MEDIATION

Ask any mediator his or her goal in a negotiations dispute, and you'll get the same answer: "Settlement is the name of the game." As long as settlement is reached voluntarily, mediators have done their job. Note, however, that mediators do not settle the contract—you and the union settle. Mediators are just facilitators, helping the two parties to agree with each other on a new contract.

Note also that mediators are acting on behalf of a specific public policy—labor peace. The important point is that this is the only public policy they are concerned about. They have no interest in the constitutional mandate for a thorough and efficient system of education nor the state's educational goals such as the achievement of core curriculum standards. Nor do they care about fiscal accountability or responsiveness to the needs and demands of the taxpayers. If a proposed package will get a settlement, a mediator will push for its acceptance by the board, without regard to its long-term implications for the district and the board.

In summary, don't expect mediators to protect your interest. They are attending to their own professional agenda.

PERC's Role in Mediation

Mediators are assigned by the Public Employment Relations Commission at the request of one or both parties. PERC maintains staff mediators and a panel of *ad hoc* mediators, who are primarily professors, attorneys and arbitrators.[1]

All of these mediators specialize in public sector negotiations, but none of them should be expected to know anything about your district when they arrive. It is your job to educate them as to why your district is different than the other seven they've worked in during the past three weeks.

All mediators are provided without charge by PERC. Generally, mediation is limited to three sessions; however, a mediator may determine that additional sessions may be beneficial. If mediation does not result in a settlement, factfinding may be recommended by the mediator.

As mentioned, PERC will assign a mediator even if only one party requests it. If you believe, however, that it is too early in negotiations to get into mediation, say so to PERC. The Commission staff realize the premature entry of a mediator into negotiations is at best a waste of time, and may even be harmful to the relations between the parties and to the chances for a settlement. Once told of your concern, PERC may encourage the parties to negotiate directly for a few more meetings before getting into mediation. If the union insists on a mediator, however, PERC will probably assign one, but at least PERC and the mediator know the situation they are entering. In such circumstances, it is common for the mediator to meet once with the parties and then ask them to renew direct negotiations and to call him or her back when they are truly at an impasse.

There is little formal evaluation of mediators done by PERC. The Commission relies on "reports from the field," both formal and informal. Don't be afraid to report to PERC on your experience with an offensive, tactless mediator. This is especially true if you believe the mediator betrayed a confidence during the course of mediation. At the least, you know you will never be assigned that mediator again. If enough boards report the same type of problems to PERC, that mediator will become less active in public education labor disputes.

Procedural Functions of a Mediator

There are a variety of procedural matters that a mediator will attend to. Even procedural determinations, however, are linked to the mediator's ultimate goal of getting a settlement.

Scheduling Meetings The mediator will usually act as a go-between to find a mutually acceptable mediation date. This gives him the opportunity to converse privately and off the record with the negotiators for both sides. Some mediators, on the other hand, ask the parties to decide between themselves upon a list of acceptable dates, and transmit the list to him, on the theory that, once at impasse, any conversations between the parties may be helpful in getting a settlement.

If, as discussed above, the mediator discovers that the timing is not right for a quick settlement because there is not enough pressure on the parties at this time or because they need a breather to let emotions calm

[1] PERC's panel of neutrals includes both men and women. The pronoun "he" has been used in this article for grammatical ease but is intended to refer to all mediators.

down, he will schedule the next meeting at a date some considerable time in the future.

Recessing Meetings As in bargaining, timing is essential to successful mediation. The mediator will control the ending time of meetings according to his assessment of the chances for settlement that evening.

If the mediator adjourns the meeting quickly, he is telling the parties that he believes that both, or at least one of them, isn't serious about settling. He'll also remind them that it is their dispute, not his, and it is they who need the settlement, not him. Essentially, an announcement that he is adjourning the meeting because the parties are wasting his time is a threat by the mediator to abandon the parties to their own devices (which, of course, have already proved wanting because they are at impasse). It is intended as a catalyst to push the parties into more movement and compromise. Once, during a strike, a mediator set up such a situation by announcing that he was leaving until the parties became serious about negotiating a settlement. He then sat down and began to retie the laces of his shoes in preparation for leaving. It took him 10 minutes to finish tying his shoes, but in that time he convinced half the school board team to increase their offer to the union!

An early adjournment can also be a simple recognition by the mediator that 1) it's the wrong night for settlement, 2) further time spent would be wasted, and 3) insistence on holding the parties when no progress toward settlement is likely, would be damaging to his credibility and might harden the parties at their present positions.

More commonly, the mediator will not recess the meeting until very late in the evening or until he gets a settlement. There are various reasons for this:

- he needs time to apply his mediator's "bag of tricks," those basic mediator tactics discussed below;
- he only gets three meetings in most situations, and they may need to be long meetings in order to settle complex issues;
- fatigue changes perceptions as to what's important. The mediator uses time just as you or the union might;
- as the night wears on and the deadline of the next day approaches, the pressure to compromise often builds, perhaps because it is the last day of school, or the first meeting of the school year, or it's the Sunday night before you enter another week of strike and/or before the union appears in court to answer contempt charges.

Changing Locations In a crisis situation, a mediator may decide to move the negotiations to another site, usually a neutral location such as a motel. This helps to avoid the badgering of the press and the tension of pickets outside the window. It also can create a little insecurity in the mind of the party who has left his home base, e.g., the board offices, and been dropped onto unfamiliar turf.

Establishing the Agenda Most mediators will seek to take control of the order in which things are discussed. This lets them discover the priorities of the parties, helps eliminate the less important issues from negotiations, and creates the impression (and therefore to a large degree the reality) that the mediator is in control of the entire bargaining process.

Mediator Tactics

A mediator is a negotiator who doesn't have any interest in where the settlement falls. He utilizes many of the same tactics that professional (and experienced amateur) negotiators use, and throws in some that are unique to his status as a neutral.

Separating the Parties All mediators will eventually separate the board team from the union team, placing each in separate rooms. This has proven to be a very useful technique because:

- it diffuses the tension between the parties;
- it permits frank discussion within the teams of the open issues, and of the motives, actions and personalities on the other side of the table;
- it allows the mediator to challenge the position of one party without embarrassment to that party (more on this later);
- most importantly, it helps the mediator to achieve full knowledge of the real positions of the parties; only in private meetings can he attain this full knowledge, because each party will tend to move off its last position "for his information only" when they would never do so in front of the other side.

Separating the parties to effectuate the above is a proven tactic in mediation and should not be discouraged. Through it, the mediator controls communications and the flow of information between the parties. Once he has separated the parties, it is likely that he will not bring the full teams together for the duration of negotiations.

Chief Spokesperson Meetings It is common for a mediator, once he has separated the teams, to call the chief spokesperson for each team out into the hallway or to wherever he has established his "office." There he is able to feel out the negotiators' positions and discern areas where there can be movement by either party and where there can be little or no movement.

These meetings may include both spokespersons, or the mediator may meet with them one at a time. In either case the spokesperson is usually able to be a little more candid in such private meetings than he can be in a group session.

Ascertaining Priorities This is perhaps the most important function of the mediator. He must discover what it is you want compared to what you really need. Once this is known to the mediator, he can begin to work on pulling together the items needed for a settlement. He may end up proposing that one side meet some of the "wants" of the other side, but that is just icing on the cake; if he fails to properly distinguish needs from

wants, however, he'll never help the parties to reach agreement.

The tactics used to ascertain priorities are the same as we use at the table: probing questions, repetition, paraphrasing, packaging, timing, etc. If he is to be successful, the mediator must know and properly use these tactics so he can correctly identify certain proposals from either side as necessary ingredients to a settlement, and others as simply desirable but dispensable extras.

Assessing the Rigidity of Positions Through the separate meeting process, the private conversations held with spokespersons, and the effort to ascertain priorities, the mediator should gain enough information to become an important resource to the board and to the union. He can recognize and inform the union that "a cap on tuition reimbursement is important to the board," and to the board state that the union didn't mean "it would never agree to restrict personal leave use," but only that such an agreement would cost the board a great deal to obtain.

Another useful mediator tactic to get this information is the "supposal": "suppose they were willing to do this and so—would you be willing to do this and that?" When you hear this, be careful! Sometimes the best reply is, "Get me that offer and we'll see." The beauty of a "supposal" is that no one, not even the mediator, is committed to it. It permits the parties to conjecture without modifying their official positions or making a commitment they might later regret.

Deflating Extreme Positions "Never" always becomes "maybe" in the right context. A mediator, in order to get a settlement, must try to move the parties off their desired, but extreme, positions, to bring them closer to each other's true needs. This goal of the mediator demands that he utilize the most confrontation-like tactics he will ever use, for he is pushing you or the union off a position that you hold near and dear to your hearts.

Accusations may fly of unreasonableness, selfishness, irresponsibility, and insanity. "Get-backs," i.e., correcting a past error by eliminating from the contract some employee benefit, are routinely treated this way.

But, likewise, union demands for substantial salary raises plus new medical fringe benefits in each year of the new contract are attacked by the mediator as "pie-in-the-sky" and ridiculous.

This tactic should only be used privately, between the mediator and the team he is working on. If done in the presence of the other party, both parties will usually become more intransigent. If the board position has been attacked in front of the union, for example, the union will believe its position has been vindicated; the board will naturally rise to defend its position, rather than lose face before the union, and become unwilling to compromise its position, even if it had the authority to do so prior to being lambasted by the mediator.

The example above dealt with a mediator's diatribe against the board. At least as often, he is using the same approach against the union, which leads to the following general rule: "The more time the mediator spends with the other side, the better off you are."

Creative Suggestions Once in a while a mediator can suggest something neither party has ever thought of which proves to be the key to the settlement. For example:

- in one district, the board refused to grant binding arbitration on the grounds that its present system of advisory arbitration was perfectly satisfactory, in that if the arbitrator was fair, the board would abide by the advisory award. The mediator knew that the union was skeptical of the future actions of the board, given its new majority. He suggested that advisory arbitration remain, with this provision: if the board failed to abide by three advisory awards during the contract, all future awards would become binding! Both parties accepted.

- in another district, binding arbitration was again the stumbling block, but for a different reason. The board feared that the union would use arbitration to harass the board, by taking all grievances to arbitration, even the most frivolous ones. The mediator suggested that the parties agree to a "loser pays" clause: whichever side lost the arbitration case had to pay the arbitrator's entire fee, rather than splitting the cost equally between the parties. Both sides, confident that they would never push a weak case to arbitration, accepted this proposal.[2]

Packaging Both parties use this tactic and so does the mediator. After some time in the situation, the mediator knows the priorities, the rigidities and the softspots of both sides, a sum of information that neither party may have on its own. From his private store of information, he can frequently fashion a package that has enough "goodies" in it that both sides can, begrudgingly, accept.

There is a danger for the mediator in offering his own package. If the package ignores an issue that one party ranks very highly, or includes an issue that party vehemently opposes, the mediator may lose his credibility with that side. He may be thereafter seen as pro-union or pro-board, and will be ineffective as a neutral. Because of this risk, many mediators prefer the "supposal" approach, and will only offer a "mediator's settlement proposal" as a last ditch effort, or where he is certain it will be acceptable to both sides.

Highlighting the Costs of Disagreement Mediators don't spend much time with one party selling the mutual benefits of the other side's proposal. They seem much

[2] The story has an interesting epilogue. The mediator was later called back by the same parties to act as arbitrator over a grievance. He eventually ruled for the union, and sent a bill for his entire fee to the board. The board appealed the legality of his decision to the courts, and had the decision reversed. The arbitrator was so informed by the board, and therefore billed the union for his entire fee. The union refused to pay on the grounds that it had won the arbitration; the board refused to pay because it had the arbitration award vacated; and the arbitrator still hasn't gotten paid! He has made this "creative suggestion" in few districts since these developments.

more comfortable as doomsayers, encouraging the parties to compromise by highlighting the negative aspects of continued disagreement, such as:

• "starting school without a contract is bad for employee morale";

• "if we don't wrap this up tonight, I can't promise that old items previously withdrawn by the other side might not pop back onto the table";

• "if we fail to settle tonight, these negotiations may drag on *forever*";

• "the longer you delay agreement, the higher the county average settlement becomes because the highest settlements always come in last";

• "if you have to go to factfinding, you never know who the factfinder will be or what he will recommend; settle tonight, 'cause the devil you know (me) is better than the devil you don't know";

• "nobody wins a strike."

Note well: none of these statements are necessarily true. Many of them are untrue in many situations. But, spoken at the right time and in the right manner, they ring true, and they may spur movement by one or both sides that eventually leads to a settlement.

Note also that mediator tactics are used with both sides. They aren't evil, and can work well when used well. Remember: the mediator doesn't want the union to win or you to win; he merely wants you to settle.

Bargaining During Mediation

The first thing a mediator tries to accomplish is to gain your trust. Without your trust, he is useless.

In order to obtain your trust, he will promise to hold confidential any information you give him that you do not want disclosed to the union. A good mediator will never disclose your positions to the union without your permission, because once he has betrayed a trust he is completely ineffective. Indeed, a reputation for such actions will jeopardize his acceptability throughout the state.

As an indicator of the importance of confidentiality and trust in the mediator, the PERC Law at *N.J.S.A.* 34:13A-16(h) protects the mediator and his notes and documents from being subpoenaed for any PERC hearings.

Given the great importance of trust and confidentiality, should you give the mediator your "bottom line" when he asks for it? Not necessarily. He has to earn that information by earning your trust. After working with him for a while, you may discover that he misunderstands the issues, or that he "shoots from the hip." In such cases you risk having the mediator "inadvertently" disclosing information given to him in confidence.

Once he has established to your satisfaction his credibility and integrity, give him your best offer...slowly, in increments. Expose your position faster than you might with an adversary, but it is usually smart to withhold something as a sweetener for later on. You may need it.

Some other advice for bargaining during mediation:

• Don't be bullied. Remember that he can't make you do anything;

• Don't agree to something you can't live with. The mediator doesn't have to live with the agreement once it is signed, but you do. You, not the mediator, are responsible to the district, the community and the children;

• Don't attack the mediator personally, because you need him to help get an agreement; but don't let him push you around either;

• Don't ignore your knowledge of tactics. Move slowly, demand trade-offs, don't move twice without a counter by the union, etc. Mediators are especially useful when you can convince them that you cannot or will not improve your offer, but you would be willing to sell a compromise position to your team or board. By instructing the mediator to "get the offer" from the union, you set up a settlement offer that will be acceptable to you, without increasing your official offer unilaterally. If he is unable to get the "offer" you want from the union, you have retained your flexibility and bargaining position.

Summary

Don't be afraid of a union threat to call in a mediator. Going to mediation doesn't imply bad faith bargaining by either side, nor that the negotiations have failed. Mediation is simply an extension of the negotiations process. Frequently, in fact, the union calls in a mediator because it needs a tactful way to withdraw its many minor demands, and it knows that will be the first suggestion from the mediator.

Mediator tactics aren't used equally. They are used on the weaker party more. To get the most from mediation, be prepared, know your goals, use your knowledge of tactics, and be tough.