

GRIEVANCE MEDIATION

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Grievance mediation is a voluntary, non-binding process using a professional labor mediator to assist the parties in reaching a mutually acceptable resolution to a grievance dispute, when there is an alleged violation of a contract.

A typical contract grievance procedure is made up of several steps, but is structured to resolve the grievance at the lowest possible level. In most instances, where the parties are not able to resolve their differences themselves, the contract provides for binding arbitration of the dispute. Not all contracts, however, include arbitration as a final step in the grievance procedure. In any event, a labor agreement is a contract and, absent binding arbitration, may be enforced through litigation.

MERC mediators have an extensive background in contract administration and typically have handled numerous grievances disputes – some involving arbitration. By mutual agreement between the employer and the union or when included as a step in the contract's grievance procedure, both parties present the basis of their position to the mediator. The mediator will become familiar with all aspects of the case and will seek to assist the parties to reach a satisfactory settlement that will resolve the dispute. An experienced mediator may also take an unbiased look at the dispute and share a neutral perspective on the parties' respective positions. A mediator's assessment of the weak points in a case or clarification of the underlying issue of the grievance, may prompt one or both parties to view the dispute in a different light and seek resolution in lieu of arbitration. Settlement options may include granting the grievance, withdrawal of the grievance or a compromise. Ultimately, however, settlement of the grievance is within the control of the parties. The mediator is present only as a confidential neutral to assist in settling the dispute, or to offer suggestions and recommendations.

Occasionally, the grievance process may break down for some reason and create a large backlog of grievances awaiting binding arbitration. When this has happened, the affected parties have sometimes agreed to call for the assistance of a mediator to help clear out the log jam. In this type of situation, the mediator may work more like a facilitator as the union and employer discuss, settle and/or withdraw issues. From time to time the mediator may be needed to take a more aggressive role and help the parties work through the most emotionally charged disputes.

There are many advantages to grievance mediation, including:

- Expedience
- Cost effective
- Not tied to a contract remedy; Resolves the “real” issue
- Less adversarial; Promotes cooperation

It is not unusual for an arbitration hearing to take months to schedule, especially with a popular arbitrator who is in demand. After the hearing, there is frequently a 30 day time period for the

parties to file post-hearing briefs. After submission of briefs, expect to wait at least another 30 days for a decision. A mediation conference can usually be scheduled within 2-4 weeks. There are no post-hearing briefs. There is also no need to wait for a decision when the dispute is resolved during the mediation conference.

Arbitrators work independently and their fee is their livelihood. Therefore, an arbitrator will charge the parties a set rate per day, plus expenses. The per diem rate is applied to time spent for travel, day(s) of hearing, reading post hearing briefs, research and preparation of an award. These are reasonable and customary expenses that the parties bear in one fashion or another for arbitration. The State of Michigan, Bureau of Employment Relations (Michigan Employment Relations Commission), Mediation Division, maintains a staff of experienced labor mediators who are available for grievance mediation at no cost to the parties for the service.

When the parties arbitrate, they are looking for a binding decision, imposing a resolution to a potentially costly dispute and it makes sense that the formal processes of an arbitration hearing be observed. When the parties agree to place their fate in the hands of an arbitrator, they also agree that the rules of arbitration will be applied. An arbitrator has no authority to add to, delete from or modify the terms of a collective bargaining agreement. The bargain struck by the parties at the time they were negotiating their agreement should stand. There is no opportunity to meet privately with the arbitrator to explore settlement possibilities.

Mediation is not tied to a contract remedy. While righteous indignation can power a moving opening statement, a successful arbitration case depends upon facts and contract construction. The authority of the arbitrator comes from and is limited by the contract. If the source of the dispute is rooted outside the language of the contract, an arbitrator may have authority to make an award disposing of the grievance, but has no authority to resolve the underlying issue. A mediator has no binding authority and, therefore, is not limited by the contract. A mediator can be expected to ask probing questions about a dispute in an attempt to uncover the true essence of the issue. With that knowledge, the mediator will work with the parties and assist them in finding a means to resolve the issue, not just the grievance.

The function of the mediator is dictated by the desire of the parties and the nature of the grievance. If the grievance is a dispute over the application of clear contract language, the mediator may have limited latitude. The exception would be where the language in question has become untenable, perhaps due to unforeseen circumstances, and both parties to the agreement want to negotiate a change through the grievance resolution. Otherwise, the function of a mediator in such a dispute is normally limited to trying to persuade one party or the other that theirs is a lost cause, likely to generate only unnecessary expense and animosity.

There are, however, grievances where the language is, of necessity, general in nature and subject to challenge when applied. An excellent example is a "just cause" provision in an article on discipline. It is not uncommon to find that two employees received different degrees of discipline for the same offense. A long term employee with a record of excellent service is not likely to be treated as severely as a short term employee who has been trouble from the start. The standard of just cause

recognizes such differences, but such differences nearly beg challenge. Once discipline has been issued and a grievance filed, management may feel duty bound to support the decision of a supervisor, right or wrong. On the other hand, the employee probably expects the union to fight the discipline hammer and tong, or the employee wouldn't have filed the grievance in the first place. The union, faced with a grievance they may not support, can feel trapped into either aggressively arguing the grievance or risk losing the support of the bargaining unit. The mediator, as a neutral, can exert substantial persuasion to resolve such disputes. Other grievances where mediation can be particularly effective are those revolving around language inadvertently, or deliberately, drafted in ambiguous terms, or when the contract is silent on the specific issue in dispute.

During an arbitration hearing, witnesses are typically sworn, there is direct and cross examination of witnesses and exhibits are entered into evidence. The win-lose environment of arbitration may result in each of the respective parties attacking the credibility of the other's witnesses. The veracity of every utterance during testimony is subject to challenge, potentially undermining any previously existing spirit of cooperation between labor and management.

Grievance mediation is far less formal than most arbitration hearings. At a mediation conference, witnesses are not sworn, there is usually no direct and cross-examination of witnesses and there are no rules of evidence. During grievance mediation, the mediator will often meet with the parties separately to gain more depth of knowledge about why a grievance was filed or why the action, which precipitated the grievance, occurred in the first place. In that more relaxed environment, the parties are free to open up and discuss the issue. If the discussion leads to the issue being resolved in mediation, the resolution came without placing anybody in the 'hot seat' and without the often relationship damaging need to attack and destroy one another's witnesses.

A spirit of cooperation can be developed in grievance mediation. Ultimately, since the parties themselves are in control of the resolution, the grievance may be settled to the satisfaction of both parties. When labor and management come together to discuss their differences in a productive, non-adversarial (or at least less adversarial) environment, the cooperative skills and trust they develop can make their relationship stronger than before. If resolution still escapes them after honest and sincere effort they can move on to arbitration with greater understanding; less as combatants and more as advocates of differing opinions.

The key to successful grievance mediation is a sincere desire to solve problems and work together cooperatively. Not all grievances require compromise; being cooperative does not mean always giving in. Working with the assistance of a mediator may help the parties decide when compromise is appropriate and, if so, to what extent. The final decision, however, will normally continue to rest with the parties to the contract. When settlement is not possible through mediation, arbitration stands as an excellent means of resolving the grievance and arbitration may then be the logical dispute resolution process.