GRIEVANCE MEDIATION

IN THE UNION SETTING

Workplace disputes can be quite divisive on both an individual and group level. They often expose issues that undermine employees' attitudes and productivity. If allowed to persist, they can divide employees from each other and from supervision and undermine team effort.

In the union environment, disputes grounded in alleged collective bargaining violations may go through a lengthy process ending in binding arbitration. Arbitration is expensive, time consuming and contentious. For a variety of reasons, the grievance steps are often not very effective in resolving the dispute. An effective grievance mediation program can overcome these problems. In addition, it can address not only the surface complaint, but the underlying problem that is often the root cause.

This paper provides a thumbnail description of grievance mediation describing:

- the primary reasons for establishing a grievance mediation program;
- the nature of the process;
- the types of grievances appropriate for mediation;
- the five (5) essential steps of the process;
- a summary of the strengths and weaknesses of the process.

Primary Reasons for Labor and Management to Establish a Grievance Mediation Program

The primary reason employers and unions create grievance mediation programs is to avoid arbitration. The program should reduce costs, including attorneys' fees, employee, union and management time lost to arbitration, and the bad feelings and contentiousness that result from arbitration's adversarial "I win, you lose" approach.

Of equal importance, the parties may wish to broaden the subject matter eligible for grievance mediation to create a channel for resolving other stressful inter-personnel disputes that may not constitute collective bargaining agreement violations. The process may allow supervisors and managers as well as employees to use it. These kinds of disputes tend to interfere with intra-company communications, undermine productivity, increase unwanted turnover of employees and produce a contagious loss of employee motivation. Examples include decisions on promotion to supervision, work assignments, personality conflicts and special personal needs for time off and the like.

Joshua M. Javits, 1666 Connecticut Avenue NW, Suite 500, Washington, DC 20009
T 202.332.0490 F 202.332.3951 E jjavits@aol.com W www.dispute-resolution.biz

Nature of the Process:

Mediation aims to bring about the voluntary settlement of a dispute involving employees, supervisors and/or the Company using a neutral third party. Mediation enables the parties to properly understand the true nature of the dispute in order to reach a resolution. The emphasis is in cooperatively resolving the grievance, rather than on "winning." It is less emotional and confrontational than arbitration and diminishes the likelihood of hostile verbal or physical workplace incidents. It provides a forum for labor and management to work together and to practice dispute resolution approaches together. This builds a better relationship, which is especially important when contract negotiations begin.

What types of grievances are appropriate for mediation?

Union grievances are appropriate for mediation if they arise under a broad contract or company policy provision, do not involve essential interests of either party, and provide a wide range of possible settlements. Also, grievances are appropriate for mediation where the parties need a neutral decision but do not need a lengthy explanation as to why the neutral reached that decision. Examples are cases that turn on a factual issue, like an overtime assignment, a discipline grievance turning solely on credibility, or a narrow issue of contract or policy interpretation, such as bereavement pay.

Grievances or disputes for which mediation is less suited, or at least considerably more challenging, are those that are rooted in historic or repeated disagreements. In the union setting, such disputes include contracting-out of bargaining unit work, the extent to which the employer is bound to continue an alleged prior practice, grievances which turn on complex factual issues, those that raise issues in which the reasoning is more important than the result and those that present issues representing deeply held positions of the parties.

Many mediation agreements allow each side to submit only those disputes they wish to go through grievance mediation. Thus there must be mutual agreement before a dispute is mediated. This is most often the case when the process is initially implemented and both sides are unfamiliar with it. Later, they may agree that certain kinds of disputes be automatically submitted to the process.

Process:

Step 1. Draft rules

The company and union must draft the rules to govern the process. A mediator can facilitate this process to ensure that the parties understand the process and that the "protocol" grievance mediation agreement address the necessary elements. Questions that need to be addressed include: How do the cases get to mediation? How is the mediator chosen? At what point in the grievance process is a mediation conference convened? What kinds of cases are appropriate for mediation, and how are they separated from the rest of the cases? Where should the mediation process occur? Who should attend?

Two rules that should be specifically addressed are: (1) whether the mediator in a given case may serve

as the regular arbitrator on that same case; and, (2) that nothing said or done by the mediator, or the parties in mediation, may be referred to in arbitration or litigation except to enforce a written agreement to resolve the dispute.

Step 2. Mediator explains process.

The mediator opens the meeting by explaining the process of mediation and the roles of the mediator and the participants. It is essential for participants to understand the function of the mediator. The mediator is not there to decide the case or to help one side win, but to help both sides reach a settlement, to facilitate communications and cooperative problem solving; to emphasize the future, and to find resolutions rather than to assign fault.

Step 3. Parties' opening statements.

Parties make opening statements. Attorneys and party representatives play a lesser role than in arbitration and the parties themselves play a more active role. The grievant should express his/her position. The immediate supervisor or manager involved should also express his/her position. The parties should tell their stories in a factual, unemotional manner in joint sessions. Presentations should be direct without being too negative regarding the individuals present.

Step 4: Mediating:

The mediator moves the parties through two critical phases in the process, which lead to resolution. The first is to attain movement away from the parties' initial positions and lead to the first matter that can be resolved. The mediators should facilitate the parties' explanation of their interests and concerns. Clarifying questions and summarizing what has been said lets everyone know that their concerns have been heard and understood. The mediator should create an environment conducive to openness in which each party really listens to and attempts to understand the other party. The mediator may meet with each party separately to explore underlying interests (needs) as opposed to their surface positions (wants), to create doubt in the party's belief that they will prevail in arbitration, and to point out how proceeding to an adversarial proceeding like arbitration can hurt the relationship between the parties and foreclose a range of alternative options for resolution:

The second key event is bridging the last gap, a moment where the whole settlement will come together or fall apart. "Closing" a deal means overcoming the parties' natural psychological resistance to ending a "fight" before the "end: The parties themselves must be convinced of the advantages of settling as opposed to not settling and be in a willing frame of mind. Most important, they must have fully participated in the process - exposing their real interests, respecting the opposing parties' interests, coming up with acceptable options and shaping the final resolution.

Step 5. If a settlement is reached, write it up.

If a settlement is reached, it should be reduced to writing and signed by all parties. The settlement agreement should be clear, specific and realistic. If no settlement is reached, the mediator may assume the role of informal arbitrator and give the parties an immediate oral advisory opinion as to the party most likely to prevail in arbitration along with the basis for that opinion. In "med-arb" programs, the mediator, if the matter is not successfully resolved, becomes the arbitrator and his/her decision becomes final and binding.

There are advantages and disadvantages to this approach. The advantages are that the arbitrator understands the case quite well and has been exposed to the parties' interests. Thus, there is little in the way of "hidden facts" or deception or wastage of time or expense as there would be if another neutral subsequently were to hear and decide the case in arbitration. The disadvantages are based on the recognition that mediation and arbitration are very different and even inconsistent processes. Combining them into a single two-step process before the same neutral destroys the benefits each of them has separately. Arbitration demands an impartial umpire and the revelations given to the arbitrator in mediation will taint his decision-making. Similarly, the power of the arbitrator to make a final and binding decision will undermine the mediator's effort to empower of the parties in mediation to resolve their own dispute (with the mere facilitation of a mediator). Furthermore, if the parties to a mediation know that an arbitral decision is readily available, they will have less motivation to "bite the bullet" and reach a voluntary settlement themselves. Also the parties may tend to "posture" for the mediator and each other rather than being open and building trust.

Strengths of the Process

Mediation produces speedy resolution of cases. There are no transcripts, briefs or written opinions. The mediation typically takes less than one day. In addition, it is less expensive: no attorneys' fees, no court reporter, far fewer witnesses and observers. Generally, mediators can address several cases in one day. Furthermore, there is a far less contentious atmosphere than in arbitration. Perhaps, most importantly, there is often a constructive result since the parties focus on the underlying problem, not just the allegation on the surface of the grievance.

Ameditated solution gives the parties a greater opportunity to fashion a settlement that better takes into account the interests of all the stakeholders. Generally, remedies available to an arbitrator are circumscribed compared with the range of options the parties can agree upon. This is especially true with the help of a skilled mediator, who can assist the parties in generating a broad range of possible resolutions. Meditated agreements are more enduring than resolutions imposed by third parties, since the parties are more involved in the process, take ownership and are likely to readily assure implementation the resolution. Also, the parties learn the techniques of dispute resolution, a valuable lesson.

Weaknesses of the Process

If mediation is unsuccessful, time and expense are lost (although what was learned in mediation may be

useful or lead to post-mediation settlement). Furthermore, the opposing party is given exposure to the other sides' witnesses, facts and theories of the case that it can use in arbitration. Also, one side might use the process to re-open a subject previously agreed upon and "put to bed" in collective bargaining negotiations. The other side may see this as a misuse of the process. However, there is no obligation to reach agreement. On the positive side, the process affords both sides a forum for addressing issues in a non-coercive setting. In mediation, it takes two to tango.

Joshua Javits is a mediator and arbitrator based in Washington, D.C. He is former Chairman of the National Mediation Board and teaches courses in ADR at the Georgetown University Law Center.