WERC MEDIATION AND ARBITRATION SERVICES AND HOW TO USE THEM EFFECTIVELY

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I. Collective Bargaining Statutes Administered by WERC

-Private Sector -- (Wisconsin Employment Peace Act, Sec. 111.01 et seq.) WEPA precursors since mid-30's, WEPA '39

-Municipal Sector -- (Municipal Employment Relations Act, Sec. 111.70 et seq.) MERA precursors since '59, MERA '71, numerous amendments especially regarding impasse resolution procedures: med-arb '78, '86, '93 (QEO introduced re teacher bargains) , '95 amendments (QEO made permanent; greatest weight and greater weight criteria added to general employee interest arb criteria; authorized expanded case filing fees to fund five existing WERC professional staff positions), '97 and '99 amendments (minor revisions of teacher QEO)

-State Sector -- (State Employment Labor Relations Act, Sec. 111.80 et seq.) SELRA precursors since '65, SELRA '71, coverage expanded over time to include UW program, project and teaching assistants, assistant district attorneys, and UW Hospitals and Clinics Board employees.

-distinctive common elements of collective bargaining laws:
- -contract enforcement jurisdiction
- -grievance arbitration by agency personnel
- -single multi-function and multi-sector agency

II. Personnel Appeals Statutes Administered by WERC
- -transferred from now-abolished Personnel Commission in July of 2003
- -review of certain primarily State of WI personnel transactions involving:

:
- -merit recruitment and selection decisions --**Sec. 230.44(1)(a), Stats.**
- -classification decisions -- **230.44(1)(b)**
- -layoffs and disciplinary actions -- **230.44(1)(c)**
- -classified civil service hiring process decisions -- **230.44(1)(d).**
- -noncompetitive appointments of disabled veterans -- **230.44(1)(dm)**
- -discharges of unclassified Corrections employees -- **230.44(1)(f)**
- -grievances involving nonbargaining unit employees **230.45(1)(c)**
- -hazardous duty pay for nonbarg.. unit employees -- **230.45(1)(d)**
- -county merit system rules disputes -- **230.45(1)(e)**

II. Resultant Roles of Wisconsin Employment Relations Commission
- -rule making (comprehensive rules revision project on-going)
- -adjudication
  - -unfair labor practice/prohibited practice complaints
  - -representation and union-security referendum petitions
  - -scope of bargaining and other declaratory ruling petitions
  - -personnel appeals
- -filing fee setting for certain WERC services
  - -$500 per grievance arbitration with fee split between parties
  - -$500 per mediation-type case, with fee split between partes
  - -$80 paid by complainant for labor relations complaints
  - -$50 paid by appellant for most personnel appeals
  - -various fees for labor-management cooperation training/facilitation
- -mediation of interest and grievance disputes
- -gatekeeper of impasse resolution processes
- -interest arbitrator/fact finder appointment -- ad hoc lists, roster and policies
  - -http://werc.wi.gov/ad_hoc_roster_policies_and_application_form.htm
- -grievance arbitration -- by WERC personnel or by ad hoc roster arbitrators
- -conduct of representation elections and union security referendums
- -encouragement and support of labor management cooperation activities
- -public information services for groups, classes and training programs
- -information gathering, reporting and publishing

III. Basic Nature of Wisconsin Employment Relations Commission
- -not the former DER or the current OSER
- -not ERD or LIRC of DWD, not DOL, and not WEAC.
- -independent agency, 3 commissioners, 6-year terms, 1 chairperson
- -professional staff -- general counsel, team leaders, Madison and out-state
- -support staff -- elections supervisor, publications sales
- -headquarters office in Madison -- PO Box 7870, Madison; (608) 266-1381
- -hearings/mediations normally conducted near parties' locations
- -website: http://werc.wi.gov

IV. WERC Dispute Resolution Procedures
- -interest disputes (disputes about terms of a new contract) subject to:
  - -binding, compellable final offer package interest arbitration
    - -general employees other than teachers -- **111.70(4)(cm)6**
    - -police-fire (except Milwaukee police and $\leq$2500 pop.) -- **111.77**
    - -teacher disputes unless employer offers QEO -- **111.70(4)(cm)5s**
  - -binding, compellable conventional interest arbitration
    - -City of Milwaukee non-supervisory police -- **111.70(4)(jm)**
    - -City of Milwaukee supervisory police -- **111.70(4)(jm)**
  - -non-binding, compellable fact-finding
    - -police and fire in populations of 2500 or less -- **111.70(4)(c)3**

-non-binding, non-compellable fact-finding
-State of Wisconsin bargaining units -- **111.88**

-steps potentially involved in interest disputes
-negotiation
-mediation by WERC mediator/investigator
-impasse determination by WERC
-arbitration or fact-finding, if applicable, by ad hoc roster member

-grievance disputes (disputes about meaning and application of existing contract)
-final and binding grievance arbitration (general or specific submission)
-by WERC-employed arbitrators
-by WERC Ad Hoc Roster arbitrators
-grievance mediation by WERC-employed mediators

-disputes subject to WERC adjudication mediated/conciliated
-by WERC-employed conciliator not involved in decision
-by WERC hearing examiner assigned to adjudicate the dispute

-disputes pending before WERC-employed grievance arbitrator
-by WERC-employed grievance arbitrator

-labor-management cooperation training and facilitation
-joint committee effectiveness
-consensus bargaining

V. Using WERC Mediation Services Effectively (separate outline)

VI. Using WERC Grievance Arbitration Services Effectively (separate outline)

VII. Using WERC Web Resources Effectively (separate outline)

USING WERC MEDIATION SERVICES EFFECTIVELY

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. 111.70(4)(cm), Stats., nearly all of the problems and techniques noted are the same as those encountered and used in mediation/investigations preceding municipal interest arbitration under Sec. 111.77, and many are the same as those involved in conventional interest arbitration under Sec. 111.70(4)(jm), and in fact-finding under 111.70(4)c.3., Stats.

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 government; sometimes by private ad hoc neutrals
-ordinarily free of charge; ad hocs customarily charge for fees and expenses
-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
    -mediator 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, where no progress is made, or 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 WERC 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
-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 response to non-settlement:

-another meeting

-another meeting if movement is indicated by date certain

-continued exchange of offers by parties

-exchange offers by mail, then confer re usefulness of another meeting

6. 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
-further unmediated meeetings for more bargaining, information exchange, etc.
-post-meeting submissions to or through the mediator
-mediator's proposal to be presented to union membership and employer board
-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 agree
-call upon parties to refrain from public statements/press releases for a while
-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 PACKAGE 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 -- compellable by either party or WERC

-NOT WHOLLY PRIVATE -- final offers, awards and some meetings are public

-PARTIES DO NOT HAVE THE LAWFUL RIGHT TO SAY "NO"

-NOT PROCEDURALLY STRAIGHT FORWARD Process designed to encourage the parties to maximize voluntary settlements and minimize extent of resort to third party decisions by:

-MANDATORY MEDIATION by WERC

-WRITTEN OFFERS ON MANDATORY SUBJECTS REQUIRED

-ULTIMATE FINAL OFFERS NOT UNILATERALLY AMENDABLE

-COMPULSORY ARBITRATION IMPOSES COSTS AND DELAYS

-EITHER-OR OFFER SELECTION HEIGHTENS PARTIES' RISK

-BROAD STATUTORY CRITERIA CREATE OUTCOME UNCERTAINTY 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

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

-GATHER INFORMATION re existence of impasse

-OBTAIN STIPULATION of agreed items

-CONDUCT EXCHANGES OF contemplated FINAL OFFERS;

-CLOSE THE INVESTIGATION -- cuts off the right to unilaterally change offer

-REPORT THE SUBSTANTIVE RESULTS of the investigation to WERC

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 all 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 balancing:

-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 MEDIATION-INVESTIGATION

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 detracting from package reasonableness

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 and cannot be expected to do for you (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 limits on the time you and your team are available

-let the mediator know in advance of limits on your availability

-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/resolved prior to mediation meeting

-get authority to bargain meaningfully

-try to know the limits of your authority

-know the reasons for your proposals, and your priorities

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

-have an idea what you are likely to offer if case goes to arbitrator

-help the mediator to be effective and credible in both rooms

-know your contract and your proposals

-help familiarize the mediator quickly with the differences between them

-know the people involved in the bargain

-help the mediator get to know the people involved quickly

-confide in the mediator --

-trust the mediator to maintain confidences

-but tell the mediator what you expect to be kept confidential

-share your problems and your reasons

-share 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 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.

---end mediation outline---

USING WERC GRIEVANCE ARBITRATION SERVICES EFFECTIVELY

INTRODUCTION

What follows are some observations from the arbitrator's perspective about the grievance arbitration process in Wisconsin and how parties can meet arbitrators' needs and expectations as they use that process.

These observations represent just one of several possible viewpoints about many of the matters discussed. They are the observations of the author, and not necessarily those of the Wisconsin Employment Relations Commission.

DESCRIPTION OF GRIEVANCE ARBITRATION AS A PROCESS

Grievance arbitration is a privately agreed-upon method of resolving disputes arising under a collective bargaining agreement

Arbitrators are selected by one or a combination of agreed-upon procedures, typically as a single arbitrator, but occasionally as chair of a tri-partite board. Typical grievance arbitrator selection methods include:

- -WERC-employed arbitrators -- non-refundable filing fee
  - -joint request for "staff" panel
  - -joint request for particular assignee(s)
  - -general request for assignment
- -ad hoc arbitrators -- arbitrators' individual fee and expense policies
  - -case-by-case selection is common, with back up system
  - -agreed-upon lists
  - -WERC lists
  - -FMCS lists
  - -AAA lists
  - -other AAA tribunal services

The parties have a right to expect the arbitration to be scheduled and conducted consistent within the limitations of applicable law, ethics codes, the parties' agreement and established arbitral principles and practices, and decided in accord with established decisional standards.

The primary sources of and limits on a grievance arbitrator's authority include:

- -legal limits -- Sec. 788.10, Stats. -- narrow scope of review of award
  - -evident partiality
  - -procedural misconduct prejudicing the rights of a party

-unreasonable denial of a request for postponement
-refusal to receive pertinent and material evidence
-otherwise denying a party a fair hearing
-exceeding contractual authority
-contractual limits
-contract grievance and arbitration procedures
-grievance definition
-specific limits on arbitrator authority
-substantive contract provisions
- award must draw its essence from the agreement
-case-specific limits
-the grievance and its history of pre-arbitral processing
-the issues submitted by the parties for determination
-the record evidence received during the hearing

The decisional standards used by arbitrators in resolving grievance disputes include:

-contract language
-standards of construction -- recognized rules for inferring what the parties intended by the contract language they used, for example:
-read the contract as a whole
-avoid rendering any part of the contract meaningless
-to express some thing is to exclude all others
-interpret narrowly against the drafter
-custom and practice in the relationship and industry
-longstanding
-uniform
-mutually understood
-bargaining history
-context in which agreement was reached
-communications between the parties during negotiations
-substantive rules of law
-equitable principles
-other arbitral principles and practices, for example:
-the various requirements implied by a "just cause" standard
-the meanings of "senior qualified" vs. "relative ability" standards
-the employer presents evidence first in a discipline case

ARBITRATORS' OBJECTIVES IN HEARING AND DECIDING GRIEVANCE DISPUTES

Grievance arbitrators' general objectives include:
-maintaining/developing effective working relationships and acceptability with advocates and parties involved

-conducting a hearing at a level of formality/informality with which the parties are comfortable, free of undue bickering and hard feelings.

-enabling key participants to "get it off their chest" where appropriate

-developing a sufficient factual record to support reliable and efficient outcome determination and award preparation processes

-using the arbitrator's and parties' time efficiently

-for a WERC-employed arbitrator: managing a caseload

-for an ad hoc arbitrator: managing a caseload and earning reasonable compensation on a full-time or part-time basis

-conforming to applicable ethical standards – examples:

-disclosure of relationships

-avoiding improper ex parte communications

-conforming to applicable legal standards such as:

-fair notice of hearing and of nature of issues to be heard

-opportunity to be heard in person or through representatives

-right to effectively gather and present evidence

-right to cross-examine opposing witnesses

-impartial decision-maker

-conforming to applicable administrative standards regarding, such as:

-timeliness of award issuance

-fees and expenses issues

-other applicable rules and policies

-producing an award:

-resolving the issues presented

-not creating more problems for the parties than it solves

-able to withstand judicial review, if any

-consistent with (or at least aware of) mainstream arbitral thought

-within the range of anticipatable outcomes and rationales

-leaving all parties feeling that -- win or lose -- they received a fair hearing and a thoughtful consideration of their evidence and arguments

WHAT ARBITRATORS PREFER PARTIES TO DO THAT HELPS ARBITRATORS ACHIEVE THEIR OBJECTIVES

Most arbitrators will tend to appreciate parties' conduct that facilitates achievement of their objectives noted above. For example, conduct that:

-affirms their reputation for neutrality and competence

-promotes their future acceptability to these and other parties

-avoids unnecessary issues or complications

Conversely, arbitrators will tend not to appreciate parties' conduct that:

-draws their reputation for neutrality and competence into question

-threatens their future acceptability to these and other parties

-unnecessarily lengthens or complicates the hearing or award writing

What follows is a list of recommendations to grievance arbitration parties on how to effectively use the process -- they are offered roughly in the order in which they might arise in a typical grievance arbitration case.

preparing the case for arbitration

-do a thorough factual investigation

-prepare witnesses, but don't script them

-understand other side's case and develop meaningful responses to it

-emphasize the full contractual, relationship and operational consequences of the rulings you and the other side are requesting

-make it easy for the arbitrator to reach the result you advocate by:

-keeping your case as clear and simple as possible

-finding at least one persuasive, internally consistent theory for ruling in your favor that the arbitrator is likely to view as an outcome and rationale that both parties would consider to be among the possible reasonable outcomes in the case.

-offering additional alternative theories where possible to reduce risk

-presenting evidence supporting all of the elements necessary to your theory or theories.

-try not to let your case depend entirely on the arbitrator adopting a non-mainstream rationale or an unusually harsh interpretation.

-minimize uncertainties about the impact a ruling in your favor would have on the parties in the future.

-if possible, offer the arbitrator ways to rule in your favor without having to decide that someone has acted in bad faith, engaged in moral turpitude, or intentionally lied.

-anticipate and meet the other side's arguments with countervailing evidence or persuasive arguments; don't overlook or ignore them and rely on the arbitrator to figure out and offer up a reason to reject them.

-try not to present evidence or arguments that reflects an attitude so arrogant, unyielding or extreme as to invite the other side or the arbitrator to find a way to hold you, your witness or your client to the same sort of unreasonable standard.

selecting the arbitrator

-unilateral requests - avoid unilateral requests for or against particular arbitrators; WERC currently tries to honor joint requests; it ignores unilateral ones.

-joint requests - submit joint requests to WERC ASAP to avoid need for reassignment; offering WERC a group of jointly requested arbitrators geographically close to the hearing site will improve likelihood that the agency will be able to honor the request.

pre-hearing communications

-ex parte communications - do not argue (or drop hints about) the merits of your case during pre-hearing communications with the arbitrator

-requests for time limit waiver - be flexible in response to the arbitrator's request for a waiver of time limits on award issuance.

-assuring impartiality - feel free to ask questions as necessary to satisfy those you represent that the arbitrator is impartial.

-transcript arrangements - if the hearing will be lengthy or if witness credibility is likely at issue, a transcript is preferable to most arbitrators

-subpoena administration – comply with your witness and travel fee obligations as regards adverse witnesses

-subpoena use - do not unnecessarily impose on witnesses' time in the arbitrator's name

<u>scheduling the hearing</u>

-initial scheduling - cooperate in getting the case scheduled on a mutually acceptable date, time and location

-canceling/rescheduling - try to determine the other party's position regarding your request and communicate same with the request to the arbitrator. Consider a hearing canceled only when the arbitrator confirms cancellation. Initiate communications requesting cancellation/postponement as early as possible.

<u>hearing room arrangements</u>

-make sure room is suitable and flexibly available time-wise

-accommodate arbitrator's varying preferences

-example: let no one read my notes

-example: let me face the witness

-example: give the witness a place for papers

<u>social amenities at the hearing</u>

-do not greet or treat the arbitrator as an old friend -- stay at arms' length

<u>settlement efforts</u>

-arbitrator preferences and practices vary widely

-let arbitrator know if you would welcome a settlement discussion

-let arbitrator know if you do not welcome a settlement discussion

-consider limiting the time devoted to settlement discussions

-involve arbitrator as mediator only with full mutual consent

-settlement discussion content is not record evidence or argument

<u>framing the issues</u>

-use great care in formulating the issues for determination

-arbitrator needs agreed issues or authority to formulate them

-issues should be neutrally stated and cover all matters in dispute

-example: "What shall be the disposition of the grievance dated ___"

preliminary procedural issues

-meal breaks and quitting times - disclose your special needs or strong preferences ASAP - if the case can be completed without an additional day of hearing, many arbitrators will prefer to do so

-share/clarify expectations re roles of appointees to tri-partite boards

-alert arbitrator and other party of potential unusual evidentiary or procedural requests ASAP, examples:

-advocate intends to call self as a witness

-request to sequester witnesses until called

-possible need to take testimony by telephone

-possible need to take witness testimony out of normal order

-confidentiality requests - alert the arbitrator and other party ASAP of any concerns about sensitive information that should not be included in award or kept in files open to public access

-requests concerning award publication - be aware of publication requirements and practices and how to overcome them

-bench decision requests - suggest a bench decision where you are comfortable doing so, but do not expect the arbitrator to provide one in the absence of unequivocal mutual agreement of the parties

-expedited award requests - let the arbitrator know ASAP if the parties agree that special circumstances require an award by a particular date. The price of earlier-than-normal award issuance may, however, be limitations on the parties' normal expectations regarding hearing scheduling, hearing length, nature and timing of closing arguments, etc.

-requests for retention of arbitral jurisdiction - some arbitrators routinely retain jurisdiction to resolve disputes about remedy compliance whether asked to do so or not; others prefer not to do so absent mutual agreement

-minimize the number and scope of preliminary issues on which you call on the arbitrator for a ruling in your favor -- avoids giving the arbitrator a felt need to bend over backwards in favor of the other side when it comes to issuance of the award and rationale.

recording the hearing

-do not expect to have exclusive use of a unilaterally ordered transcript

-if there is no transcript, do not object to arbitrator's use of a tape recorder, but do not expect many arbitrators to do so

-if there is no transcript, give the arbitrator time to keep a complete set of notes.

-understand the vagaries of official record rules

opening statements

-general intro to issue, contract, anticipated proofs, relief requested

-nature of the issue and your party's concern about it

-agreement provisions involved

-decisional standards relied on

-avoid testifying

-try to make some kind of opening statement, even if you are necessarily non-committal until you have heard the other party's case.

preparing and presenting exhibits

-reduce raw data to understandable summaries and have a witness explain how summary relates to raw data

-have extra copies of each document you intend to introduce so you can give one to the witness, one to the other side, and one to the arbitrator besides your copy.

-offer prior awards involving the same parties as evidence

presenting witness testimony

-first hand testimony is preferable

-try not to use leading questions about issues in dispute

-cooperate in scheduling witnesses' appearances

-where appropriate, facilitate testimony by phone or stipulation

objections to other party's questions

-sometimes needed to protect the record against unreliable or repetitious evidence

-arbitrators' receptiveness to technical objections may vary greatly

-even if overruled, objections can be useful by drawing into question what weight if any should be given to the other side's evidence

-objections should be used sparingly to avoid irritating the arbitrator and to avoid appearing intent on preventing the arbitrator from learning the facts

cross examining witnesses

-keep it short

-clarify points in ways that help your case

-do not merely rehash the direct examination

making closing arguments

-lay out the facts reliably and persuasively

-emphasize the undisputed evidence that supports your case

-acknowledge adversary's strong points and explain why your strong points should be viewed as more persuasive

-argue only from facts in the record; adjust your arguments to the evidence as it came in at the hearing

-do not try to submit new evidence in your closing arguments

-argue in the alternative where appropriate

-remedies - arguments regarding remedies or alternative remedies can be quite helpful to the arbitrator in some cases and should not be viewed as a sign of weakness

-provide copies of authorities cited to arbitrator and other side if they are not readily available resources

submitting briefs

-comply with briefing deadlines and procedures agreed on at hearing

-accompany extension requests with both parties' positions on the request

-reply briefs are for answering the other side's initial brief; do not add new arguments of your own.

post-award interactions

-do not expect arbitrator to answer ex parte questions about the award

-do not expect to have access to the arbitrator's hearing notes or audio tapes.

-pay the arbitrator's bill, if any, promptly

----end grievance arbitration outline-----

Searching WERC PDF Archives With the State of WI Ultraseek Search Engine

In addition to the HTML format WERC decisions and grievance awards issued since 1989 that are searchable on the WisBar website (www.wisbar.org/werc/), searchable PDF archives of WERC documents now available on the WERC website consist of the following file collections that will be updated on a monthly basis:

- -A newly-expanded WERC PDF archive of WERC and related court decisions in labor relations cases, now including decisions issued after as well as before July of 1989; municipal sector since 1962, private and state sector since 1971.
- -A newly created WERC PDF archive of grievance awards July 1989-date
- -The previously existing WERC PDF archive of interest awards 1971-date.
- -A recently created WERC PDF archive of 1978-99 Personnel Commission decisions and WERC personnel appeals decisions since July of 2003.

To search the PDF archives on the WERC website using the Ultraseek search engine:

- -open the WERC website which is located at http://werc.wi.gov
- -left click on one of the Search links near the top of the opening page
- -enter your search term or terms (DECISION NUMBERS IN LOWER CASE ONLY) in place of the words "Enter your search terms here"
- - press the Search button at the bottom left corner of the search screen
- -scroll down to view a Search Results list of links to the found documents.
- -follow one of those links to view the document associated with it
- -search for a particular word or phrase in the found document using the Acrobat Reader Find and Find Again buttons (binoculars and binoculars with arrow, NOT with your browser's Find command)
- -use the Acrobat Reader buttons rather than browser commands to print (printer picture), save (diskette picture), copy a portion of the text for pasting into a Word document (T+square button and then highlight text to be copied e.g. using mouse, then right click on highlighted portion and choose copy).
- -use your browser's Back button to return to the list of Search Results.

For more detailed information, including sample searches, go to the following page on the WERC website: http://werc.wi.gov/sample_pdf_archive_searches.pdf

If you have questions feel free to contact Marshall Gratz at WERC.

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