COLLECTIVE BARGAINING UNDER WISCONSIN'S INTEREST ARBITRATION LAW FROM THE MEDIATOR-INVESTIGATOR'S PERSPECTIVE

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I. INTRODUCTION

What follows are some observations regarding the nature of the mediation process generally and the ways it works in the context of statutory interest arbitration.

While the "investigation" process referred to is that provided for in Sec. 111.77, many are the same as those involved in conventional interest arbitration under Sec. 111.70(4)(jm).

These observations represent just one viewpoint among several regarding possible approaches to the problems discussed, and they are not necessarily the viewpoint of the WERC.

II. DESCRIPTION OF MEDIATION AS A PROCESS

A. In private and state sector and some municipal cases:

-ordinarily provided by a governmental service: sometimes by private ad hoc neutrals
-ordinarily free of charge; ad hocs charge, of course
-generally consensual, that is:
-initiated only upon agreement of the parties
-mediator has no authority to require either side to agree or even to meet; depends upon ability to persuade parties in those regards
-primarily as regards contract negotiation (interest) disputes
-grievance mediation is also available, though not widely utilized

B. General functions mediation can perform:
-clarify: get information and get it straight: get positions; remind parties of clear legal principles and responsibilities, etc.
-filter out personalities
-create some degree of confidence that movement will be reciprocated; that progress is possible and settlement within reach
-narrowing alternatives under discussion; focus thinking on realities and major issues requiring most attention
-impact intra-caucus relationship and conditions preventing or discouraging settlement: e.g. press for hard decisions concerning priorities, etc. to be made; help leader or boost moderate voices' efforts to overcome unreasonable minority influences -provide: a scapegoat; a foil; an injection of levity; a prod; a stern voice; voice of reality;

a source of optimism or of creative suggestions -provide impetus to keep going long hours; to get back together -a means of testing other sides willingness or resolve without showing weakness

C. A mediator cannot be expected to be:
-a crutch to do your bargaining for you
a universally reliable means to wear down the other side; a proponent of your position alone
-a means of avoiding costing calculations or research or decisions
-merely a means to move to the next statutory step in dispute resolution
-able to provide intensive and creative work re large number of issues
-available indefinitely or where no progress is made or available at a moment's notice
-able to work effectively without being taken into caucus and confidence

D. WERC's general expectations of those conducting a mediation:
-attempt to get in touch with the parties promptly to schedule meeting
-make reasonable efforts to accommodate joint requests for scheduling on a particular date or offer to attempt to transfer the case to someone who can accommodate the parties' request
-make at least some efforts to coordinate trips with other cases (though no 100 mile requirement currently)
-get a settlement if one is at all possible, but do not unduly waste the parties' time or your own if a settlement appears clearly unattainable
-exercise sound judgment on whether to meet again and when
-work out disputes about mandatory/permissive subject disputes, if possible, before giving up on possibility of a voluntary settlement
-avoid blow-up that results in unnecessary impasse, litigation or dissatisfaction with the process
-make sure the parties feel every alternative was carefully explored

III. TECHNIQUES USED BY WISCONSIN MEDIATORS IN FULFILLING THEIR RESPONSIBILITIES

A. GENERAL OBSERVATIONS

-Techniques vary considerably from individual to individual and situation to situation - based on style and experience of mediator, mediator's familiarity with parties and issues and several factors relating to parties noted below.
-Mediators are allowed considerable flexibility and independence to adjust their techniques to their personalities and personal styles. They must be comfortable to be of greatest service and assistance to the parties they are working with.

B. MEDIATORS FACE DILEMMAS IN ATTEMPTING TO BALANCE:

-risks to mediator's credibility inherent in pressuring parties vs. retaining the parties' trust, respect and comfort with the process and the mediator
-need for expeditious handling of case vs. need to give parties reasonable opportunity to make informed choices and to exercise care in drafting offers and agreements

-desire to obtain a settlement if at all possible vs. adverse consequences for bargaining and mediation processes if either party feels misled, taken advantage of, or ineptly or inappropriately dealt with by the mediator

C. SITUATIONAL FACTORS THAT CAN AFFECT TECHNIQUES UTILIZED:

-are the parties: experienced // or inexperienced:
-knowledgeable about the law, about how to negotiate effectively, about one another, about existing comparables and other factors bearing on likely bargaining outcomes // or not
-concerned only about impact on instant unit and employer // or also concerned about reputation, keeping this and other clients, this and other units, organizing still others, other bargains, etc.
-excitable // or level-headed
-are the leaders flexible and the team or principals tough // or vice versa
-are the leaders secure // or are they worried about job, holding unit or members, maintaining unity, etc.
-are the teams authorized to move and deal // or are they on short strings
-is this a good and mature relationship of longstanding // or is it a new or historically hostile one, e.g., history of litigation and/or strikes and strife in past, political sabotage, table and rejection treachery, etc.
-are the parties: optimistic, egotistic, pessimistic, fatalistic
-is there strong administrative staff, strong line management, strong elected or appointed officials, strong local union leadership, strong union staff person, etc.
-are there many issues // or relatively few
-are there other pattern-setting settlements already in place // or not

D. TECHNIQUES TYPICALLY USED DURING A MEDIATION

1. Before meeting with the parties:
-telephone calls to principal representatives to obtain basic information about the dispute and to work out date for meeting
-letter confirming date, time and location of meeting, and asking for contract and bargaining positions in writing

2. At the outset of initial meeting:
-meet with both parties together in a joint session -introduce self to each member of each team
-have parties sign in on sheet with their titles (a "scorecard")
-gather general information concerning, size and composition of unit, history of negotiation, status of predecessor agreement, etc.
-explain role of mediation and its limits
-discuss approach to confidentiality – assure parties mediator will maintain confidentiality of indicated flexibility when requested to do so
-inform parties that mediator may suggest: tradeoffs, compromises, alternative solutions to problems, ideas to consider
-urge parties to share their true concerns, priorities and reasons.

-audit the issues in joint session: proposal, status quo, other party's response position

-obtain copy of old agreement

-clarify status of pre-mediation tentative agreements

-get sense of: evident priorities, number of issues, interest groups within unit, personal concerns of individuals at table

-make some tentative and quick judgments about how to best proceed

3. Subsequent to initial joint session:

-separate the parties and caucus separately with each to learn parties' priorities, reasons, bases for concerns (desire it, others have it, problems or non-problems during administration, etc.)

-encourage parties to reduce number of issues outstanding by:

-drop for drop

-this for that

-compromises

-drop "without prejudice"

-ask "what if" they proposed this, would you accept it (no risk of showing weakness, etc) (may be mediator's or other party's idea)

-encourage response with different package if package is not entirely acceptable

-listen and watch for clues to possible solutions or compromises

-allow caucus opportunities when requested or when appear likely to be useful; sparingly knock on door during long caucuses to ask how caucus is going

-avoid doing anything that will reduce parties' confidence and trust -- keep clear distinction between what other side says and what mediator is personally appearing to endorse or suggest; don't take "no" for an answer too early

-request further explanation of position

-request parties' priorities

-probe priorities or concerns by asking what is underlying concern and seeking means of achieving the objective while avoiding objectionable aspects from other side's point of view

-suggest packaging of items for trade-off, drop for drop, etc.

-explore or initiate other approaches to generate movement such as:

-non-monetary items first, then money

-solve the knotty issue and others will be easy

-clear away easier issues to give momentum and focus

-group or regroup issues or take them one at a time

-take the time to attempt to change a party's unrealistic view of consequences of non-agreement..

-encourage parties to be realistic in terms of consequences of move or non-move

-mediator's substantive suggestions or sharing of opinions about potential outcomes can be risky and often unhelpful if offered too early, but can be more effective once mediator is trusted and viewed as competent and well-informed

4. If it appears that settlement may not be achieved:

-make sure parties each know exactly why that happened and what risks they are taking by not settling

-decide how to proceed in face of non-settlement:
-another meeting
-another meeting if movement is indicated by date certain
-continued exchange of offers by parties
-mail-in exchange and telephone evaluation of usefulness of another meeting

5. Upon achieving a settlement:
-close with care to avoid post-write-up or post-ratification misunderstandings -- keep the parties at the meeting to make sure the tentative agreement terms are mutually understood the same way – though participants may be tired, end of meeting a which agreement is reached is usually the best time and atmosphere to review the agreements reached and preferably to reduce them to a written summary that is reviewed approved by all participants
-determine when and in what order ratification will undertaken
-stress value and need for recommendation and effective selling of the package by both of the bargaining teams

E. ADDITIONAL TECHNIQUES USED ON OCCASION BY SOME MEDIATORS

-suggest the parties negotiate further on their own or exchange certain information before mediation meeting is set up or convened
-meeting with one party where lengthy discussions/explorations are needed
-extended or reconvened joint session for exchange of information, discussion of complex issue, establishment of bargaining history, etc.
-"chance" or semi-planned meeting in hallway, restaurant etc., with one or both chief spokesperson(s)
-openly arranged meeting with one or two representatives of each side
-inter-meeting communications with principal representatives
-post-meeting meetings between the parties without mediator for further bargaining, exchanges of information, etc.
-post-meeting submissions to or through the mediator
-mediator's proposal to be presented to union membership and employer governing body
-public announcement of mediator's prom to both sides (rare)
-cooling-off period before scheduling of another session
-mediator serving as spokesperson in response to press inquiries, if parties mutually agree -call upon parties to refrain from public statements and press releases for a period of time
-call in additional mediator for assistance (rare)
-call upon both sides to pare down to specified number of issues
-personal plea to one or both to do or not do something

IV. DIFFERENCES IN MEDIATION PROCESS WHERE DISPUTE IS SUBJECT TO FINAL OFFER INTEREST ARBITRATION

Mediation preceding final offer interest arbitration differs from the private and state sector mediation described above, in the following ways.

-NOT WHOLLY CONSENSUAL (can be invoked by either party or the Commission)

-NOT WHOLLY PRIVATE (results of unsuccessful mediation are a matter of public record)

-PARTIES DO NOT HAVE THE LAWFUL RIGHT TO SAY "NO" (no right to strike or lockout, and lawful strike is subject to court imposed arbitration if found to harm public health or safety)

-NOT PROCEDURALLY STRAIGHT FORWARD (i.e., not merely a choice by the parties whether to jointly call in a mediator or not). Rather, A COMPLEX COMPULSORY PROCEDURE IMPOSED BY LAW CULMINATING POTENTIALLY IN A FINAL AND BINDING OUTSIDE ARBITRATOR'S DECISION. Process designed to encourage the parties to maximize voluntary settlements and minimize extent of resort to third party decisions by:

-MANDATORY MEDIATION by WERC and possible agreed-upon follow-up mediation by interest arbitrator with award-selection authority.

-MUST REDUCE FINAL OFFERS ON MANDATORY SUBJECTS TO WRITING

-FINAL OFFERS NOT UNILATERALLY AMENDABLE AFTER CLOSE OF WERC INVESTIGATION

-MUST PARTICIPATE IN PROCEEDINGS BEFORE OUTSIDE ARBITRATOR attendant costs and delays if no voluntary agreement

-RISK OF ARBITRATING HEIGHTENED BY LIMITING ARBITRATOR TO SELECTION OF ONE PACKAGE OR THE OTHER without compromise (unless the parties agree on some other form of arbitration), and hence increasing the potential consequences of non-settlement.

-UNCERTAINTY OF OUTCOME HEIGHTENED by BROAD STATUTORY CRITERIA with NO MANDATED WEIGHTING and subject to limited administrative and judicial review. Decisions have generally emphasized internal and external comparables and have placed burden on the party seeking to change a historical arrangement or relationship

-PROCESS PROTECTED FROM MOST DELAYS BUT EXPRESSLY SUBJECT TO DELAY FOR PROCESSING OF DISPUTE AS TO MANDATORY/NON-MANDATORY NATURE OF PROPOSAL. Objections can be timely raised at any time prior to close of investigation.

V. ADDITIONAL RESPONSIBILITIES OF THE MEDIATOR IN DISPUTES SUBJECT TO FINAL OFFER ARBITRATION

-GATHER INFORMATION that forms the basis for the agency's subsequent determination of existence of an impasse and substantial compliance with conditions precedent to the initiation of the arbitration procedures;

-OBTAIN a mutually executed STIPULATION of items on which the parties unconditionally agree to be bound regardless of the outcome of a subsequent arbitration proceeding;

-CONDUCT EXCHANGES OF contemplated FINAL OFFERS;

-CLOSE THE INVESTIGATION -- step which ordinarily cuts off the right of either party to further change its final offer absent permission from the other side. Under WERC rules and

decisions investigator is to close only when satisfied that each side with knowledge of the contemplated final offer of the other has no further move to make, and only after no further timely objection to non-mandatory nature of a proposal is pending;

-and REPORT THE SUBSTANTIVE RESULTS of the investigation to the Commission and through it to the mediator-arbitrator and the public in the form of the stipulation of agreed items and the parties' ultimate final offers.

VI. SOME OF THE GENERAL PROBLEMS THE MEDIATOR-INVESTIGATOR FACES

-the mediator is more than at the parties' consensual service; the mediator is also an administrative agent responsible for processing the dispute as provided by law: sometimes the administrative purposes are contrary to those of one or both parties

-some parties resent the imposition on their former prerogatives and demonstrate their frustrations by varying degrees of non-cooperation, delay, objections, declaratory ruling petitions and other litigation.

-parties can come to look upon arbitration as a means of avoiding responsibility for settling some or all of the issues, or as a means of resolving the dispute without need of ratification.

-parties can view the process as one in which there is little incentive for the other side to stretch to achieve a settlement

-parties may expect another "kick at the cat" when the outside arbitrator mediates – expecting hat although the offers are unamendable without mutual agreement, that the interest arbitrator will be able to overcome any unwillingness on the other party's part to permit a modification of final offers.

-parties may feel they need to "hold something back" for the interest arbitrator rather than revealing the full range of their possible flexibility prior to that step in the procedure.

-parties may come to the mediation or investigation without a full understanding of the relatively complex realities imposed by the final offer system, the mechanics of final offer exchanges, the significance of the close of the investigation, the risks involved in pursuing a particular proposal or overall position, or the need for detailed preparation in advance of arbitration.

-parties may conclude that it is in their best interests to delay or to speed up the process in order to avoid or take advantage of existing or developing comparables, cost of living or other elements of proof that will not or may not be as advantageous or disadvantageous with the passage of time. Parties may object that proposals of the other are non-mandatory subjects as a means of prolonging the process generally or for tactical advantage.

-parties may be unwilling to submit a "final offer" when it is called for by the investigator; others may become frustrated at the other party's or the investigator's failure to follow through on commitments concerning when the final offer exchange will be completed.

-the mediators' dilemmas are often more sharply presented, requiring a balancing of:

-risks to mediator's credibility inherent in pressuring parties (calling for final offers, threatening to close the investigation, emphasizing risks of arbitral setback) vs. retaining the parties' trust, respect and comfort with the process and the mediator.

-benefits of a frank discussion of comparables and risks of arbitration vs. concern about directing attention toward something other than a complete settlement through mutual accommodation and mutual problem solving

-need for expeditious handling of case vs. need to give parties reasonable opportunity to make informed choices and to exercise care in drafting final offers and stipulations

VII. MEDIATION TECHNIQUES PARTICULARLY APPLICABLE IN MEDIATIONINVESTIGATION

-make certain that the parties understand the process and the realistic alternatives available to them in it at any given time, and make informed choices including:

-general costs and delays inherent in arbitrating; the more issues outstanding, the greater the potential cost and delays in preparing, presenting and having the case decided

-possibility that investigation will close with party in disadvantageous position, potentially foreclosing further modification of final offer--can't rely on mediation by mediator-arbitrator

-reduce risk of arbitration loss by avoiding long list, unusual cost, sore thumbs, unjustifiable resistance to other's proposals, unjustified proposals for changes in status quo or deviation from historical relationships or arrangements

-create settlement incentives for the other side by offering

-"stick" -- make your offer reasonable but have it hurt other side on item(s) they're vulnerable on, i.e., a "zinger" if you can find one

-"carrot" -- offer better terms if settle without arbitration -- solve problems for other side they couldn't hope to fix through arbitration

-early revelation of both may move things along

-draft and work around uncertainties of litigation re prohibited practice allegations, objected-to subjects of bargaining, unsettled areas of law

-at least narrow issues if you can't settle all of them -- saves money and time with the outside arbitrator and perhaps reduces risk of loss

-possible that full or partial settlement can provide some outcomes that arbitrating cannot:

-non-mandatory subjects

-complex issues requiring mutual efforts to achieve a workable solution

-issues that would be sore-thumbs or at least detract from reasonableness of a package

VIII. RECOMMENDATIONS TO THE PARTIES ON EFFECTIVE USE OF THE MEDIATION AND MEDIATION-INVESTIGATION PROCESSES

-use the mediator's time effectively

-know what mediator can do and can’t be expected to do for you (noted above)

-don’t over-utilize mediation -- try to get down to manageable number of issues before resorting to mediation; sometimes a bilateral meeting before a scheduled mediation session can be useful

-be ready to work, to reconsider, to go long, to work between meetings

-cooperate as much as possible regarding scheduling, submitting preliminary final offers and other documents, etc.

-give the mediator enough time to get the job done --

-try to avoid limitations on the time you and your team have available for mediation

-let the mediator know in advance of limits on availability of you or various members of your team; it may affect the mediator's timing and pace

-know the law and your options under it; learn your WERC mediator's ground rules and expectations and know the limitations on what the mediator can expect/require either party to do

-come prepared --

- have costing issues discussed between the parties and resolved by the time the mediator arrives

-get authority to bargain meaningfully and try to know the limits of your authority, the reasons for your proposals, and your priorities

-have some alternatives in mind or on paper that you would consider

-have an idea what you are likely to offer as an arbitration position if an acceptable settlement is not achieved

-help the mediator to be effective and credible in both rooms -know your contract and your proposals and help the mediator to quickly become familiar with the differences between them

-know the people involved in the bargain and help the mediator get to know them quickly

-confide in the mediator --

-trust the mediator to maintain confidences, but tell the mediator when you expect the mediator to do so.

-share your problems and your reasons and other information as openly as possible; if the mediator knows what your goals and priorities and concerns are, the mediator can most effectively try to achieve them for you and help the other side to do the same and/or help the other side understand why your side is unwilling or reluctant to agree to some alternative.

-don't harm the mediator's credibility with the other side --

-don't monopolize the mediator's time

-don't appear unduly familiar with or friendly with the mediator

-use the mediator to try ideas you prefer not to have proposed on your behalf, but don't expect the mediator to unconditionally recommend settlement entirely on your terms.

-level with the mediator -- misleading or not informing mediator about important aspects of an issue or the relationship only to have the other side spring them on the mediator by surprise, causing the mediator to lose credibility in the other room. You are welcome to maintain your informal lines of communication with the other side, but share what you hear through them with the mediator to validate or correct the information or impressions your informal sources have given you.

-allow the mediator to show the other side both a stick (your likely offer for arbitration) and a carrot (your more attractive offer for settlement) giving the other side something to lose if they choose not to settle

-be willing to share your data and rationale supporting your anticipated arbitration proposal; this may enable the mediator to cause the other side to be less certain of victory in an arbitration or less convinced that their proposals are more reasonable than yours

-keep in mind that:

MEDIATORS DIFFER as to experience, talents, background, styles, personalities, schedules, workloads (decision writing and mediation), particular day (health, family problem, long drive, lack of sleep, lack of food, etc.)

-some mediators view mediation as most enjoyable, others as the least enjoyable; some as the most rewarding others as the least rewarding of their functions.

MEDIATORS TEND TO HAVE CERTAIN BIASES. They are:

-committed to collective bargaining process as means to peaceful resolution of disputes and for translating relative power into words

-settlement oriented – believe best settlement is the one the parties hammer out themselves -they may consider it a defeat if parties do not reach total voluntary settlement

MEDIATORS MAY BE RELUCTANT TO:

-give unqualified advice on legal issues
-do costing/computations
-to make judgments about who's being reasonable or what is "right"
-to carry threats
-to create bargaining history -- prefer that parties do it face to face

MEDIATORS, AS ALL NEUTRALS, NEED TO AVOID APPEARANCE OF PARTIALITY

-not appearing to lean only on one party
-not spending much more time in one caucus than the other
-paying for own meals
-not appearing more friendly or familiar with one party than with the other

MEDIATORS TEND TO DISFAVOR CONDUCT THAT UNDERCUTS THEIR EFFECTIVENESS

-treating mediator as member of other side, as mere messenger, as insignificant
-disregard of previous procedural commitments
-lack of authority or lack of preparation
-unwillingness to work long hours

-unnecessarily emotional interactions with mediator or other side

-unduly long caucuses to do costing of proposals, prepare basic documents, determine priorities or overcome inability to make group decisions.

-sessions that are ultimately unproductive

-disputes about what was or was not tentatively agreed upon before mediator arrived

-parties treating processes away from table as the inevitable locus of ultimate dispute resolution; parties not letting mediator know about external developments or processes that are having major impact on the dispute

-unilateral .attempts to greatly speed up or slow down processing of the dispute regardless of the status of the negotiation

-failure to have tentative agreements in contract language form

-failure to have costing, proposals, former agreement, other related documents available for the mediator at or in advance of first meeting

-taking unreasonably long to get post-meeting paperwork submitted
-keeping the mediator out of the caucus much of the time
-failing to level with the mediator early or at all

-misleading the mediator about facts, priorities, etc.

MEDIATORS TEND TO APPRECIATE CONDUCT THAT ENHANCES THEIR EFFECTIVENESS OR RECOGNIZES THEIR POTENTIAL CONTRIBUTION TO THE PROCESS

-opposite of the above items, including:

-costing methods agreed upon or at least discussed with other side

-dry run costings of various alternatives to current position completed before meeting; or tools needed to do amended costings available during meeting

-appropriate size of committee – large enough to have authority to move without constantly consulting others; not so large as to lack the ability to meet at reasonable times and to reach decisions reasonably quickly

-people who know problems and contract available

-clearly identify your chief spokesperson so mediator knows whom to address and whose indications are to be taken as those of the team

-hearing promptly from parties re scheduling, re settlement ratification or non-ratification and re problems with scheduled dates as soon as they develop.

IX. SOURCES OF ADDITIONAL INFORMATION ABOUT MEDIATION

-excellent booklet: Guide for Labor Mediators (1976) by Eva Robins with Tia Dennenberg; Industrial Relations Center, University of Hawaii, 2404 Maile Way, Honolulu, Hawaii 96822

-more thorough treatment:: Mediation and the Dynamics of Collective Bargaining (1971) by William Simkin; BNA Books, Washington, DC.

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