Caucuses are private and you may call one at any time in the mediation process. T F
11. Locals are assessed half the cost of mediation sessions. T F
12. In mediation, most of the time is spent away from the other party. T F
13. A mediator can compel you and the other party to attend. T F
14. The styles of mediators from the BMS are pretty much the same. T F
15. Locals can ask for a specific mediator (from the BMS) and expect to get that person. T F