INTRODUCTION

For years, mediation has been used to resolve conflicts. Most civil (noncriminal) disputes can be mediated to a successful conclusion, including those involving contracts, leases, business ownership, employment, and divorce. A brief definition of mediation is provided by the Calpepra Labor Academy Co-Director Madge M. Blakey as, “The involvement by a neutral (often the State Mediation and Conciliation Service) to assist in breaking an impasse in negotiations by discussing the disputed issues with the parties together or separately, and assisting the parties in reaching a settlement.”

Mediation is further defined by Frank Elkouri and Edna Asper Elkouri as:

“Mediation is the process whereby a skilled mediator aids disputing parties in reaching a mutually acceptable resolution, but does not have the authority to make a binding decision. A mediator does not hold evidentiary hearings, as in arbitration, but conducts informal joint and private meetings with the parties to understand the issues, facts, and positions. Because the separate meetings are strictly confidential, original positions are not jeopardized. This format allows the mediator to facilitate a resolution of the dispute. By agreeing to mediation, parties do not relinquish any legal rights.”

Furthermore, author Christopher W. Moore believes that mediation has been used effectively to build consensual decisions on a wide range of public policy, regulatory, and organizational issues. He anticipates that this trend will continue and that the range of application will become even more diverse. For example, nonviolent criminal matters, such as claims of verbal or other personal harassment, can also be successfully mediated.

Today, using mediation for personal, organizational, and public conflicts is still a fledgling idea. Everyone understands that mediation is a resolution mechanism that is popular for settling personnel issues, but I have observed that many HR practitioners are hesitant to use it. This paper will describe a structured mediation designed for resolving workplace conflicts as a tool for HR professionals to use when attempting to resolve labor-management disputes.
WHY MEDIATE?

Mediation is particularly useful when it is used to identify and cope with interpersonal issues not originally thought to be part of the dispute. This is also true of many aspects of labor relations, including negotiations, workplace disputes, harassment claims, and organizational dynamics. While there are other tools available to resolve issues, mediation can help salvage damaged relationships. Mediation is particularly valuable when the dispute involves another person with whom (by choice or circumstance) you need to remain on good terms. A well-functioning organization must ensure that working relationships exist among all parties (elected officials, management, employees, unions, etc.)

To fully understand the conflict resolution cycle, one should study the various conflict management and resolution approaches, as indicated by Moore below.

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<tr>
<th>Conflict Management and Resolution Approaches</th>
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<tr>
<td>Private Decision Making by Parties</td>
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<td>Private Third-Party Decision Making</td>
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<td>Legal (Public), Authoritative Third-Party Decision Making</td>
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<td>Extralegal Coerced Decision Making</td>
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<td>Conflict Avoidance, Informal Discussion, and Problem Solving, Negotiation, and Mediation</td>
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<td>Increased Coercion and Likelihood of Win-Lose Outcome</td>
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As indicated above, mediation is one of the less coerced methods of resolution approaches and is less likely to result in win-lose outcome. Furthermore, mediation allows the parties in dispute to reach resolution, rather than letting a third party decide the outcome. For those who have engaged in litigation or arbitration, it can be a daunting experience to find out that a third party will decide the fate of an important matter that may have long lasting effects on the organization.

In addition, Mediator Michael Roberts gives the following benefits of mediation:

1. **Economical Decisions**: Mediation is generally less expensive than litigation or other forms of dispute resolution.
2. **Rapid Settlements**: Mediation often provides a quicker way of resolving disputes.
3. **Mutually Satisfactory Outcomes**: Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party.
4. **High Rate of Compliance**: Parties who have reached their own agreement in mediation are generally more likely to comply with its terms than those whose resolutions has been imposed by a third party.

5. **Comprehensive and Customized Agreements**: Mediated settlements can address both legal and extralegal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

6. **Greater Degree of Control**: Parties who negotiate their own settlements have more control over the outcome. Gains and losses are more predictable in a mediated settlement than they would be if the case is arbitrated or adjudicated.

7. **Personal Empowerment**: People who negotiate their own settlements often feel more powerful than those who use advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power of influence.

8. **Preserving Relationships**: A mediated settlement that addresses all parties’ interests can often preserve a working relationship in ways that would not be possible in a win-or-lose dispute resolution procedure. Mediation can also make the termination of a relationship more amicable.

9. **Workable Solutions**: Parties who mediate their differences are able to attend to the details of implementation. Mediated agreements can include specially tailored procedures for how the decision will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

10. **Agreements Instead of Simple Compromises or Win-Lose Outcomes**: Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions can.

11. **Durable Decisions**: Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilize a cooperative forum of problem solving to resolve their differences than to pursue an adversarial approach.

12. **Confidentiality**: With very few exceptions (for example, where a criminal act or child abuse is involved), what is said during mediation cannot legally be revealed outside the mediation proceedings or used later in a court of law.

If properly used, management can utilize mediation to retain the rights to decide, if not collaborate, on important organizational issues with the other party in a dispute.

**HOW DOES IT WORK?**

The goal in mediation is for all parties to work out a solution they can live with and trust. It focuses on solving problems, not uncovering the truth or imposing legal rules. While mediation is less formal than a court trial or arbitration, it has several stages. The process of mediation is best defined by Jennifer Beer and Eileen Stief, who explain the anatomy of a mediation session as follows:

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1. Opening Statement
2. Uninterrupted Time
3. The Exchange
4. Setting the Agenda
5. Building the Agreement
6. Writing the Agreement
7. Closing Statement

During the exchange process, the mediator may try to get the parties talking directly about what was said in the opening statements. It is then followed by private caucuses with each party meeting privately with the mediator to discuss the strengths and weaknesses of his or her position and ideas for settlement. In caucus, the mediator usually uncovers what the parties want. With this information, the mediator links his suggestions with the parties’ needs, wants, and desires. This may go back and forth several times with each party as needed. After caucuses, the mediator may bring the parties back together to negotiate directly.

Because the mediator has no authority to impose a decision, nothing will be decided unless both parties agree. This greatly reduces the tension of the parties, and also reduces the likelihood that someone will cling to an extreme position. Finally, if mediation does not result in an agreement, either party may take legal action.

MEDIATION IN NEGOTIATIONS

In their book Getting to Yes: Negotiating Agreement Without Giving In, authors Roger Fisher and William L. Ury defined mediation as “integrative” or “interest-based” bargaining. It works on the principle of the parties’ interests, and if successful, each party will satisfy its specific interest. In other words, successful mediation is win-win and does not produce a winner and a loser. Fisher and Ury recommends the following five principles for mediation:

1. Don’t bargain over positions.
2. Separate the people from the problem.
3. Focus on interests, not positions.
4. Invent options for mutual gain.
5. Insist on using objective criteria.

In the public labor negotiations setting, mediation is often used during impasse. Mediation is used in impasse procedures under the Dills Act, Educational Employment Relations Act (EERA) and Higher Education Employment Relations Act (HEERA).

For EERA and HEERA districts, once the Public Employment Relations Board (PERB) certifies the parties are at impasse, PERB appoints a mediator to try to resolve the parties’ differences (Gov. Code § 3548). If a mediator does not succeed, the mediator
will declare fact-finding to be the appropriate resolution process and either party may request that their differences be submitted to a fact-finding panel.

Under the Dills Act, the parties are authorized to engage the services of a mediator to resolve their differences (Gov. Code § 3518). The parties may select a mediator or request that PERB provide one. If the parties are unable to reach agreement, the State may implement any or all of the terms contained in its last, best and final offer.

For Meyers-Milias-Brown Act (MMBA) agencies, MMBA allows a public agency to adopt mediation on a voluntary basis (Gov. Code § 3505.2). Therefore, impasse procedures depend on local rules. Local rules generally require mediation, consultation or determination by the governing body, and/or arbitration.

On the federal level, the Federal Mediation and Conciliation Service (FMCS) is authorized to perform dispute resolution functions within the federal government. The purpose of the FMCS is to provide mediation, conciliation, and voluntary arbitration services to prevent or minimize labor-management disputes affecting interstate commerce.

Given its role in resolving collective bargaining disputes, the FMCS handles an average of 1,000 cases per year for agencies such as the Internal Revenue Service, the U.S. Department of Agriculture, the U.S. Department of Education, the U.S. Department of Homeland Security, the U.S. Postal Service, the U.S. Department of Health and Human Services, the Equal Employment Opportunity Commission, and the Federal Bureau of Investigation.

The Civil Service Reform Act of 1978 directs the FMCS to provide mediation assistance in disputes arising from negotiations between federal agencies and the exclusive representatives of their employees. The Postal Accountability and Enhancement Act of 2006 also requires the FMCS to appoint mediators in collective bargaining disputes between the Postal Service and the exclusive representatives of its employees. Based on these acts, mediation is a well-accepted process in the federal government.

MEDIATION IN THE WORKPLACE – PRACTICAL APPLICATION

Workplace mediation can be an effective way to resolve work-related and interpersonal conflicts in a timely, efficient and cost-effective manner. It can also help make the work environment more amicable. Empowering employees to reach their own resolutions takes the burden off of managers and supervisors; it also strengthens the personal investment of employees in their jobs.

Workplace mediation is remedial, but also can prevent future disruptions. Conflicts resolved amicably are much less likely to result in more dramatic actions, such as resorting to legal or labor union intervention. Workplace mediation is a tool for sustaining growth of an organization and personal growth of the employees.
Furthermore, the traditional method for handling disputes, such as a grievance procedure, is sometimes viewed as punitive and employees may perceive the grievance process as career suicide.

The alternative of litigation is rarely the best solution for most labor-management disputes. It is expensive, disruptive and time-consuming. More significantly, by its very nature, litigation often drives the parties further apart and weakens their relationship, often irreparably. Litigation may also fail to disclose the underlying problem that could have been revealed through mediation.

Mediation is based on an entirely different philosophy of problem solving. As author Rebecca Jane Weinstein stated, "it is not control-oriented, but rather satisfaction-oriented."x

Mediation can also bring benefits to public sector organizations with unions. Although the unions might initially be hesitant to include mediation in its grievance processes, there are benefits of significant cost savings (from fewer legal actions), the ability to explain or clarify their perception of a perceived injustice, the opportunity to negotiate on an important principle, and the ability to mediate everyday interpersonal squabbles between employees and management. Mediation is an opportunity for unions to deal with trivial matters that nevertheless stress their members. Furthermore, mediation does not have to be a substitute for the grievance procedure, and no resolution can be imposed.

Newcastle University recommends that mediation is most effective whenxi:

- Both parties are willing to work together to resolve their differences.
- Room exists for an improvement in working relationships.
- Allegations and counter allegations have been made.
- There is dispute over a workplace situation.
- No serious breaches of workplace policy or procedures have occurred.

In the event that breaches of workplace policy or procedures have occurred, or incidents of physical or verbal abuse arise, it is more appropriate to follow the organization's investigation and disciplinary procedures.

Agencies interested in pursuing mediation may contact the State Mediation & Conciliation Service (SMCS) which was established to improve employer-union relations in California. Currently SMCS staff mediate labor disputes between employers and employee organizations free of chargexi.

DISCRIMINATION & EEOC COMPLAINTS
The U.S. Equal Employment Opportunity Commission (EEOC) offers mediation as an alternative to its traditional investigative or litigation process. A mediator assists the opposing parties to reach a voluntary and negotiated resolution of a charge of discrimination. According to the EEOC's website, “Choosing mediation to resolve employment discrimination disputes promotes a better work environment, reduces costs and works for the employer and the employee.” Currently, mediation is available at no cost.

After an EEOC charge is filed, an EEOC representative contacts the employee and employer to discuss participating in the program. If both parties agree, a mediation session is scheduled. Although it is not necessary to have an attorney or other representation, the EEOC allows either party to do so. If mediation is unsuccessful, the charge will then be referred to an EEOC investigator.

Since the inception of its mediation program in 1991, the EEOC has conducted several studies on its program. In a report titled, “An Evaluation of the Equal Employment Opportunity Commission Mediation Program” conducted by researchers from Salisbury State University, Hood College, and the University of Baltimore, they examined the program from the perspective of charging parties and respondents and their satisfaction with the EEOC mediation process. The survey of parties who participated in the program found the process to be fair and neutral, and 96% of respondents and 91% of charging parties indicated they would use mediation again if the opportunity arose, even where the results of the mediation were different than they had anticipated.

Data provided by the EEOC shows a steady use of mediation and a 72% settlement rate:

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<td><strong>Resolutions</strong></td>
<td>4,833</td>
<td>7,438</td>
<td>6,987</td>
<td>7,858</td>
<td>7,990</td>
<td>8,086</td>
<td>7,900</td>
<td>8,202</td>
<td>8,649</td>
<td>8,840</td>
<td>8,498</td>
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<tr>
<td><strong>Mediations Conducted</strong></td>
<td>7,397</td>
<td>11,478</td>
<td>10,588</td>
<td>11,457</td>
<td>11,595</td>
<td>11,658</td>
<td>11,278</td>
<td>11,314</td>
<td>11,956</td>
<td>12,254</td>
<td>11,692</td>
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<tr>
<td><strong>Resolution Rate</strong></td>
<td>65.3%</td>
<td>64.8%</td>
<td>65.9%</td>
<td>68.5%</td>
<td>68.9%</td>
<td>69.4%</td>
<td>70.2%</td>
<td>72.5%</td>
<td>72.3%</td>
<td>72.1%</td>
<td>72.7%</td>
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Employers wishing to take advantage of mediation may also sign a Universal Agreement to Mediate (UAM). A UAM is an agreement between the EEOC and an employer to mediate all eligible charges filed against the employer, prior to an agency investigation or litigation. Because mediation is voluntary, the employer or the charging party may still opt out of mediation on a particular charge even though a UAM has been signed.

For example, CVS Caremark, a large pharmacy health care provider which operates CVS Pharmacy and Long’s Drugs, recently signed a National Universal Agreement to Mediate (NUAM) to informally resolve workplace disputes through alternative dispute resolution before an EEOC investigation or potential litigation occurs.

To date, the EEOC has entered into approximately 200 national and regional Universal Agreements to Mediate (UAMs), and EEOC district offices have entered into more than 1,500 mediation agreements with employers at the local levels within their respective jurisdictions. This demonstrates a growing need among employers to reach resolutions through mediation in discrimination charges.

CHOOSING TO MEDIATE

Organizations wishing to take advantage of mediation should consider adopting a mediation policy. For example, North Carolina State University has a mediation policy that includes the following components:

1. The mediation process is a voluntary alternative to the formal grievance processes available to staff.
2. Mediation is not legally binding.
3. A designated staff member will administer the mediation program, which includes administration, training, and approval of trained mediators.
4. The mediation process shall provide for confidentiality of the process and confidentiality of the mediation documents to the extent permitted by law.
5. All parties have the right to withdraw from the process at any time.

Once agencies have decided to use mediation, it is recommended that the following steps are used in preparing for mediation:

1. **Select a Mediator:** In most instances, the parties will mutually agree on a mediator. Agencies should carefully vet the potential choices, as mediator selection is often a major factor in the success of the mediation. When selecting a mediator, consider the appropriate training, experience, and methods. Agencies should also inquire about potential conflict of interests.
2. **Provide Confidential Premediation Papers to Mediator:** Be sure to provide concise statement of the issues and positions, identify strengths and weaknesses, a timeline for the case and for negotiations, and detail who will be present and their relationship to the case.
3. **Bring the Right People to Settle**: No mediation can succeed unless both sides bring party representatives with settlement authority. Agencies should decide beforehand who is necessary to be at the mediation and make sure that the mediation is scheduled to ensure those individuals’ attendance.

4. **Governing Body’s Approval**: For many public agencies, if the parties reach an agreement at mediation, it must also be approved by the entity’s Board of Directors. In this case, agencies should explicitly communicate this requirement with the other party and be careful not to bind the agency to such agreement. Any agreement’s terms must be subject to the governing body’s final approval.

5. **Attend Premediation Client Caucus**: Explore initial positions and sensitive issues with the mediator.

6. **Mediator’s Opening Statement**: The mediator will provide an introduction of him/herself. The mediator will also outline his position, the basis of his position, and areas of good-faith disagreement based on his consultation with the parties. The mediator will also set ground rules for all subsequent meetings.

7. **Opening Statement**: Each party will be allowed to provide an opening statement. Be prepared to discuss your wants, the basis of your wants, and explore areas of disagreement.

8. **Caucus with the Mediator**: This is an opportunity to identify the strengths and weaknesses of your case, evaluate the expected outcome, and discuss the “first credible offer” and when to make it. Be open to weight different options, select the criteria for selection of the different options, and propose how the parties will handle each issue, and in what priority order.

9. **Renegotiate**: This will be an ongoing process throughout mediation. During negotiation, seek the meeting of interests of each party, identify what is negotiable, feel each other out, and reach substantive and psychological gains.

10. **Memorialize the Agreements in Writing**: As in traditional negotiations, after coming to a verbal agreement, all agreements should be memorialized. This may come in the form of a term sheet, memorandum of agreement, or memorandum of understanding. Be sure to reconfirm terms and language with both the mediator and the other party.

By working together and preparing in advance, Human Resources practitioners can maximize the chances for a successful mediation.

**CONCLUSION**

From personal observations, I have noted that what generally stops management and unions from pursuing mediation is lack of knowledge of mediation techniques and processes. This paper is intended to provide a framework for others when handling disputes involving mediation.

Finally, it is important to note that in today’s economic and political climate, Human Resources practitioners must continually think outside the box for innovative and
effective resolution methods. The nature of the labor relations dynamic between an employer and employee is like a marriage, with one exception: Divorce is not an option.

Disagreements and periods of stress are inevitable. However, the way in which disharmonies are handled can drive the parties further apart or serve to enhance and strengthen relationships. Mediation is a proven and effective approach to resolving conflicts and should be seriously considered by agencies as a mechanism to resolve labor disputes.

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vii Yeung, Timothy G., and Genevieve Ng. The Twists, Turns and Detours on the Road to Impasse. 18 November 2010.


