

# Making the Case for Mediation in Public Sector Labor Relations

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## I. INTRODUCTION

Over the course of my career as a firefighter and union member, I have participated in the collective bargaining and grievance processes in Ohio and Tennessee. Ohio has a collective bargaining statute for public sector employees which allows for the use of multiple dispute resolution processes, including mediation for the resolution of collective bargaining impasse and grievances.<sup>1</sup> Tennessee, on the other hand, does not have a statute that addresses collective bargaining impasse or grievances. In Tennessee, bargaining and grievance adjustment are handled through either the state for state employees, or individual municipalities for municipal employees.

While working in Memphis, the firefighters' local was looking for ways to improve the grievance procedure for the new memorandum of understanding. As part of this process, a

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<sup>1</sup> OHIO REV. CODE § 4117 (West 2012).

mediator with the Federal Mediation and Conciliation Service (FMCS) gave several of us on the negotiations committee a presentation about their services. At the time, my understanding of mediation was not what it is now. I was, however, intrigued and thought it was a great process that warranted greater exploration.

I tried my best to persuade the other members of the committee that mediation is worthwhile based on my experience working under a collective bargaining law in Ohio, which incorporated mediation. This discussion paid off, and we were successful in getting mediation added as a step prior to binding arbitration in the grievance process. Mediation would be voluntary, but at least it was available to the parties. This step became part of the memorandum of understanding in 2011, but has not been used one time as of 2017. Even though mediation became part of the bargaining and grievance processes, there are still barriers to its use. There are many reasons for this, but one of the main reasons is how comfortable the parties are with arbitration.

Management and labor too often turn to arbitration as a first line process to settle their impasses and grievances. This paper advocates that management and labor should come together to adopt mediation as a voluntary step prior to arbitration in the collective bargaining and grievance adjustment processes. Since collective bargaining is a self-directed process, mediation should remain voluntary to give the parties the greatest ability to come to an agreement under their own volition and without a third party dictating the outcome, except in the instance of workers without the right to strike. It is essential to the process for the parties to enter into mediation with an open mind and the willingness to reach an agreement, or at the very least listen to what the other side has to say.

Mediation has been used for over 80 years in the private sector labor setting to help labor and management reach agreements, adjust grievances, and avoid strikes. Labor and management

in the public sector can learn from their counterparts in the private sector about the use of alternative dispute resolution (ADR) processes. Mediation in the public sector is not utilized by labor and management to the extent that it should be,<sup>2</sup> which allows plenty of room for its growth. Whether it is impasse during collective bargaining or a grievance, both processes cost time and money. Being able to break the impasse or settle the grievance as soon as possible has advantages for both parties that go beyond saving time and money.

There are five elements that make mediation particularly well suited for use in the labor relations arena: (1) parties make the decision; (2) the power relationship; (3) deadlines; (4) historical perspective; and (5) the continuing relationship.<sup>3</sup> Many labor-management relationships last longer than many marriages, and for that reason alone, both parties should want the best possible relationship.<sup>4</sup> No matter how awful the fight, employees go back to work and the employer must welcome them.<sup>5</sup> The notion of “leave if you do not like working here” avoids the underlying issues that will continue to bubble up if not properly addressed. It is essential that these underlying issues are addressed because continuous “defection [of employees] will not change the character or problems of the body.”<sup>6</sup>

This paper discusses five ADR processes, but will focus on mediation and why it should be more widely used, barriers to its use, and how to overcome these barriers. In doing so, I will make the case for the increased use of mediation, why it is a viable alternative to arbitration, and how it fits into the dispute resolution process. Part II discusses the mediation process overall, advantages of its use, barriers to its use, and overcoming those barriers. Part III discusses why

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<sup>2</sup> Clyde M. Mills, *The Role of Mediation in Collective Bargaining*, 23 TENN. L. REV. 146, 146 (1953-1955).

<sup>3</sup> Ira B. Lobel, *What Mediation Can & Cannot Do*, 53 DISP. RESOL. J. 44, 45 (1998).

<sup>4</sup> Mills, *supra* note 2, at 148.

<sup>5</sup> *Id.* at 146.

<sup>6</sup> *Id.* at 148.

labor and management should use grievance mediation, barriers and solutions to its use, and when to use it. Part IV discusses the governmental interest in maintaining orderly collective bargaining of which mediation is a central part. Part V, briefly concludes. Having a clear picture of what mediation is and why it is of great benefit in collective bargaining and grievance adjustment allows parties to better assess if, and when it should be used.

## II. THE MEDIATION PROCESS

There are five core ADR processes used in collective bargaining and grievance adjustment: (1) negotiation, (2) conciliation, (3) fact finding, (4) mediation, and (5) arbitration. Conciliation and mediation use a third-party neutral to assist in resolving differences at the direction of the parties. Conciliation is “the more passive and informal process of bringing” parties together to discuss their problems.<sup>7</sup> Mediation allows the third-party neutral to be more involved in the process by acting as a leader or go-between when needed. Fact-finding is a compiling of the facts and rendering of a nonbinding recommendation. This allows the parties to focus on certain contested aspects of the dispute.<sup>8</sup> Arbitration has a third-party neutral adjudicate the issue for the parties, and can be either advisory or binding. Arbitration is the most widely used ADR process in the public-sector labor setting to settle impasses and grievances.

There are five elements that make mediation particularly well suited for use in collective bargaining and grievance adjustment: (1) only parties make the decision; (2) power relationship; (3) deadline; (4) historical perspective; and (5) the continuing relationship.<sup>9</sup> In some parts of the public sector, employees are free to engage in concerted activity like strikes where as some—mostly those in the safety services—benefit from binding arbitration as a tradeoff of not being able

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<sup>7</sup> *Id.* at 634.

<sup>8</sup> Mills, *supra* note 2, at 150.

<sup>9</sup> Lobel, *supra* note 3, at 45.

to strike. For those employees that can strike, there are three likely outcomes of the inability to reach an agreement: (1) agree to terms that one side does not like; (2) continue to bargain; (3) or engage in concerted activity.<sup>10</sup> In situations where employees can strike, the parties must make the decision for themselves as there is no third party to impose a resolution on them. The collective bargaining process is based on a power relationship. The willingness of one party to exercise their power is affected by the power of the other party.<sup>11</sup>

At the heart of the mediation process is the ability of the mediator to get the parties to focus on issues and underlying interests with an eye toward settlement. Mediation is a non-binding process where a neutral third party helps the parties reach a resolution.<sup>12</sup> Mediators do not make any decisions or enforce any laws, instead they simply establish the atmosphere which allows for the parties to reach agreement for themselves. The mediation process should not leave any impression on the collective bargaining relationship save for an agreement reached through the mutual and voluntary assent of the parties.<sup>13</sup>

Mediation is merely another tool available to the parties to assist them in pursuing their goals as they define them.<sup>14</sup> Depending on the style of mediation used, the mediator may even make suggestions or recommendations for finding areas of agreement. Mediators may evaluate the positions of both parties and tell both parties who has the stronger position. Sometimes by the mediator just intervening the agreement-making process can be expedited.<sup>15</sup>

Allowing the parties to exhaust their own efforts in reaching an agreement advances what is in their best interest. If the mediator continually intervenes prior to the parties exhausting self-

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> James A. Mackraz, *General Role of Mediation in Collective Bargaining*, 11 LAB. L.J. 453, 453 (1960).

<sup>14</sup> *Id.*

<sup>15</sup> Walter Maggiolo, *Mediation's Role on the Labor Stage*, 4 LAB. L.J. 632, 634 (1953).

help, the parties will have a tendency in the future to look to others to settle their differences. This is the case in public sector labor relations as things stand now. Arbitration has become such a ubiquitous part of the collective bargaining and grievance adjustment process that parties rely heavily on it to make decisions for them.

For mediation to be successful, both parties must come to the table with at least some desire for success in reaching an agreement. If one of the parties is intransigent, the mediation will fail to produce options for mutual benefit, and ultimately a resolution.<sup>16</sup> The mediator will approach the process by instilling in the parties a positive philosophy about reaching a settlement. Mediators help to “stimulate bargaining, analyze issues, factually evaluate positions, balance equalities, suggest alternative approaches and solutions to problems and assist the parties to seek out areas of agreement.”<sup>17</sup>

There are five stages in mediation. First, the mediator introduces the process, gives an outline of how things will progress, and has the parties agree to ground rules. Second, the parties make opening statements to state the issues as they see them. After both sides share their perspective, the mediator circles back to clarify the issues and bring focus to what is contested. Third, the mediator tries to identify areas of mutual interest and where mutual gains can be achieved. This stage is heavy on questions from the mediator and gives the parties an opportunity to ask the other party questions. During stage four, the mediator will try to get the parties to identify what they have learned and if their positions have changed based on the discussions in the prior stages. This is an attempt by the mediator to bring clarity to the issues and understand what the interests are. The parties may present any new ideas or information that may help lead to an

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 635.

agreement. Finally, the mediator helps the parties work toward reaching an agreement. This is no easy task even if the parties agree on all the core issues.<sup>18</sup>

Mediation is a combination of “six procedural, communicative, and substantive functions: (1) educating the parties relative to the bargaining process; (2) helping the parties gain a better understanding of the other’s position; (3) helping the parties reduce hostility by developing objectivity; (4) providing a format for problem resolution during mediation for the parties to utilize when additional problems arise; (5) presenting additional alternatives to the parties that may keep them at the bargaining table; and (6) providing alternatives that individual parties would be able to advance without losing face and which may assist the parties in making concessions.”<sup>19</sup> These six functions help labor and management strengthen their relationship and move forward in the collective bargaining process.

### III. MEDIATION IN COLLECTIVE BARGAINING

With issues like pensions and health care being at the forefront of many collective bargaining sessions, some state legislatures have limited the scope of bargaining. Yet others, have repealed collective bargaining laws altogether. Both options are draconian and are more politically motivated than done with a genuine concern for taxpayers or employees. Employing ADR processes and especially mediation can help stem the need for such drastic measures.<sup>20</sup>

When mediation is used as a step prior to arbitration, fewer disputes are likely to reach arbitration,<sup>21</sup> which saves time and money. Depending on the statutory framework that governs

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<sup>18</sup> Michael D. Cooper, *Mediation in Labor Negotiations*, 3-4, <https://www.calpelra.org/pdf/Cooper,%20Michael.pdf> (last visited Feb. 2, 2017).

<sup>19</sup> Gay M. Gilbert, *Dispute Resolution Techniques and Public Sector Collective Bargaining*, 2 OHIO ST. J. ON DISP. RESOL. 287, 288 (1986-1987).

<sup>20</sup> Charles B. Craver, *The Use of Alternative Dispute Resolution Techniques to Resolve Public Sector Bargaining Disputes*, 28 OHIO ST. J. ON DISP. RESOL. 45, 61 (2013).

<sup>21</sup> Gilbert, *supra* note 19, at 299.

collective bargaining agreements, mediation can be mandatory or voluntary. Even if it is mandatory, it is the least coercive of the ADR processes. If it is mandatory, parties are expected to participate less they run the risk of being on the receiving end of an unfair labor practice. Parties should view mediation as a chance to find out the other side's interests and to narrow the issues.<sup>22</sup>

While there are many advantages to using mediation along with, or instead of fact finding or arbitration, there are also disadvantages. Unfortunately, there are also many institutional hurdles that the parties must overcome before management and labor will truly begin to embrace mediation. The disadvantages, however, are far outweighed by the advantages of mediation. My experience as a member of the negotiations team and being involved in the preparation of grievances has taught me that both labor and management do not understand all the ADR processes available to them, or how the ADR processes function by themselves and as a larger part of the collective bargaining process.

Since the parties must live with the contract, they should want to have the most say possible as to how it is crafted. Neither labor nor management want to have a contract imposed on them, which is what arbitration does. Having one party unilaterally dictate their will on the other party goes against our moral and legal principles of freely entering into a contract. Being able to negotiate contracts without having the outcome imposed is an important freedom enjoyed by labor and management. It should be exercised often and not left to the discretion of a third party.<sup>23</sup>

The point of the collective bargaining process is for the parties to reach a voluntary agreement of their own accord. At the heart of this is the ability to reason and persuade the other side. The process will be undermined if one of the parties approaches it with an antagonistic,

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<sup>22</sup> *Id.* at 292.

<sup>23</sup> Maggiolo, *supra* note 15, at 633.

unreasoning attitude, or fixed and unchangeable position. Attempting to bargain by edict prior to a full discussion with the other party misses the basic theory of collective bargaining.<sup>24</sup>

#### *A. Structuring the Mediation*

Prior to jumping into mediation, it is important to establish ground rules. Only the most significant representatives should attend the mediation. Since mediation is private, limiting the number of people present is likely to move the process along and limit the chance of leaks. Something to consider is whether the mediator uses caucuses or if that is something the parties want to agree to. Caucusing allows the mediator to meet privately with each side to discuss a wide range of issues relevant to the mediation. Information given to the mediator in a caucus is not shared with the other side unless expressly allowed. Caucusing is designed to allow parties to have a frank discussion about what their concerns are without worrying about interruption from the other side. These sessions are useful for the mediator to help the parties craft proposals or to deal with roadblocks ahead.<sup>25</sup>

Once parties have decided to participate in mediation, they should be aware of the background of their mediator. Mediators come from many different backgrounds. Some are “lawyers, industrial relations personnel, government employees, professors, and people who have ‘grown up’ around labor relations.”<sup>26</sup> There is a debate as to whether familiarity with labor issues is a necessity, or if mediator with a solid base of skills is enough. Given the complexity of issues and range of topics covered in labor mediation, it is best to have someone with at least a working knowledge of the field. Of course, having someone who is an effective mediator is also valuable.

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<sup>24</sup> Mills, *supra* note 2, at 148.

<sup>25</sup> Craver, *supra* note 20, at 56.

<sup>26</sup> Gilbert, *supra* note 19, at 300.

When and how mediation is used in conjunction with collective bargaining is still a contested issue. Since mediation is a self-determinative process, it can be used at different stages in the collective bargaining process to incentivize parties to reach their own agreement.<sup>27</sup> If the mediator becomes engaged early in the collective bargaining process—before impasse is reached—it allows the mediator to become thoroughly acquainted with the issues and how to best help the parties overcome what is standing in the way of agreement.<sup>28</sup> As a consequence of the mediator entering the process early, their contribution later in the process might be diminished since they cannot offer a fresh viewpoint.<sup>29</sup> Mediation is normally used once impasse is reached. This approach seems to be the soundest and most in line with national labor policy.

The mediator must be willing to employ different techniques based on the tenor of the mediation. Being able to inspire confidence in the parties, intuitively knowing what will move the mediation forward, and when to make those moves are important qualities for a successful mediator. Equally as important is being able to anticipate unfavorable reactions and not letting them divide the parties.<sup>30</sup>

The mediator's role is to assist the parties to get to a place where they can develop a contract that they can live with. Whether the mediator finds the contract palatable is not of concern. The mediator is simply there to assist, but can make suggestions and attempt to persuade or reason.<sup>31</sup> Of course, how the mediator engages with the parties should largely be determined by the parties themselves. If the parties are open to suggestions from the mediator then the mediator should share them, but mediators should be wary of putting forth ideas if the parties are not receptive. This

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<sup>27</sup> Gilbert, *supra* note 19, at 288.

<sup>28</sup> Maggiolo, *supra* note 15, at 634.

<sup>29</sup> *Id.* at 635.

<sup>30</sup> Mills, *supra* note 2, at 148.

<sup>31</sup> Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 514 (1997).

could be counterproductive and needlessly inject the mediator into the collective bargaining process.

Parties should keep in mind, however, that mediators bring a set of skills likely not possessed by anyone else participating in the collective bargaining process. Parties should be open to the suggestions of the mediator since the mediator has a broader view of what is happening in other collective bargaining mediations. To provide the most assistance possible, the mediator is evaluating every proposal that is made during the process. The mediator can serve as a wealth of information in this regard. If parties are open to the mediator being an active participant in the process, they can allow the mediator to make proposals for settlement, “suggest areas of discussion, lines of exploration and solutions to problems.”<sup>32</sup> A consequence of allowing the mediator to evaluate options is that the mediator may not appear neutral and even lose credibility, which could derail the entire mediation.<sup>33</sup>

To further strengthen the transparency of the process, mediators must tell the parties any relationship they might have with the parties. Personal or financial relationships can make it difficult for the mediator “to render a perception of neutrality.” Since collective bargaining by its very nature can be contentious, parties try to get information from the other side so both parties have the same information. Parties must be willing to share information with the mediator so the mediator can be an active participant in the process. There must be trust between the parties and the mediator since the mediator is left to accept whatever the parties give him as accurate information.<sup>34</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 515.

<sup>34</sup> Joel M. Douglas & Lynn J. Maier, *Bringing the Parties Apart*, 49 DISP. RESOL. J. 29, 35 (1994).

## B. *Barriers to Mediation and How to Overcome Them*

During my time as a member of a union negotiations team, I observed several barriers to the acceptance of mediation. Some of the barriers were resistance by the more senior members of the negotiation team to embrace something they had never heard of and had very little understanding of how it worked within the current parameters of the bargaining process. Additionally—the fact that I—as someone who had relatively little experience in the union as compared to others in the room, likely played a role in the skepticism about mediation. I find that rank and file union members, and even some in leadership do not have even a basic understanding of what the contract they work under says, much less how the process of collective bargaining works. Lack of education as to how mediation works is a fundamental barrier to being able to incorporate it into a contract. Much of the blame for not being aware of how mediation and the larger process works lies with the union for not training its members.

Let's look at some of the reasons why parties are unable to reach agreement: (1) contradictory information; (2) misinformation; (3) inaccurate or irrelevant information; (4) lack of resources; (5) interpersonal disputes; (6) past practices; (7) bargaining history; (8) egos; (9) assumptions; (10) value or belief systems; (11) and reliance on non-credible information.<sup>35</sup> While this is probably only a partial list of barriers to reaching agreement, it is easy to see how labor and management can easily be derailed. Not only are there barriers to agreement, there are also barriers to the use of mediation: (1) differences in information and how the situation is perceived; (2) lack of interest in quickly solving the dispute; (3) lack of communication; (4) overall leeringness of mediation; counsels' comfort with the adversarial process; and (5) use of mediation shows

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<sup>35</sup> Cooper, *supra* note 18, at 1.

weakness.<sup>36</sup> Based on these lists, it is little wonder that parties have difficulty reaching agreement and using mediation to do it.

The fact that some of these barriers exist are the exact reasons why parties should participate in mediation. A lack of information is not a barrier to mediation, but a barrier to agreement, which mediation can help cure. If a party is satisfied with the status quo they are less likely to want to engage in any process that will move the ball forward. Mediation is the least intrusive manner of trying to reach an agreement or at least getting the other party to the table.

A lack of communication between the parties is one of the best reasons to use mediation, instead of avoiding it. Mediators are trained to get the parties talking. By having someone trained in getting parties to communicate, this barrier should easily fall. Parties who are skeptical about mediation can overcome this through education of the process. If parties are uncomfortable with committing to mediation, having them go through an information session or training is likely to assuage those fears.

One of the more pervasive problems with getting parties to mediation has less to do with the parties and more to do with their counsel. There are issues of self-interest like how much money the lawyer will make as well as their level of comfort with ADR processes. Again, this is an issue of education on the part of the parties.

If the parties decide to engage in mediation, there are a variety of problems intertwined in the process. Attitudes, economic strength of the parties, economic drives and patterns, emotions, human relations problems, intracompany and union politics, public relations, premature rigidity of positions, and personalities all contribute to increasing the difficulty of mediation.<sup>37</sup> For both sides,

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<sup>36</sup> Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 294-96 (1991-1992).

<sup>37</sup> Maggiolo, *supra* note 15, at 634.

calling a mediator might be viewed as a sign of weakness.<sup>38</sup> While I do not want to reject this idea outright, I find it difficult to believe that using a mediator can be viewed as a sign of weakness when letting an arbitrator decide and outcome for you is somehow seen as the better way. By institutionalizing mediation in the agreement, neither party has to wrestle with the optics of possibly losing credibility when they suggest it.<sup>39</sup>

On the management side, skepticism as to how the mediation process works in addition to feeling like it will somehow take away power from management to make decisions plays into the skepticism of mediation. Many of these concerns are unfounded based on how mediation works. Whether mediation is voluntary or mandatory, there is still plenty of room for self-determination for the parties to come to, or not come to an agreement because of mediation. If management is truly concerned with losing the ability to make decisions, they should want to avoid arbitration at all costs. Unlike mediation, the arbitrator makes a decision and if it is binding, the parties have no choice but to abide by it. Mediation does not impose a decision on the parties and allows them to retain their ability to direct the process.

Parties in the collective bargaining context routinely run into barriers to agreement, but likely do not give a lot of thought to what the underlying interests are. Many times, they will have a proposal declined and immediately move to a fallback position that might not be exactly what they want, but one they can live with. A better approach would be to engage the other side in a discussion as to why the rejected proposal will not work for them.

A good way for labor and management to improve labor relations is by participating in preventive mediation. It is used to alleviate the amount of distrust that exists between the two sides. The goal of this type of mediation is aimed at finding the issues that result in employee

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<sup>38</sup> Mills, *supra* note 2, at 151.

<sup>39</sup> *Id.* at 293–96.

dissatisfaction and moving to correct them before they arise to the level of a dispute. By finding the causes of dissatisfaction and disputes, they can be examined and corrected. The best time to do this is when there is no impending unrest. By addressing misunderstandings, distrust, frustration, and communication problems labor disputes and impasse can be avoided.<sup>40</sup>

### *C. Advantages of Using Mediation*

Mediation affords the parties several tangible benefits in improving their relationship. Even if no agreement is reached, mediation gives the parties an opportunity to show their willingness to engage in frank communications about the issues and their interests. This can go a long way towards preserving, enhancing, or even repairing relationships. One of the big issues that mediation can help with is the issue of credibility between the parties. By demonstrating that they are forthright and honest with each other, they can lay the groundwork for future negotiations. If the parties come to an agreement during mediation, they will have a better understanding of the issues and interests which will hopefully lead to a more stable collective bargaining agreement and fewer grievances. Mediation should be viewed as a benefit that allows the parties another chance to reach an agreement, especially if it is one they can support.<sup>41</sup>

Confidentiality in mediation is an area of concern for some parties. Since mediation is a private and voluntary process, confidentiality must be adhered to. It is important that mediators are clear with all parties involved that anything they tell the parties will be held in confidence and not become part of subsequent proceedings. This allows a party to tell the mediator what their bottom line is without having it shared with the other side. Labor mediators tend to use a “what if”

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<sup>40</sup> Maggiolo, *supra* note 15, at 636.

<sup>41</sup> *Id.* at 5.

technique to get the parties to show their positions and will not ask what their final offer is unless settlement is imminent.<sup>42</sup>

### III. GRIEVANCE MEDIATION

Not only is mediation a useful tool in helping parties to reach agreement in the collective bargaining context, it has a long history of use in grievance adjustment arising out of collective bargaining agreements.<sup>43</sup> While grievance mediation has its roots in the private sector like most other collective bargaining processes, it is easily translatable to the public-sector. Even though grievance mediation has experienced a resurgence over the past thirty years, there is still a lot of room to grow. Grievance mediation can be added as a step prior to arbitration. This step tends to be voluntary and both parties must agree to its use once a grievance has been filed.

Integrating grievance mediation into the contract is accomplished through the collective bargaining process. Mediation can be used as a stand-alone process or as part of process known as mediation-arbitration (med-arb). In med-arb, the same third-party neutral attempts to mediate the grievance before moving onto arbitration in the same session, if the mediation is not successful. Yet another way to handle it is to have the mediator—who is also an experienced arbitrator—tell the parties how an arbitrator would rule after the mediation. The next step would be to either come to an agreement or take the grievance to arbitration with a different neutral, but without the information disclosed in mediation.

#### A. *Why Use Grievance Mediation?*

One experiment in the use of grievance mediation occurred in the coal industry. It was found that mediation allowed grievances to be resolved quicker, with less resources, and with

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<sup>42</sup> Douglas & Maier, *supra* note 34, at 34.

<sup>43</sup> Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 384 (2004).

higher satisfaction as opposed to going straight to arbitration. Using mediation allows the parties to engage in interest-based problem solving instead of taking a distributive, or win/lose posture. The most important part of using grievance mediation—aside from adjusting the grievance itself—is preserving the relationship between the parties.<sup>44</sup>

Not only can mediation help parties settle grievances faster, it also allows the parties to develop problem solving skills. Knowing that mediation is successful at helping parties resolve grievances at a lower cost and with higher satisfaction should cause parties to take a hard look at including it in their grievance adjustment process. Even with a plethora of information pointing to the benefits of mediation in grievance adjustment, it is still relegated to a small section of the unionized workforce.<sup>45</sup>

Another big advantage for the use of mediation is the time it takes to settle a grievance. It is not uncommon for it to take seven months from the time the grievance is filed to the time parties receive the arbitrator's award. The reasons for delay range from parties causing the delay to a shortage of arbitrators.<sup>46</sup> Mediators, on the other hand, are usually able to contact the parties within a couple of days of receiving the request. The time needed for the mediation depends on the structure, issue complexity, and schedules of the parties involved, but the process can normally be completed in one day. While delay might be beneficial to management, it most assuredly does not benefit the union. Members want their grievance resolved as soon as possible, and delaying that only leads to backbiting and unhappy members.

Cost is a major reason parties should strongly consider the use of mediation in the grievance process. While arbitration is more cost effective than litigation, it still has associated costs that

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<sup>44</sup> Helen Elkiss, *Alternatives to Arbitration: Are Unions Ready for the Change?*, 48 LAB. L.J. 675, 677 (1997).

<sup>45</sup> Hodges, *supra* note 43, at 384–85.

<sup>46</sup> John M. Caraway, *Grievance Mediation: Is It Worth Using?*, 18 J.L. & EDUC. 495, 498 (1989).

surpass those of mediation. Court reporters and transcripts along with post-hearing briefs are the norm for arbitration. In Ohio as well as other states, a staff mediator will work with the parties at no cost. Even if a state does not have any public agency to provide the service, parties can turn to FMCS or a local mediation service. If a mediator bills at \$200 per hour in an eight-hour day totaling \$1600, plus expenses, parties still stand to save several thousand dollars.<sup>47</sup>

As previously mentioned, parties are more satisfied with outcome of their grievance dealt with through mediation. This is a result of the level of comfort participants feel with the less formal process of mediation versus the more formal process of arbitration. The mediation process deals with the underlying interests of the grievant and management instead of the grievance as written.<sup>48</sup> Since mediation is confidential and not a forum for setting precedent, more flexibility can be introduced in the remedy, than what would be allowed in an arbitration award. This allows the parties to craft a resolution that is more to their liking and suits their needs.<sup>49</sup>

#### *B. Barriers and Solutions to the Use of Grievance Mediation*

Some of the reasons parties might not want to engage in grievance mediation has to do with shifting from what has historically been an adversarial model to a more cooperative one. Mediation moves the parties from the status quo of being adversaries to a more cooperative stance. For mediation to be effective, parties must let go of the historical position of being adversarial and learn to focus on the conflict instead of the personalities of the participants. Continually trying to make power plays based on organizational hierarchy will do nothing to advance the conversation.

Union leadership can still hold a firm position on a grievance if they think this is what the grievant wants. By engaging in mediation, collaboration can be seen as compromise and therefore

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<sup>47</sup> *Id.* at 499.

<sup>48</sup> *Id.* at 499–500.

<sup>49</sup> *Id.* at 500.

weakness, in some labor-management relationships. Since the union and management work out a deal between them, there is no way to put the blame on the mediator for an unpopular decision. On the other hand, taking the grievance to arbitration offers cover for labor and management, but leaves nothing up to the parties. It is not uncommon for a union to have a high grievance arbitration rate because they have an unofficial policy of taking all unresolved grievances to arbitration. Union leadership might take this position for internal political reasons.<sup>50</sup>

While these issues might seem too daunting to overcome, there are ways to engage in grievance mediation while still saving face. At the heart of moving past these barriers is education. Educating labor and management on the inherent advantages of mediation that might not otherwise be obvious to those who have never participated in mediation can help move the parties towards trying mediation. Prior to mediating grievances, “labor and management must be trained in mediation skills, how to be advocates and work through collaboration.” Understanding what the barriers are allows union leadership to sell the idea of adding mediation to the grievance process to the membership. Additionally, it will make it easier to get buy in from management to add it to the process. Once the parties are educated on the benefits mediation brings to the table, it makes the conversation much easier.

A survey by the University of Illinois found that 29% of respondents did not use mediation because they lacked information about the process. A majority, 43%, said they liked to settle during the earlier steps of the grievance process, but when that does not work, they turn to arbitration.<sup>51</sup> The fact that 29% of respondents did not want to use mediation due to a lack of information points back to the need for education on the mediation process. If properly educated on mediation, grievants are likely to settle earlier and have higher satisfaction with the process.

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<sup>50</sup> Elkiss, *supra* note 43, at 683.

<sup>51</sup> *Id.* at 683.

Training in mediation allows participants to learn new skills and learn a new orientation. By replacing confrontation with cooperation and interests with positions, mediation can be successful. If the parties do not undergo training, they are likely to stay locked in their old ways of position-taking instead of interest based problem solving. Training teaches parties how to separate interests from rights and resist the urge “to exercise rights in order to honestly and creatively explore interests.”<sup>52</sup>

Not only is it important for union leadership to be well versed in mediation, the membership should also understand why it can be helpful in grievance adjustment. If the membership understands the advantages and buys into the use of mediation, it will provide the cover union leadership needs to engage in mediation. Moving towards a more cooperative approach to grievance mediation can also help in the bigger labor management relationship.

### *C. When to Use Grievance Mediation*

Deciding what grievances are appropriate for mediation is important to the success of the process. Since mediation lacks formality and does not have a record of what is said, certain claims are not appropriate for mediation. These claims need to have a full record developed like what would occur in arbitration, along with a full analysis and award. Cases that are likely to have an industry wide impact, or those that arise because of new contract language are not ripe for mediation.

Additionally, grievances that might result in litigation beyond what the contract can award are not suitable for mediation. Subject areas like “organizational security, management rights, or subcontracting clearly would not be, and *should* not be solved at this step in the grievance process”

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<sup>52</sup> Elkiss, *supra* note 43, at 683–84.

due to their interest to the parties.<sup>53</sup> Like with most issues involving substantive rights, there is the question of whether or not it is best to have a court decision and precedent to guide parties in the future. Grievances impacting the entire bargaining unit can have far-reaching implications for years to come. Otherwise, mediation is a viable alternative for the parties, instead of going right to arbitration. Grievances not having an impact on the entire bargaining unit or not holding any significance for the union or management beyond the issues raised in the instant grievance are best suited for mediation.<sup>54</sup> Since there are likely not any substantive rights involved, settling in mediation does not set a precedent that will impact hundreds or thousands of union members.

#### IV. GOVERNMENTAL INTEREST IN ORDERLY LABOR RELATIONS

Government has a legitimate interest in collective bargaining and grievance adjustment in the private sector that implicates national welfare and security.<sup>55</sup> This is even more concerning in the public sector since government—at some level—is one of the parties to the process. As evidence that the government is concerned with maintaining labor peace and the orderly enforcement of labor relations, the federal government, some municipalities, and many states provide labor mediators.<sup>56</sup> At the federal level, FMCS provides mediators for all types of labor disputes. The service is free of charge<sup>57</sup> and they are willing to assist in the absence of a local or state labor mediation program. Since mediators are so readily available, finding a mediator is no longer an impediment to engaging in mediation.

Our society is one that values the ability of parties from different political, economic, and social backgrounds to come to an agreement that serves the overall greater good. These are also

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<sup>53</sup> Caraway, *supra* note 46, at 497.

<sup>54</sup> *Id.*

<sup>55</sup> Mills, *supra* note 2, at 150.

<sup>56</sup> James A. Mackraz, *Coexistent Labor Mediation Agencies*, 10 LAB. L.J. 537, 537 (1959).

<sup>57</sup> Gilbert, *supra* note 19, at 300.

the tenets on which labor is built. Workers from different backgrounds coming together through collective action to increase their economic power. Mediation allows people to enter into a contract through agreement instead of compulsion.<sup>58</sup> So much of what many who work in the public-sector fear from their employers—compulsion—is taken away by settling their differences through mediation.

The idea of personal responsibility is thrown around a lot these days in the context of social and political issues. Mediation allows the parties to assume their responsibilities as citizens to resolve their issues.<sup>59</sup> Mediated agreements the parties come to under their own volition are more likely to be satisfactory for the parties over the long term. These tenets are set out in Section 502 of the Defense Production Act: “[t]he National policy shall be to place primary reliance upon the parties to any labor dispute to make every effort through negotiations and collective bargaining and the full use of mediation and conciliation to affect a settlement in the national interest.”<sup>60</sup>

Section 201 of the Labor Management Relations Act also puts forth that the satisfactory settlement of issues between employers and employees can be achieved through the process of conference and collective bargaining. The Act further encourages the use of conciliation, mediation, and voluntary arbitration to aid in settling disputes.<sup>61</sup> Consistent with these pronouncements, mediation serves a critical role in allowing labor and management to maximize their own self-interests.<sup>62</sup> The question still remains as to whether an atmosphere has been created where mediation is accepted as an indispensable part of labor relations.<sup>63</sup> Mediation should be

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<sup>58</sup> Maggiolo, *supra* note 15, at 632.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 632-33.

<sup>61</sup> Mills, *supra* note 2, at 151.

<sup>62</sup> Mackraz, *supra* note 13, at 453.

<sup>63</sup> Mills, *supra* note 2, at 151.

viewed as an adjunct only to be used after the parties have engaged in an earnest effort to reach agreement.<sup>64</sup>

One of the bedrocks of collective bargaining is that labor and management can reach amicable solutions to their problems. The responsibility to assist labor and management in resolving their disputes falls on the government through ADR mechanisms. I strongly believe in the labor policy that it is not the responsibility of government to dictate to labor or management the terms of their contract. Mediation empowers the parties to undertake settling contracts and grievances instead of relying on government to do it for them. Since the outcome of collective bargaining should be the result of concerted efforts of both parties to reach the best resolution for everyone, parties should rely on mediation to help facilitate them to this end.<sup>65</sup>

Labor and management possess the leadership and ability to work out their own solutions, either on their own or with the help of a neutral third party in mediation. The goal of a lasting industrial peace is achieved using collective bargaining, with mediation as an integral part.<sup>66</sup> The desire to get rid of a dispute at any cost should not overshadow the obligation of labor and management to resolve their differences.<sup>67</sup> By evading this obligation, they take the focus off doing what they exist to do, serving the public.

## V. CONCLUSION

Parties must come to mediation with an understanding of the process gained through education and with the clarity of what mediation can and cannot do. To ensure parties come to the best agreement for them, either party should be able to request mediation, but both parties must agree to engage in it. Neither party should be able to force the other into compulsory

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<sup>64</sup> *Id.* at 152.

<sup>65</sup> Maggiolo, *supra* note 15, at 633.

<sup>66</sup> *Id.*

<sup>67</sup> Mills, *supra* note 2, at 149.

mediation. Like a lot of things in life, if you are forced into them, you might not be as willing to actively participate in the process.

The great news about mediation is parties are likely to be no worse off coming out of mediation than when they went into it. If parties know they have very little lose—other than time—they are likely to be more willing to actively participate in the process. Even the time they spend in mediation should not be looked at as a loss even if an agreement is not reached. There is a lot of information that can be learned from participating in mediation. Information that could lead to an agreement even after the mediation has ended.

While parties should learn about and understand the barriers to mediation and how to overcome them, they are best served by focusing on the benefits of it. Not only is it a highly successful alternative to arbitration, it can reduce the time and cost of collective bargaining, grievance adjustment, and arbitration. Mediation is more likely to produce mutually acceptable and beneficial outcomes. Since the outcomes are directed by the parties, there is a higher rate of satisfaction amongst the participants, less chance of breaching of the agreement, and less chance that a certain type of grievance will be repeatedly filed. Most importantly—since many collective bargaining relationships last longer than most marriages—it is beneficial that mediation helps “improve the parties’ overall dispute resolution ability and ultimately their entire relationship.”<sup>68</sup>

It is true that not every impasse or grievance is ripe of mediation nor is it true that every impasse or grievance brought to mediation will be settled. The possibility of failure should not deter the parties from earnestly participating in the mediation process. Even if the parties fail to

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<sup>68</sup> Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 1 NEGOTIATION J. 9, 14 (1989).

come to an agreement in mediation, the dialogue has been started. It is possible that something one of the parties or the mediator says may cause the other party to change their position before arbitration. Getting the parties to give an honest assessment of their case adds value to the process. Coming out of mediation, the parties have a better idea of the underlying interests and issues.

Of course, it is easier to go to arbitration and have someone else do the work for you. But let's face it, that is not why members elect union leadership or management appoints people to handle these issues. Collective bargaining and grievance adjustment are not easy processes to work through. People are elected and appointed to do the hard work of ensuring labor management relations continue as smoothly as possible.

In the end, it is always in the best interest of union leadership and management to be good stewards of their member's and taxpayer's money. If there is a process that will save time and money, why not try it? Union membership will be happy with the economic stability that comes with settling the contract or their grievance at the lowest level possible. Management should also appreciate the ability to move on other issues when the contract or grievance is settled with the least amount of time and effort. Mediation exists to achieve these goals and improve the underlying relationship between the parties.