

Chapter Four: Negotiation Dispute Resolution Procedures

A. Mediation

In Michigan in 1939, not long after the famous sit-down strikes and sometimes violent union organizing efforts in the automobile industry, the Legislature enacted the Labor Relations and Mediation Act. This law created the Labor Mediation Board whose name was later changed to the Michigan Employment Relations Commission (MERC) and established a Mediation Division to assist in the settlement of labor disputes in the private sector. In 1965 the Public Employment Relations Act (PERA) was passed which, among other things, extended the mediation service to labor disputes involving public employees.

Mediation is a process in which an impartial neutral person tries to help the labor and management negotiators reach an agreement. The mediator has no power, other than expertise and persuasion, and cannot order a resolution of any disputed item. By law the mediator cannot disclose confidential information given to him or her by either of the parties. Mediation can be very effective if the parties involved will trust the mediator and cooperate with the process.

Section 7 of PERA requires the parties to notify MERC at least sixty days before the expiration of a labor agreement of the status of negotiations. This notice is usually sent by the union, but the requirement is for both parties to do so. MERC will send a very short questionnaire to both parties asking for the names, addresses and phone numbers of contact persons, the size of the bargaining unit, and the date of contract expiration. MERC will then notify the parties of the name of the mediator assigned to the case. This is merely to make it easy to contact the right mediator if a party wants to. Although MERC has the explicit authority to send a mediator into negotiations on its own, it will rarely do so unless one of the parties requests mediation.

When a mediator is brought into the negotiations several basic principles should be kept in mind:

1. The mediator is an employee of the State. There is no fee for his or her services.

2. The mediator is neutral and doesn't care if management or union prevails on any particular issue. The mediator's job is to try to get the parties to reach an agreement.
3. The mediator should take control of the negotiations in terms of deciding when and where the mediation sessions are to take place. It is important to cooperate with the mediator.
4. Most important – trust the mediator. You can tell the mediator your most confidential positions regarding the issues. You can reveal the bottom line. If you hold back and conceal such information in an attempt to manipulate the process you damage the process. To encourage the candor that is necessary for the mediation process to work, the law clearly prohibits a mediator from disclosing confidential information.

Sometimes inexperienced parties don't realize that the mediator is neutral and treat the mediator as an agent of the party who requested the mediator's involvement. For this reason it is better if the management negotiator holds back and allows the union to be the party requesting mediation, just in case there is someone on the union's bargaining team that suffers from this misunderstanding.

Usually the mediation begins with a joint meeting where both parties explain to the mediator what the issues are that are preventing a settlement. It can be very helpful to prepare in advance a set of materials that will help the mediator understand the issues and the parties' positions. This will probably include the old agreement, if there is one, and all demands, proposals and offers made by the parties.

At the joint session, there is no point in arguing or trying to persuade the mediator to agree with your point of view. It is counterproductive to accuse the other side of being unreasonable, greedy, stingy, stubborn or any other such thing. Try to explain what the issues are and exactly what has been your position regarding each issue. Most important, listen carefully to the union's explanation of the issues and its positions. You may discover at this

point that you've been misunderstanding the union all along and the issues may suddenly appear to be more solvable.

Next, the mediator will probably separate the parties and alternately talk to the bargaining teams privately. If you are providing the facilities, be sure to arrange for separate rooms where there is no possibility of anyone overhearing what is being said in the other party's room. The mediator will shuttle back and forth between the two rooms, bringing questions, suggestions and maybe even proposals. Listen carefully to the mediator. This is a person who has a great deal of experience and often is able to suggest solutions to bargaining problems that might not have occurred to the parties. The mediator can also give you information that can be helpful, such as an overview of recent settlements in your general labor market.

It is true that you should cooperate fully with the mediator. It is also true that you should obey the most important axiom of bargaining: never say yes when you should say no. Don't let the mediator talk you into a bad deal – something you cannot live with. Remember the mediator's job is to get a deal, not to protect either party from getting hurt. It is up to you to know what your side can afford, financially and politically.

The mediator can help both parties save face. Perhaps in the heat of the moment in an earlier negotiating meeting, you said you would never agree to a particular union demand, or the union said it would never agree to a contract that didn't include a particular benefit or provision. Now, even though the situation has changed, you or the other side won't budge for fear of losing face. There are several ways a mediator might get around this. One is to present the outcome as a "mediator's proposal." This proposal can be brought back to the union membership or the city council as an opportunity to reconsider a previous mandate or frozen position.

There are many techniques often used by mediators. These vary depending on the circumstances of each situation, the mediator's personal preferences and the various styles and approaches used by the negotiators involved. Mediators are masters at communicating, keeping the parties focused on the issues, defusing emotional barriers and suggesting realistic outcomes.

B. Fact Finding

Fact finding is the second dispute resolution procedure provided by Michigan's public sector labor laws and administered by MERC. It is available to all unions and their employers that are covered by the Public Employment Relations Act except those that are covered by Act 312, the Police-Fire Arbitration Act.

The underlying hope of fact finding is that the logjam of unsuccessful negotiations might be broken if there is public awareness of the facts regarding the negotiations. Perhaps political pressure or public embarrassment might persuade an unreasonable or stubborn party to come to its senses. The fact finder, at the conclusion of the process, issues a report and findings of fact and a recommendation regarding each issue. The recommendations are just that and neither party is required to give in or agree to the recommendations so fact finding doesn't settle anything unless the final report persuades one or both of the parties to change its previous position.

Mediation is a prerequisite to fact finding. After mediation is tried either party may petition MERC for fact finding using forms supplied by MERC. The other party is required to file an Answer to the Petition. At MERC's option, MERC begins the process by sending a list of five potential fact finders to the parties. Each party can cross off up to four as unacceptable and can ask MERC to disqualify a candidate if that person is an advocate for either management or labor or happens to have a conflict of interest in the particular case. Each party then prioritizes the remaining names and MERC appoints a fact finder. The fact finder is an agent of the State and is fully paid by the State. The parties are responsible for the fees and expenses of their own representatives and witnesses.

The fact finder will conduct a hearing at which both sides will present evidence in support of their positions on the issues. This evidence will be in the form of exhibits and the testimony of witnesses, but the proceedings are somewhat informal and the technical rules of evidence do not apply. The principles of evidence do apply, however, and hearsay and unsupported evidence will not carry much weight with the fact finder. It is wise for the employer, if it is going to take the process seriously, to be represented by an attorney, preferably by one experienced with fact finding.

There may be opening and closing oral arguments and, especially if the evidence presented is voluminous, briefs may be filed. The hearing is open to the public, but the fact finder can close it for good cause, such as disruption by persons attending.

Many fact finders are also experienced interest arbitrators and are familiar with Michigan's Act 312 which specifies a number of "factors" an arbitrator must consider in arriving at a decision. It would be helpful in preparing and presenting a fact finding case to consider the Act 312 "factors" and present evidence that addresses them, if such evidence supports your positions.

Fact finders have, over time, had a tendency to gravitate toward a mid-range position on major issues between the employer's position and that of the union. Anticipating this "baby-splitting" tendency, sometimes the union's strategy is to take an extreme position. If splitting down the middle was a certainty of the fact finder, the union would simply ask for twice what is wanted. Although such a scenario is overly simplistic, there are times when a fact finding case seems to follow such a script.

One of the great weaknesses of fact finding and interest arbitration, too, is that the fact finder most likely is unfamiliar with public sector finance. He or she needs to be educated from the most elementary concepts on up if he or she is going to be able to consider the limitations on the employer's ability to pay for the wage rates and benefits being considered or recommended.

After the fact finder issues the findings and recommendations, the bargaining process continues. The legal obligation to continue does not end there. After good faith bargaining continues for at least sixty days, but not before, it may happen that an impasse is reached. Remember an impasse occurs when the positions of the parties on the issues have solidified, are very clear, and further bargaining would be useless.

C. Interest Arbitration/ Act 312 in Michigan

1. Description of Act 312

Interest arbitration is a process in which a third party arbitrator determines all or part of the contract between the parties. Wages, benefits and contract language may be issues the arbitrator will determine. Interest arbitration should be not confused with rights arbitration which is also known as grievance arbitration.

They are very different and arbitrators who are excellent grievance arbitrators may be terrible interest arbitrators.

Rights or grievance arbitration is a process in which a third party arbitrator determines if there has been a violation of the labor agreement and, if so, what would be the appropriate remedy. It is a quasi-judicial process where a set of facts is examined relative to the labor agreement to determine if that agreement has been violated. It is an alternative to a civil lawsuit, hopefully, a little faster and a little cheaper with the judge and jury (the arbitrator) bringing to bear special knowledge regarding labor / management relationships and the so-called "common law of the shop."

If grievance arbitration is quasi-judicial, interest arbitration could be said to be quasi-legislative because it will determine what the labor agreement, the law in the workplace is going to say. Usually interest arbitration centers on the big three benefits: wage rates, pension benefits, and health insurance, but any issue that is a mandatory subject of bargaining can be at stake. Almost half the states have some form of legally mandatory interest arbitration available to some public employees. "Traditional interest arbitration" is the term given to the version where the arbitrator may fashion any outcome to an issue that he or she feels is appropriate. It is distinguished from "last best offer" arbitration where the arbitrator must choose either the position of the union or the position of the employer. "Total package last best offer" is the version where the arbitrator must select the total contract offer of one or the other of the parties and cannot compromise the outcome. Arbitrators greatly prefer to have more power and flexibility so they can bring to bear their experience and special expertise and so they very much prefer "traditional" over "last best offer" systems.

In Michigan, interest arbitration is provided by Act 312 of 1969, as amended, which covers police, fire, public safety, emergency medical service, and dispatch employees of police, fire, public safety and sheriff departments in cities, villages, townships and counties. Various public safety employees of colleges, universities and special authorities are not covered. The Michigan State Police by virtue of a special constitutional amendment are also covered. Act 312 is traditional arbitration relative to non-economic issues and is "issue-by-issue last best offer" arbitration relative to economic issues. That is,

on each separate economic issue, the arbitrator must award either the position of the union or that of the employer.

Because of the structure of Act 312, there are often quarrels about whether or not an issue is economic and also over identifying just what is an issue. When the parties agree that the term of the contract being submitted to arbitration shall be for three years, they may still disagree over whether wage rates is one issue or three (a separate issue for each year). Sometimes a party may feel it would be to its strategic advantage to “bundle” similar issues and sometimes it may feel it is better off to “splinter” issues into several distinct issues. The law provides that, absent a stipulation of the parties, the arbitrator shall “identify” the issues in dispute. Sometimes arbitrators fail to do this, or to do it well, and confusion occurs.

Another feature of Michigan’s Act 312 is that it calls for an arbitration panel of three persons: a neutral arbitrator appointed by the Michigan Employment Relations Commission (MERC) and two delegates to the panel, one appointed by the union and the other by the employer. The two partisan delegates are paid, if at all, by their representative parties, and the fees and expenses of the neutral or chairperson of the panel are shared equally by the State, the union and the employer. The chairperson’s daily fee is set by the State. It was last increased to \$650.00 per day on October 1, 1999. The law also provides that a verbatim record of the proceedings be made, at the expense of the State, and, if either party orders a transcript of the record, it shall pay the costs. A transcript is not required for a decision by the arbitration panel, but usually both parties order transcripts, share the costs of doing so and provide a courtesy copy of the transcript to the panel chair. MERC policies allow the panel chairperson to bill up to two additional days for each day of hearing if such days are needed and used. Conscientious arbitrators often spend more than two additional days poring over hundreds of pages of transcript, hundreds of exhibits, and voluminous briefs, but cannot bill for more time than the limit of two additional days.

An Act 312 case begins when the union, or the employer files a petition for arbitration with the other party with a copy to MERC. MERC has developed a form for this petition. Over 99 percent of Act 312 petitions are filed by unions. Although the Public Employment Relations Act requires both parties to bargain in good faith and Act 312 states that it is to be deemed to be

supplementary to PERA, it has been ruled that there is no requirement that an Act 312 petitioner must bargain in good faith in order to file a petition. For that matter, there is no requirement that there be a bargaining impasse. The only two requirements are that the petitioner has requested mediation at some point, and that there is a bargaining “dispute.”

2. The petition

According to MERC rules (R423.505), a petition for Act 312 arbitration must be prepared on a form furnished by MERC, signed by the petitioner, with the original served on the other party by registered or certified mail and with three copies filed with MERC. There are six pieces of information that MERC rules specify shall be included in the petition:

- a) The name and address of the employer and the name and telephone number of its principal representative.
- b) The name and address of the collective bargaining representative (union) involved and the name and telephone number of its principal representative.
- c) The name of the arbitrator from MERC’s panel of arbitrators that the two parties have selected, if they have (see below).
- d) The name and address of the petitioner and the signature and telephone number of the person executing the petition.
- e) A copy of the most recent labor agreement between the parties.
- f) A copy of the last offer made by each party to settle the agreement.

In addition, the petition form supplied by MERC calls for “. . . a list of any issues in dispute and the related facts thereto . . .” In most cases the union representative is the petitioner and the petition does not include a copy of the most recent labor agreement, does not include the last offer made by each party to settle the agreement, lists only some of the issues in dispute (the ones raised by the union) and does not include any facts related to the issues. These common deficiencies do not bother MERC which proceeds to process the petition anyway.

3. The Act 312 team

When an Act 312 petition is about to be filed, or when one is filed, management should form a team of persons who will manage the case from the employer’s side. The most important member of this team is the advocate who will present the case, argue management’s positions and prepare the brief. This person should be an attorney,

preferably one with plenty of Act 312 experience.

The second team member is the employer's delegate to the three-person arbitration panel that will decide the case. This person should be an experienced negotiator and should have Act 312 experience. He or she will contribute to overall strategy discussions as a member of the team, will feedback information regarding how the arbitrator is receiving the various arguments during the hearing and will be the employer's only representative in the all important private discussions of the issues by the arbitration panel.

Other members of the team would be the negotiating team, the department head and the persons who will be assigned to conduct surveys and do other research, prepare exhibits and testify. It is sometimes helpful to designate some individual to be the case coordinator who makes sure all deadlines are met and proper records are kept and so on.

4. The answer to the petition

Prior to the adoption of MERC's Act 312 rules in 1995, MERC, by resolution, required the party upon whom an Act 312 petition had been served to file an Answer to the Petition. The current rules do not mention anything at all about an Answer to the Petition but it is usually a good idea to file one, especially if the petition failed to list issues raised by management in the negotiations. This answer should be sent to the union and to MERC and should be sent to the arbitrator when one is finally appointed. You certainly don't want your issues to be forgotten about simply because the union failed to list them in the petition and MERC has failed to enforce its rule that all issues be included in the petition.

5. Appointment of an arbitrator

MERC maintains a list of Act 312 arbitrators called its panel of arbitrators with about thirty-eight names of arbitrators on it. If the parties can agree on one of these persons serving as the chairperson of the tripartite panel that will hear the case, MERC will appoint that person. If there is no such agreement MERC will send the parties a list of three of the members of its panel and instruct the parties that they each may strike off one of the names. This is done in the strictest of confidence with neither party knowing who was struck by the other party. If the parties strike different names, MERC will appoint the

remaining person. If the parties strike the same name, MERC will choose one of the remaining two.

It is important to get the best arbitrator possible and a lot of thought and effort should go into selecting an agreed-upon arbitrator or deciding which of the three to strike off. The full team should discuss the question and other friendly Act 312 experts should be consulted.

6. Preparations

Of course, preparations for an Act 312 case should begin prior to commencement of the negotiations. The issues raised by management with the hope that they might deter the union from submitting the case to arbitration at this point apparently haven't worked. Hopefully, they were carefully chosen and are issues that management can plausibly win — that there is evidence to support management's case. If you raise "deterrent" issues that are nothing but "throwaways" and then you throw them away once an Act 312 petition is filed, your credibility will be damaged and future "deterrent" issues will be seen as nothing more than empty threats.

You need to have, at the onset, a "theory of the case" which includes your issues, both the very serious needs of the employer and the "deterrent" issues as well as good reasons, backed by evidence, as to why you should prevail on your issues and regarding your positions on the union's issues. This "theory" is the heart of your case and it must be something that can be explained in short, clear, ordinary language so that anyone can understand your position.

A critical part of preparing the case is gathering the evidence you need to support your theory of the case. This will inevitably involve conducting surveys. No one likes being on either end of a survey, but surveys are the only tried and true way to get evidence that meets the requirements of Section 9(d) of Act 312. This particular section of the Act has been the most abused and overused by the arbitrators over the years. Section 9 lists eight factors upon which the arbitration panel must base its findings. Subparagraph (d) is the one that requires comparison of wages, hours, and conditions of employment with those of other employees performing similar services in "comparable" communities. It also invites comparisons with other employees generally and with employees in the private sector, but arbitrators all but ignore these two points. Many arbitrators act as though this comparison factor were the only important

factor. This is why it is very important that you have survey data that supports your positions regarding the disputed issues.

When selecting the comparable communities that will be used in your surveys and exhibits, select them based on objective criteria, such as type of government, population, proximity to your community and general wealth of the community. The fewer criteria used, the better. Do not select them because their wages and benefits make you look good. This is called “cherry-picking” and is frequently used by unions. Arbitrators may let a union get away with cherry-picking but they expect better of employers. You might begin with an arbitrary population range such as plus or minus fifty percent of your population and an arbitrary proximity measure such as a fifty-mile radius from your town. List all communities of your type (don’t compare cities to counties) that fit the criteria. You’re looking for a manageable number of communities that you’ll be able to survey (no more than 12 to 15) and enough so as to give a picture of what others are doing with wages and benefits (6 to 8). Adjust your parameters – smaller or wider ranges – to get a workable number. It is not a good idea to compare a wealthy town with a poor one so you may need to look at wealth measures such as taxable value per capita and exclude towns that are substantially different from your town.

When surveying other communities, remember the Golden Rule. No one likes surveys. One way to ease the pain and encourage cooperation is to start slowly. Send the target cities a polite letter informing them of your survey, thanking them in advance for their assistance, apologizing for the inconvenience you’re causing, and making it easy to help you. In the letter, ask them to send you copies of materials readily at hand such as labor contracts, personnel handbooks, pension actuarial valuations, seniority lists, and so on. You’ll be surprised at how many of your survey questions you’ll be able to answer yourself from such materials. Later, you may be able to fill in the blanks and gaps with a few easy questions, asked over the phone.

You will need to decide how to present the survey data in exhibits to be presented to the arbitration panel. Also, you will probably have previously agreed at the pre-arbitration meeting to exchange exhibits with the union by a deadline specified as so many days prior to the first scheduled day of hearing. All of your case presentation keys off of this exchange date. As

to the survey data, you want to allow enough time to complete the survey and prepare the exhibits but, on the other hand, you want your data to be fresh and current, so don’t do the surveying too far in advance. If possible, allow enough time to send copies of your exhibits to your survey communities, asking them to check the data for accuracy and also asking them to inform you if any of the data changes.

Survey data, as well as all the data to be presented in all the exhibits, should be laid out on each page in a simple, well-labeled format that is easy to understand quickly. A common mistake is to cram too much information onto a page. Another common mistake is to supply sketchy or enigmatic column headings that leave the reader wondering what the numbers mean. Early drafts of exhibits should be “tested” by showing them to some disinterested person and asking him or her to explain the point being made by the exhibit. If this person cannot do this easily, the exhibit needs more work. Teenagers are good testers. They don’t give a hoot about the issues in your case, have short attention spans, simple reading skills and limited knowledge of statistical methods, economics, and municipal finance — much like many arbitrators. When preparing exhibits or having them prepared, remember that you or some other person, is going to be sworn in as a witness to present the exhibit and explain it. This should be the person who prepared it or under whose direction the work was done. Nothing is worse than a witness that cannot explain the exhibit, where the data were obtained, the underlying assumptions of the exhibit, or who cannot answer questions arising from the exhibit.

7. Presentation of the Act 312 case

Most important: hire a lawyer to be the advocate who presents your case. Preferably, this will be a lawyer who specializes in labor and employment matters who has experience with Act 312. There is a juxtaposition or special relationship between facts and conclusions or data and arguments that lawyers are trained to understand and develop. Act 312 has become a specialized forum that requires special knowledge of public sector labor negotiations as well as experience with the peculiarities of the Act 312 process that have evolved since 1969. You’re Act 312 case is not a good place for an advocate to learn about Act 312 any more than your brain would be a good place for a brain surgeon to be learning procedures. Get a good solid experienced Act

312 lawyer, place him or her in charge of the case, do what he asks and help him conduct the case.

Help your advocate stay organized. Keep the exhibits organized and numbered properly. Take notes during the hearings. Be able to explain your theory of the case (why you should prevail) to help your advocate articulate this to the arbitrator. Suggest lines of argument that the advocate might include in the brief. Be alert to inconsistencies or contradictions in the union's case and point these out to your advocate. Shield your advocate from distractions during the hearing. Monitor the arbitrator. Read all the non-verbal messages he or she gives out. Is the arbitrator hearing and understanding your case? Does he pay attention to your witnesses? Where are his sympathies? Is he confused? You should be able to feed back this kind of information to your advocate so that adjustments or embellishments in the case presentation can be made.

8. Final offers

When all the witnesses have testified and all the exhibits have been introduced, the hearing will end. Normally a date a week or two later will be selected as the date the parties will exchange their last offers on the issues. With respect to the economic issues, these positions are irrevocable. Usually the arbitrator will require the parties to also submit final positions regarding the non-economic issues. All positions should be in the form of the exact contract language the party desires or seeks. Commonly these final offers are called "last best offers" or "LBOs." Because the LBOs on the economic issues cannot be changed, it is important that each issue is clearly identified and circumscribed. Treating an issue as two issues or two or more issues as one issue can make the parties' LBOs confusing and even impossible for the arbitrator to deal with. Although it is clearly the responsibility of the arbitration panel to identify the economic issues in dispute (Section 8 of Act 312), many arbitrators are careless and imprecise and confusion results. Which issues are to be splintered into several or bundled into one should be discussed and made clear before the hearing is closed and before LBOs are exchanged. Each party has a responsibility to see that this is done. If the arbitrator and the union are not interested in identifying and clarifying the issues, you should go to the trouble of drafting a detailed listing and description of the issues as a proposed stipulation.

LBOs and briefs should be exchanged through the arbitrator, that is, submitted to him or her and then, by him or her to the parties. This avoids the horrendous situation of one party seeing the other's LBOs or brief prior to preparing or submitting its own.

9. Panel meetings

If your delegate to the Act 312 panel is a skilled and experienced panel delegate, it will be to your advantage to request and encourage executive sessions of the arbitration panel as early in the process as possible, and to request more rather than fewer meetings. Your delegate should be able and prepared to argue the issues persuasively. This means he or she should be an experienced public sector labor relations negotiator who is carefully and thoroughly prepared to discuss the issues and the facts of this case. You and the advocate need to have special meetings to brief your panel delegate prior to meetings of the arbitration panel. One aspect of panel meetings is your delegate may get only a split second to decide what to say regarding an issue or to counterpoint an argument by the union's delegate. Consequently your delegate must be familiar with all the issues, all the arguments and all the facts supporting or not supporting each argument. This must be at his or her fingertips. In a panel discussion, there is no time to reflect or consider or think it over. Chances to make effective points or point out persuasive exhibits or particular pages of transcript come and go very quickly. Once an arbitrator makes a preliminary decision on an issue, he or she is unlikely to change his or her mind later. The focus will be the next issue. Your panel delegate must be familiar with your priority of issues. Which is most important? You should develop with your entire Act 312 team, a crib sheet showing priorities. Rank each issue. If you could only win one or two or one-half of them, which would they be? Are there any that you must win? Are there some that don't matter? Although you will tell the arbitrator in the brief that each issue is important and why you should win them all, this inflexibility has no place in Act 312 arbitration panel executive sessions. A hard-nosed approach here will probably be counter-productive and yield worse results than a flexible approach. Remember, the panel discussions are off-the-record and secret. Nothing is politically sensitive in panel meetings.

10. Opinion and award

The arbitrator will issue an Opinion and Award explaining his or her reasoning and deciding all the issues. The case is over. Hopefully your panel delegate had a chance to review and proofread a draft of the award with an eye to removing any embarrassing references such as how the testimony of one of your witnesses persuaded the arbitrator to rule for the other side. Sometimes arbitrators forget to “clean up” what they write and do unnecessary damage to one or both parties.

Although Act 312 Awards can be appealed on certain narrow grounds listed in the statute, it is almost always futile to do so. Rarely do the courts overturn an Act 312 Award. It just doesn't pay to appeal. Although it is not technically necessary, most employers and unions take the trouble after an Act 312 Award to draft a new contract incorporating the award. This keeps the formal contractual relationship in a familiar format and a single document which is much easier to live with later.