Hybrid Mediation/Arbitration Using the Same Neutral in Labor Grievance-Arbitration

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On September 14, 2012, the Chicago Teachers Union ("CTU") and the Chicago Public Schools ("CPS") reached an agreement that settled the first CPS teachers' strike in 25 years.[2] The agreement included several new and innovative provisions that addressed contentious issues between the parties. Among them was an agreement for a hybrid mediation and arbitration ("med-arb") process for high-level employee discipline dispute resolution in which the mediator-arbitrator was empowered to issue a final and binding award should the parties fail to reach agreement through mediation. The contract language that created these processes is sparse[3] as the parties left the details to be worked out over time based on their experience. In this paper, I discuss

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[2]The tentative agreement was reached on September 14th and subsequently ratified by the Chicago Teachers Union membership on October 2, 2012 and the Board of Education of the City of Chicago on October 24, 2012. https://www.cpsboe.org/content/actions/2012_10/12-1024-EX7.pdf .

[3]The med-arb language is as follows:

> ***29-4. Review of Discipline – Appointed Teachers and Temporarily Assigned Teachers.*** *Within fifteen school days of its receipt by the employee, appointed teacher and temporarily assigned teacher Warnings in Lieu of Suspension shall be submitted to mediation under Article 3-9, if requested by the UNION. The mediation panel and procedures outlined in Article 3-9 shall be employed when the UNION requests mediation, except that the neutral mediator shall issue a final and binding decision resolving the dispute if the parties are not able to reach agreement on a resolution.*
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> ***29-5. Review of Discipline and Dismissal for PSRPs.***
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> *Non-probationary PSRP Warnings in Lieu of Suspension may be submitted to mediation under Article 3-9 exclusively upon request of the UNION. Non-probationary PSRP dismissals shall be submitted to grievance arbitration under Article 3-10 if requested by the UNION, or alternatively, shall be submitted to mediation under Article 3-9, exclusively upon request of the UNION. The mediation panel and procedures outlined in Article 3-9 shall be employed when the UNION requests mediation, except that the neutral mediator shall issue a final and binding decision resolving the dispute if the parties are not able to reach agreement on a resolution.*

general concerns about med-arb processes and recommendations that have been made to mitigate those concerns. This paper also examines the CTU-CPS experience with its unique med-arb model. I conclude with some reflections about the value of the process and how professional labor-management dispute resolution organizations can assist neutrals and labor and management representatives in navigating and improving these processes.

I. Background on the CPS-CTU Med-Arb Agreement. CPS is a sprawling organization which, in 2012, had over 600 schools and over 40,000 employees. School principals issued hundreds of disciplinary actions to teachers and other employees each year. Teachers had rights to review disciplinary actions through a management-run administrative hearing process. Under the then-existing collective bargaining agreement, the CTU could, and often did, submit certain teacher discipline to grievance mediation but it had no contractual opportunity for a final and binding review and decision by a neutral.

In negotiations for the 2012 agreement, the CTU initially demanded final and binding arbitration of all discipline issued by principals. The parties settled on a med-arb process for "Step 3" discipline and non-teacher dismissals. Step 3 discipline is the most severe form of discipline prior to dismissal.[4]

In reaching their 2012 med-arb agreement, CPS and CTU representatives were influenced by a number of factors including: the volume of discipline issued to teachers and non-teacher employees, the potential cost and delay of arbitration, the resulting uncertainty that might result from arbitration of discipline, and their experiences in resolving disciplinary issues in mediation. The parties hoped that a med-arb would be: (1) cost-effective, (2) expeditious so that final and binding decisions would be made in

[4]The CPS disciplinary process has four steps for teachers and non-teachers. For teachers, only step three discipline is covered by the med-arb process. That can include a publicly-issued "warning resolution" which makes the step three teacher discipline a high stakes issue for both parties. The fourth step is dismissal. Tenured teacher dismissal is a statutory process not covered by the collective bargaining agreement. Non-teacher dismissals are covered by a "just cause" requirement in the agreement.

close proximity to the disciplinary decision, (3) creative so that relationship-building resolutions might be made, (4) collaborative so that management and the union could mold the outcome, and (5) conclusive.

In examining the CPS-CTU model, I think it best to first give a framework for some concerns that arise out of the med-arb model and touch upon how the CTU and CPS have addressed or experienced those concerns.[5] I shall then reflect on the viability of med-arb and the trade-offs that management unions and employees must make to benefit from the process.

II. Pitfalls of Hybrid Mediation and Arbitration. Hybrid mediation arbitration processes have a number of potential pitfalls for the parties involved as well as for the mediator-arbitrator. Commentators and dispute resolution organizations have done some robust studies of the hybrid mediation-arbitration process using the same neutral in commercial arbitration but comparatively little in labor grievance arbitration. Stipanowich, Thomas J. *"Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators",* Harvard Nego. L. Rev., Vol 26, p. 265, (Spring 2021) at note 28, page 272.[6] *See*, Institute for Conflict Prevention and Resolution Commission on the Future of Arbitration, "*Commercial Arbitration at Its Best: Successful Strategies for Business Users,*" (CPR/ABA, 2001) at pp. 20-33; Stipanowich, *supra*. *See also*, Centre for Effective Dispute Resolution, *"Final Report of Commission on Settlement in International Arbitration,"* (2009), at p. 7, Appendix 2 (https://www.cedr.com/wp-content/uploads/2021/04/Arbitration-Commission-Document-April-2021.pdf.) *But see*, Javits, Joshua M. *"Better Process, Better Results:*

[5]CTU and CPS have now had over 10 years of experience with their med-arb model. CPS and CTU representatives will discuss their experiences with the med-arb process at the Chicago Kent College of Law Public Sector Labor Conference. CTU in-house counsel LaToyia Kimbrough and CPS's First Deputy General Counsel Libby Massey are representing the CTU and CPS perspectives at the conference.

[6]Stipanowich provides a helpful comparison of guidance on various combinations of mediation and arbitration given by the Institute for Conflict Prevention and the Centre for Dispute Resolution. *26 Harvard Nego. L. Rev.* at pp. 363-369,

Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes." ABA Journal of Labor & Employment Law 32, no. 2 (2017):167–87. http://www.jstor.org/stable/44648547. Though labor relations dispute-resolution processes are often thought to be unique environments, the concerns about hybrid med-arb are, in my view, mostly identical in that environment because they may ultimately lead to an adjudicated decision in the form of an arbitration award. Consequently, I have looked at and relied on the commentary regarding commercial arbitration in studying the process.

There has long been hostility to the idea of using a single neutral to both mediate and adjudicate a single dispute. The two functions are thought by some to be fundamentally incompatible. The Uniform Mediation Act specifically prohibits mediators from making "a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation" to the ultimate decision maker. 710 ILCS 5/7. Though not applicable to labor management mediations, it reflects a judgment that mediation is efficacious only when it is a stand alone process.

Moreover, the aims of mediation and arbitration, while overlapping, are not always fully aligned. Mediation seeks amicable resolutions and compromises through candid and confidential *ex parte* communications between the mediator and the parties. Resolutions or compromises made via a mediated agreement do not need to rely on or enforce existing agreements but may be extra-contractual, innovative, and relationship-focused. Arbitration awards, on the other hand, are constrained by a governing agreement. Arbitration is an adversarial and adjudicatory function in which a neutral receives relevant evidence and enforces the terms of an agreement based on established legal standards via a final and binding award.

Additionally, combining the two processes has a number of potential perils involving professional responsibility, due process, evidence, process efficacy, and enforceability of the award. I summarize these below.

A. *Professional responsibility*. Labor arbitrators and labor relations mediators are governed by various codes of responsibility and standards of conduct, none of which give arbitrators helpful guidance when acting as both mediator and arbitrator in resolving labor grievances.[7] Section F of the Code governing labor arbitrators allows arbitrators to act both as mediator and arbitrator for "residual" issues, but there is no guidance for them when they are asked to mediate a resolution of the central issues raised in a grievance. *Code of Professional Responsibility for Arbitrators of Labor Management Disputes* (https://naarb.org/code-of-professional-responsibility/). That is a significant gap. While perhaps not common, parties often ask labor arbitrators to assist in voluntary resolution of grievance on an *ad hoc* basis. Further, the advantages of a med-arb model to the parties in grievance arbitration require greater guidance from the Code.

The Model Standards of Conduct for Mediators and *The Federal Mediation and Conciliation Service Code of Conduct for Mediators, FMCS Directive 3300* provide no better guidance for mediators who might be called upon to participate in a med-arb process. Indeed, the overall thrust of their provisions tend to discourage mediators' participation in the med-arb model. *See*, American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution (2005). https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf; Federal Mediation and Conciliation Service, *Directive 3300* (undated but post-2021), (reproduced in Appendix A).

As indicated above, there has been significant discussion of arbitrators and mediators roles in med-arb in the commercial arbitration and international arbitration contexts. Further, dispute resolution associations have developed guidance for the use

[7]*See*, *Code of Professional Responsibility for Arbitrators of Labor Management Disputes*, Section F explicitly allows Labor Arbitrators to mediate so-called "residual" issues as an arbitrator but is silent on whether it permits the arbitrator to mediate the central issue in any grievance. That omission is a gap that should be filled irrespective of the formal med-arb process. The parties to an arbitration often engage the arbitrator to assist the parties in reaching an amicable resolution of grievance.

of a med-arb model using the same neutral as both mediator and arbitrator. *See*, Institute for Conflict Prevention and Resolution Commission on the Future of Arbitration, "*Commercial Arbitration at Its Best: Successful Strategies for Business Users,*" (CPR/ABA, 2001) at pp. 20-33; Stipanowich, *supra*. *See also*, Centre for Effective Dispute Resolution, *"Final Report of Commission on Settlement in International Arbitration,"* (2009), at p. 7, Appendix 2. Indeed, the American Arbitration Association amended its commercial arbitration rules to specifically permit parties to use the same neutral as mediator and arbitrator. *Commercial Arbitration Rules and Mediation Procedures, Rules R-10 and M-10,* American Arbitration Association, (amended and effective September 1, 2022). https://www.adr.org/sites/default/files/Commercial-Rules_Web.pdf. Similar efforts should be made for labor arbitrators and mediators.

B. *Confidentiality, due process, evidence, and the basis of the neutral's decision*. Confidentiality, due process, and the basis of the neutral's decision are additional overlapping concerns that affect one another and are best addressed together. Successful mediation depends on the parties' confidence in and their candidness with the mediator. During mediation, parties have private caucuses in which the mediator attempts to understand their interests and needs and the reasons for them. Mediators generally ask parties what they can and cannot share with their adversary and often a party asks that at least some information remain confidential.

The "rub" arises when mediation fails and the mediator puts on the arbitrator's hat to deliver a final and binding decision. An award influenced by or based upon information that the mediator-arbitrator learned in a private caucus that has not been shared with the other party violates due process principles on which labor arbitration relies. It violates fundamental fairness if decisions are based on information one party does not know was shared and did not have the opportunity to object to it, test its accuracy, rebut it or give it context.

C. *Process efficacy or functionality.* Process efficacy concerns what one commentator describes as the "functionality," of med-arb.[8] "Functionality" depends on participant confidence in the process. It boils down to this: if a party does not believe that the process will result in fair outcomes, the party will not engage in the process robustly, the process will be ineffective and its purposes will not be achieved.

D. *Enforceability of the neutral's award*. The Federal Arbitration Act, (9 U.S.C. §1 et. seq., the Illinois Uniform Arbitration Act, 710 ILCS 5/12, and the precedents of the Illinois Educational Labor Relations Board ("IELRB") and under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), apply the same or very similar criteria for vacatur or enforcement of arbitration awards, including:

(1) Arbitrator or party corruption, fraud, or undue means in the making of the award;

(2) Arbitrator partiality or corruption involving a party and the arbitrator;

(3) Arbitrator misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior on the part of the arbitrator by which the rights of any party have been prejudiced; or

(4) Arbitrator assertion of authority that exceeded that granted to him or imperfect execution of powers or authority by the arbitrator such that a mutual, final, and definite award upon the subject matter submitted was not made.

(9 U.S.C. §10; 710 ILCS 5/12; Chicago Board of Ed., 2 PERI ¶ 1089 at VII-256 (IELRB 1986).[9]

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[8]Deason, Ellen E. *"Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review,"* 5 Y.B. Arb. & Mediation 219 (2013).

[9]The Illinois Educational Labor Relations Act (115 ILCS 5/1 et seq.) does not incorporate the Illinois Uniform Arbitration Act (710 ILCS 5/1 et seq.). Actions to confirm or vacate awards under collective bargaining agreements under that Act are made directly to the Illinois Educational Labor Relations Board. *See*, *Board of Education v. Compton*, 123 Ill.2nd 216, 526 N.E.2d 149 (S.Ct. 1988) (IELRA divested the circuit courts of jurisdiction of arbitration awards).

Putting aside the question of whether a med-arb award can be enforced under the FAA or the UAA[10], med-arb awards are potentially vulnerable to attack based on claims that the award was arbitrary and capricious because it was based on information learned in *ex parte* caucuses or some other aspect of the process unfairly prejudiced the aggrieved party. *See,* Deason, Ellen E. *"Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review,"* 5 Y.B. Arb. & Mediation 219 at pp. 238-242 (2013). Indeed, in one reported case, a party who claimed to have been misled sought to vacate an award that was inconsistent with mediator-arbitrator's evaluation of the case during mediation caucuses.[11]

III. <u>*Mitigating the Pitfalls of Med-Arb.*</u> Dispute resolution organizations and commentators have developed a number of recommendations for arbitration agreements to mitigate the pitfalls of med-arb identified above, including provisions requiring the following:

a) Arbitrator's award must be dependent solely on evidence and arguments presented during arbitration proceedings.
b) Mediator must disclose confidential information that the mediator considers material to the arbitration proceedings.
c) Parties consent to med-arb with full awareness that arbitration award may be influenced by information received in *ex parte* caucus in mediation phase
d) Parties should confer regarding continued service of neutral at the conclusion of mediation and riven written consent for arbitration after mediation.
e) Recusal of neutral under defined circumstances.[12]

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[10]Deason, "*Combinations of Mediation and Arbitration*," 5 Y.B. Arb. & Mediation 219 at pp. 236-238, discussion of whether a med-arb award is an award subject to the Federal Arbitration Act

[11]Stipanowich, *"Arbitration, Mediation and Mixed Modes,"* 26 Harvard Nego. L. Rev. 265 at pp. 292-293.

[12]Stipanowich, *"Arbitration, Mediation and Mixed Modes,"* 26 Harvard Nego. L. Rev. 265 at pp. 355-357. Deason, "*Combinations of Mediation and Arbitration*," 5 Y.B. Arb. & Mediation 219 at pp. 245-249. *See also,* Philips, Gerald F. ``*Same Neutral Med-Arb: What does the Future Hold?"* Dispute Resolution Journal, Vol. 60, No. 2 (2005); Stipanowich, Thomas J. and Fraser, Vêronique, "*The International Task Force On Mixed Mode Dispute Resolution: Exploring The Interplay Between Mediation, Evaluation And Arbitration In Commercial Cases*," Fordham Int'l L.J., Vol. 40, Issue 3, (2017) p. 839 at 879.

IV. The CTU-CPS Experience.

CTU and CPS began their foray into med-arb by first setting some basic ground rules on how the process would work. That included determining how the parties would be represented, who the arbitrators would be, how cases would be scheduled and the mechanics of the process including when and how they would move from mediation to a final and binding decision. They borrowed significantly from the mediation process they used prior to the 2012 agreement.

CTU and CPS created a roster of mediators-arbitrators. A single member of the roster conducts each mediation/arbitration session. Arbitrators conduct hearings on a rotating periodic basis. They created an integrated mediation-arbitration rather than a sequential process of mediation first followed by arbitration. The parties committed their procedures to writing in what they called "Mediation-Arbitration Norms" in a 2020 document. (Appendix B) Notable provisions of those norms include:

- The process is informal.
- The goal of the parties is to enable the manager and the employee to work together for the benefit of CPS students.
- Each case is generally allocated 90 minutes for presentation, caucusing, agreement and decision but may run longer.
- CPS has the burden of going forward and the burden of proof.
- Evidence is submitted and shared between the parties prior to the mediation/arbitration session.
- The majority of the mediator-arbitrator's time should be spent in caucuses as the relations between the manager and the employee may be contentious and may devolve into argument rather than productive problem-solving.
- Caucuses should generally be limited to two (2) caucuses with each party
- The mediator-arbitrator must keep confidential from the opposing parties information shared and discussions had in caucuses "to the extent possible."
- The mediator-arbitrator determines if agreement is feasible or an impasse is reached.

- When the mediator-arbitrator determines that mediation has failed, the mediator-arbitrator moves directly to making a decision without further argument or evidence from the parties.
- The mediator-arbitrator may take the case under advisement and issue a decision within fourteen (14) days.
- Decisions do not include an opinion but either party may request that the mediator-arbitrator provide them a written explanation of the award

CTU and CPS representatives have decidedly mixed and not always positive views about their med-arb model.[13] Most of the concerns come from CPS and are focused on the substantive results of the process. CTU has a much more positive view.

The parties have enjoyed a relatively stable roster of arbitrators including a core group of three arbitrators, though there has been some turn-over in the roster. Mediator-arbitrators have not expressed to the parties any concerns about meeting their professional responsibilities or about the supposed incompatibility of the mediator and arbitrator roles.[14] They have, however, expressed frustration about the dearth of evidence presented to them and, often, its failure to meet acceptable standards for authenticity and reliability. The mediator-arbitrators have expressed concerns that their decision-making - particularly their ability to confidently resolve factual disputes - may be compromised by evidence that fails to meet reliability standards or that is uncorroborated. The parties' representatives recognize the evidentiary concerns that arbitrators have raised to them, and CPS shares them. CTU believes that it is a conscious trade-off inherent in a process whose greatest virtue may be bringing the dispute to a conclusion in an expeditious manner.

[13]I have relied on conversations with CTU representatives Latoyia Kimbrough and Graham Hill and CPS representatives Libby Massey, Paul Ciatsko and Rachel Resnick for these reports. Kimbrough and Massey are participants in the presentation on this topic at the Chicago-Kent College of Law 39th Annual Illinois Public Sector Labor Relations and Labor Law Conference on December 1, 2023.

[14]I have not consulted with the mediator-arbitrators engaged in the CTU-CPS process; instead, I have relied on reports from the parties about what mediator-arbitrators have expressed to them.

The parties' norms specifically require the mediator-arbitrator to keep information received in confidence during caucuses confidential "to the extent possible." That requirement has caused some trepidation about the influence that information revealed to arbitrators in caucuses may play in arbitrator's decision-making, particularly information unrelated to the discipline that may be used to gain the mediator-arbitrator's sympathy. Some CPS managers believe that when information revealed in caucuses is going to play a role in the mediator-arbitrator's decision-making, that information should be revealed to all parties and the parties should be given an opportunity to respond and/or give context to that information and argue about its overall effect in the mediator-arbitrator's decision-making. Others have suggested that the mediator-arbitrator should rely on confidences shared only for the purposes of achieving an agreed upon resolution and those confidences should play no role in any award issued by the mediator-arbitrator. CTU and CPS have not been able to resolve these concerns.

CPS and CTU do have some concerns about the enforceability of awards, whether they are entered by agreement or by the arbitrator. CTU noted one incident in which CPS refused to comply with one aspect of an award that it had deemed illegal. CTU took no enforcement action so the question of enforceability remains a concern.

Both CPS and CTU representatives value their med-arb model's efficiency and low cost, but much of that value is tempered by what each party views as its success in the process. CTU also sees value in the process for cases where the likelihood of success for the employee is small as it enables CTU to put that case before a neutral at very low cost.

Finally, from a procedural perspective, the parties acknowledge that while the aspirational goal of the process is amicable resolution of the dispute via mediation, agreements on discipline are rare and mediator-arbitrator decision making is required in most cases. The nature of the dispute - penalizing an employee to modify his/her

behavior - is high stakes for both the school principal and the employees. That serves as an impediment to resolving the cases by agreement.

CTU representatives indicate that they are generally happy with the substantive results of the process. CTU believes that the process has helped to curb some school principals whose instincts are to discipline employees too much or too harshly. Furthermore, they believe that mediator-arbitrators can be effective in curbing employee conduct that results in discipline. They note that some mediator-arbitrator's have blunt and sometimes harsh conversations with employees about their conduct in caucuses and in joint sessions.

Unsurprisingly, having moved from a management-run process to one ultimately controlled by a neutral, CPS representatives are much less enthusiastic about the results in med-arb. The results have not been encouraging for CPS principals. Far more often than not, their disciplinary decisions are changed in med-arb, mostly due to mediator-arbitrators' conclusions that the discipline imposed has not been sufficiently progressive or is too harsh under the circumstances. CPS representatives concede that upheld discipline can be helpful in defending future discipline or dismissal of the employee but are frustrated that it prolongs what may be an inevitable result. CPS representatives note that the results have made the school district more careful during the disciplinary process, which has both positive and negative aspects, and CPS fears it also may lead to the conclusion by school principals that disciplinary processes are ineffective, time-wasters. However, they feel that the process encourages the CTU to seek requests for review of all step 3 discipline without regard to the merit of each case. Finally, CPS representatives wonder if non-disciplinary contract compliance matters might be better suited to the med-arb process. In that, they fear that the existence of a mediation of discipline suggests a willingness by management to retreat from disciplinary decisions, when that is often not the case. The result is that the process is more often than not deadlocked and the mediator-arbitrators issue "split" decisions in which discipline is simply reduced, sometimes without much justification.

IV. Reflections and Conclusions.

Med-arb is a potentially valuable process that can help parties effectively manage disputes arising out of their collective bargaining agreement. It may be uniquely effective in the collective bargaining context given the ongoing relationship of parties and the frequency at which disputes may arise between them. As one commentator put it, the "parade of horribles" of same neutral med-arb may be overstated as they are often mitigated by the parties' innovations to the process and their willingness to risk an imperfect process to achieve higher priorities. Stipanowich, *"Arbitration, Mediation and Mixed Modes," 26 Harvard Nego. L. Rev.* at p. 297. *See also*, Blankley, Kristen M. "Keeping a Secret from Yourself? Confidentiality When the Neutral Serves Both as Mediator and As Arbitration in the Same Case." *63 Baylor L. Rev. 317, 325-330 (2011).* Another commentator, speaking specifically about med-arb in labor grievances, has expressed great enthusiasm for the efficacy of the process in strengthening the collective bargaining relationship. He emphasizes that the process benefits from the parties' making knowing trade-offs that best fit their needs. Javits, *"Better Process, Better Results,"* 32 ABA Journal of Labor & Employment Law at p. 174. http://www.jstor.org/stable/44648547.

I think that the CTU-CPS experience and the parties' perception of their experience indicates that the med-arb can be a valuable dispute resolution process. Though the employer feels handicapped by it in many respects, it does provide a cost-effective alternative to a full adversary hearing before an arbitrator. Moreover, it may be a useful check on over-aggressive disciplinarians.

Like most attempts to achieve low-cost and expedited resolutions to contractual disputes, the med-arb process requires the parties to sacrifice certain aspects of full adversarial proceedings. The pros and cons of the process include the following:

Pros	Cons
Cost-effective: multiple matters heard/ decided for one day's worth of fees	Probity of evidence becomes secondary and, when mediation fails to achieve agreement, mediator-arbitrator may not have the best or all evidence to make a decision.
Expeditious resolution of disputes	Ultimate decision may be influenced by what mediator-arbitrator heard during *ex parte* caucuses in mediation.
Allows for creative resolution of disputes; improve relationships	Process may encourage "splitting the baby" results
Parties have an opportunity to mold the outcome	Mediator-arbitrator may rely on information shared in caucuses that the other party has not had an opportunity to hear or respond to.
Awards are final and binding	Awards may be vulnerable to attack

The risks in med-arb may be worth the opportunity to achieve amicable and/or innovative results in a low cost and expeditious process. Moreover, the parties can blunt some of the more worrisome issues presented by this process, like a mediator-aribtrator's reliance on *ex parte* communications, by agreeing either that (1) the mediator-arbitrator may not rely on ex parte communications; or (2) the arbitrator may only rely on that information if the other party is made aware of and has an opportunity to respond to the communication. The important point is that the parties are empowered to mitigate the cons and maximize the pros of the process.

To conclude, we are in an era in which parties to collective bargaining agreements need to resolve disputes with effective, low-cost, and expedited means. Med-arb processes molded to the parties' needs offers one way for parties to achieve that provided they understand the tradeoffs. As CTU and CPS discovered, the parties and

the neutral benefit from clear written guidance about the mechanics and values of their process. Neutrals and the parties will also benefit if professional labor-management dispute resolution organizations embrace these processes and give guidance to those engaged in them. Legislation, codes of professional responsibility, and standards of mediator and arbitrator conduct do not acknowledge the value of med-arb or give any guidance to mediators and arbitrators on how they can accommodate the important management and labor needs addressed by the process. Professional labor-management dispute resolution organizations should address gaps in these codes to empower neutrals to work with parties to meet these needs.

APPENDIX A

Code of Conduct for Mediators, FMCS Directive 3300

The Federal Mediation and Conciliation Service

(Undated but post-2021)

FEDERAL MEDIATION AND CONCILIATION SERVICE
Office of the Director
250 E Street, SW
Washington, D.C. 20427
(202) 606-8100

DIRECTIVE 3300. MEDIATOR CODE OF CONDUCT

1. PURPOSE.

   FMCS mediators provide mediation and other conflict management and prevention services that require adherence to ethical responsibilities and duties in addition to Federal ethics rules and regulations. Mediator effectiveness relies on the mediator's acceptability to the parties as a neutral third party.

   To accomplish this, mediators must uphold the pillars of the mediator code of professional conduct: self-determination of the parties, neutrality, confidentiality, effectiveness, and professionalism. This code is intended to establish principles above those required by Federal ethics rules and regulations applicable for all FMCS mediation and conflict management and prevention services.

2. AUTHORITY. 29 CFR § 1400.735-20 Code of Professional Conduct for FMCS Mediators.

3. APPLICABILITY. This Directive applies to all FMCS mediators and their managers.

4. BACKGROUND.

   In 1964, a Code of Professional Conduct for Labor Mediators was drafted by a Federal-State Liaison Committee and approved by the FMCS and the Association of Labor Relations Agencies. On April 13, 1968, at 29 C.F.R. 1400.735-20 the FMCS published a final rule entitled "Code of Professional Conduct for Labor Mediators." This final rule adopted and codified the Code of Conduct for Labor Mediators.

   This Code has not been updated in nearly sixty years and no longer reflects the agency's values, scope of services provided by FMCS mediators, or best practices for conflict management and prevention and resolution services. Therefore, FMCS created an internal committee composed of mediators from every district, mediator managers, and general counsel staff, and created a new code of professional conduct. The rule was updated to reference this internal Code of Professional Conduct.

5. POLICY. Directive 8104 is hereby revoked.

6. RESPONSIBILITIES: Various aspects of a mediation may be impacted by other applicable laws, rules, and agreements of the parties. These sources may create conflicts with, and may take precedence over, this Code. However, FMCS employees should make every effort to comply with the spirit and intent of this Code in resolving any such conflicts. This effort should include honoring all remaining parts of the Code not in conflict with these other sources.

   The following positions are responsible for the successful implementation of the Code:

   a. MEDIATOR

      1) *The responsibility of the mediator to the parties*. The responsibility of the mediator is to act as an impartial third party who assists and guides the parties toward voluntary resolution of their own dispute.

         The mediator's role includes guiding dispute resolution processes; serving as a

resource; and assisting the parties to explore and understand the issues to facilitate reaching a resolution.

The primary responsibility for the resolution of disputes rests with the parties. The mediator must recognize that the agreements reached are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching their settlement or resolution.

A mediator shall recuse themselves in cases in which, for any reason, they believe they will not be effective and/or neutral. If there is a possible appearance of a conflict but the mediator believes that they can be effective and neutral and recusal is not required by the federal ethics rules and regulations, the mediator shall notify the parties of the possible appearance of the conflict and obtain a waiver from the parties before continuing the mediation process. A mediator may, but is not required to, recuse themselves in cases in which they believe there is a possible perception issue, but that would not be a conflict under the federal ethics rules and regulations and in which the mediator believes they would still be effective and neutral.

The mediator shall not disclose to any non-party oral or written communications made during the mediation process, including settlement terms, proposals, offers, or other statements, whether made privately to the mediator or when all parties are present. If a mediator holds private sessions (caucuses) with a party, the mediator shall not disclose anything that is said or given to them in confidence during private meetings unless the party authorizes them to do so. A mediator shall not use confidential information acquired during the mediation for personal gain or advantage for others, or to affect adversely the interests of others. A mediator should destroy all confidential mediation materials once the matter is closed in line with all Agency policies.

2) *The responsibility of the mediator toward other mediator(s)*. A mediator should not enter any dispute which is being mediated by and/or assigned to another mediator or mediators without first conferring with any mediator(s) currently providing services, or at the direction of a manager.

   In the event more than one mediator is participating in a case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort and should extend every possible courtesy to the other mediators.

   Mediator(s) should work collaboratively and avoid any appearance of disagreement with or criticism of other mediators. Discussions as to what positions and actions mediators should take in particular cases should be conducted solely between the mediators.

3) *The responsibility of the mediator toward the agency and the profession*. FMCS is responsible for providing collective bargaining mediation and other conflict prevention, management, and resolution services as an independent agency of the United States government. The mediator is not judged solely on an individual basis but also as a representative of FMCS. A mediator's conduct impacts mediator effectiveness and acceptability with the parties, the reputation of FMCS, the Federal Government, and the dispute resolution process.

Therefore, a mediator's conduct should be at the highest level of professionalism at all times and intended to maintain the highest regard of the Agency. Mediators are expected to increase and refine their practice knowledge and skills throughout their professional careers through self-study, review of practice outcomes, and other life-long learning opportunities.

4) *The responsibility of the mediator toward the public*. Mediators serve the public as provided in various statutes and the FMCS Mission Statement. Collective bargaining mediation and other conflict management services, while generally private, voluntary processes, may impact the public interest. The primary purpose of mediation is to assist the parties to achieve a resolution and minimize or prevent impact on the public interest. However, such assistance does not limit the rights of the parties to resort to economic and legal actions. The mediation process may also serve to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. The mediator does not regulate or control any of the content of a collective bargaining agreement or other agreements reached as a result of mediation or other conflict management services performed by FMCS mediators.

   A mediator might find it necessary to withdraw from a negotiation, if the mediator believes the parties intend to use the mediation process as an implied governmental sanction for an agreement contrary to public policy.

   Collective bargaining mediation and other conflict management services are confidential; however, the agency may release non-confidential or other information as required by law, when in the context of interagency collaboration, or with the permission of the parties when it serves the public interest.

   Publicity shall not be used by a mediator to enhance their own position. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

b. DIRECTOR

   1) Supports the Code of Conduct by overseeing implementation of the Code;

   2) Fosters an ethical culture; and

   3) Emphasizes the importance of the Mediator Code of Conduct to the Agency's mission.

c. DEPUTY DIRECTOR OF FIELD OPERATIONS AND ASSOCIATE DEPUTY DIRECTORS OF FIELD OPERATIONS

   1) Supports the Code of Conduct by assisting in the consistent implementation of the Code;

   2) Fosters an ethical culture; and

   3) Emphasizes the importance of the Mediator Code of Conduct to the Agency's mission.

d. FIELD MANAGERS:

1) Ensures that mediators are aware of the Mediator Code of Conduct;

2) Ensures consistency in its implementation; and

3) Takes the Code into account in making work assignments.

e. OFFICE OF HUMAN RESOURCES:

1) Ensures that all newly hired mediators receive a copy of the Mediator Code of Conduct.

f. CHIEF LEARNING OFFICER:

1) Ensures that training on the Mediator Code of Conduct is provided at New Mediator Training and available to incumbent mediators.

7. REQUIREMENTS.

a. COMPLIANCE. Mediators and their managers are required to abide by the terms of this Code of Conduct.

b. REMEDIAL ACTION AND DISCIPLINE. An employee's failure to comply with this Code of Conduct can be cause for remedial or disciplinary action. Such action may include, but is not limited to:

1) Change in assigned duties;

2) Disqualification from a particular assignment; and

3) Appropriate discipline, up to and including dismissal.

8. REFERENCES.

a. Federal ethics rules and regulations, including 18 U.S.C. § 201. See 2021 compilation of federal ethics laws by Office of Government Ethics.

b. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635.

9. DEFINITIONS.

a. MEDIATION: All conflict prevention, management, and resolution services provided by FMCS mediators, including mediation, facilitation, coaching, leadership alignment and development, culture change/change management services, consulting, and education and training activities. Education and training activities by the Institute are not covered.

b. MEDIATOR: All conflict management and prevention professionals[1] unless specifically delineated.

10. CONTACT. Office of Field Operations

11. EFFECTIVE DATE: This Directive is effective immediately and shall continue until superseded or replaced.

[1] Within the 0241 series.

APPENDIX B

Mediation-Arbitration Norms

The Chicago Teachers Union and the Chicago Public Schools

(2020)

CTU/CPS MEDIATION-ARBITRATION NORMS

The purpose of this document is to provide the neutrals with information and a common set of practices that allow for an efficient and effective handling of the Mediation-Arbitration process. Our goal is to provide guidance to mediator/arbitrators on how the parties envision the process functioning.

Background

- Prior to 2012, the Board handled discipline of CTU members through suspensions without pay ranging from 1 to 30 days. There was not a CBA article that covered it. Board had an Employee Discipline and Due Process Policy that applied to CTU members.

- In 2012, the parties negotiated into their contract an article covering employee discipline – Article 29. Under Article 29, suspensions were replaced with a 4-step, progressive discipline process, with the fourth step being termination.

- Per Article 29-4 and 29-5 of the CBA, the parties also agreed that the Union is permitted to submit Level 3 discipline and PSRP terminations to independent review through mediation/arbitration.

The Sorts of Cases Addressed through Med/Arb

- The vast majority of cases that you will hear in med/arb concern what are known in the contract as "Step 3 Final Warnings."

- A Step 3 Final Warning is the most severe discipline a CTU member can receive short of discharge. For tenured teachers, if a Step 3 Final Warning is upheld in med/arb, the Board subsequently adopts a Warning Resolution against the tenured teacher. A Warning Resolution is the precursor to initiating the tenured teacher dismissal process under the Illinois School Code. A Warning Resolution does not begin the dismissal process. However, if a teacher violates the directives in the Warning Resolution, The Board will move for the dismissal of the teacher. A Warning Resolution is a formal Board action adopted a public meeting of the Chicago Board of Education. It is public record and can be found by searching the employee's name on the internet. The Warning Resolution itself which contains the specific allegations and facts of the underlying conduct and the directives for improvement; however, are not a part of the public record and cannot be found on the internet. What's found online is the Board Report, which informs the employee that a Warning Resolution is being adopted and issued to the employee to inform the employee that they engaged in unsatisfactory conduct. (See attached sample).

- Under the contract, the Union also has the option to challenge for-cause dismissals of non-probationary paraprofessionals in its bargaining unit (known as PSRPs (professional school-related personnel)) through either the grievance arbitration process, or in this forum – mediation/arbitration. A small percentage of the cases on this docket are PSRP dismissal cases.

Contractual Framework

- Article 29 sets forth a just cause standard and calls for discipline to be progressive and corrective. While the parties agree that certain egregious acts of misconduct can warrant initiation of the discipline process at a higher step, the contract provides that discipline should not be advanced to a higher step unless, "the employee commits the same unwanted behavior after being afforded a reasonable period of time for correcting the behavior but within twelve months of the delivery of the [previous step warning]."

- The Board developed a Discipline Matrix to provide internal guidance to its principals as to what level of discipline is appropriate for different kinds of misconduct.

Mediation/Arbitration Session Participants

- Typically, the med/arb session participants include the neutral, a CPS attorney, the principal who issued the discipline, a CTU attorney and the member. The panel may also include, from time to time, an additional representative from either side, including a CPS HR consultant, the CTU Grievance Director, or the CTU field representative.

Pre-mediation Procedure

- The parties will make all reasonable efforts to designate which pending Mediation/Arbitration cases will be heard on a particular date at least fourteen (14) days prior to the date of the scheduled session.
- Prior to the med/arb session, the parties submit by email to the arbitrator documents on which they intend to rely at the session, copying the other party. The parties agree that documents will be exchanged at least seven (7) days prior to the session. Any additional documents after the initial exchange should be submitted at least three (3) days prior to the session. The parties shall make all reasonable efforts to comply with these deadlines and shall advise one another of any delay regarding the same. The Board shall first provide all the documents upon which it intends to rely to support the discipline, and the Union shall respond by providing any documents it intends to use in defense.
    - Occasionally, supporting documents will surface on the day of the session which were not exchanged in advance. This should not occur normally. The arbitrator may, in their discretion, deny the use of any previously undisclosed documents in the session. In the event that any documents not previously disclosed are permitted, the parties will be given adequate time to review those documents.

- Documents containing confidential student information, including names, dates of birth, addresses, ID Numbers or contact information must be redacted accordingly. Privileged student records, such as student IEPs, are not to be included in the materials except that in limited circumstances where the discipline at issue involves student IEPs or other student records, those documents may be utilized provided that the parties ensure all confidential student information is redacted from the relevant documents accordingly.

Mediation/Arbitration Session Procedures

- Intended to be an expedited, informal dispute resolution forum.
- Typically, there will be 3 cases scheduled for a day. If one of them is a PSRP dismissal case or a case with several underlying disciplinary step warnings, the parties might decide to only schedule 1 or 2 cases for that day.
- We aim to spend 90 minutes or less on each case. Sometimes a case takes more time than that, sometimes less. The parties agree that it is best practice to operate within that time frame to be considerate of the schedules of the individuals who are participating in later sessions.
- At the outset of the case, each party offers an opening statement with the Board going first since it has the burden in discipline cases.
- Immediately following opening statements, unless the neutral has clarifying questions about the statements, the parties will go into caucus sessions and meet separately with the mediator.
- The vast majority of the session is spent in caucus. (It has been our experience that sessions can quickly devolve into the principal and the employee calling each other liars if the mediator asks for each one's side of the story during joint session. This, of course, makes the goal of reaching a mediated resolution less likely and more difficult.)
- Shuttling between the caucuses, usually no more than twice, the mediator will get each party's side of the story and attempt to facilitate a settlement.
- If the mediator determines that a settlement is not feasible, the mediator can put on his/her arbitrator hat and issue a decision.
- The line between mediation and arbitration has not been sharp in this process. After the parties reach impasse, they do not make additional presentations to the arbitrator. The arbitrator makes his/her decision based upon what s/he has been presented to that point.
- Bench decisions are the default and the norm.
    - There is a Mediation/Arbitration results form on which the decision or the settlement is written at the session.
        - The parties or the arbitrator can add an attachment to the form spelling out lengthier terms of a settlement or conditions of a ruling.
    - The parties have the right to request a written, reasoned award. Parties will occasionally do this in certain kinds of cases. In those instances, they will

typically request that the arbitrator take the case under advisement and will submit written position statements following the session. This is fairly rare – the exception, not the norm.

- The neutral also has the discretion to take the case under advisement and submit a decision at a later time. This is also fairly rare—the exception, not the norm. In the event that a case is taken under advisement, a written decision should be issued within 14 days. The parties can jointly agree to allocate more time to issue a written decision.

Important Contract Provisions

Article 29 governs nearly all of what we do in med/arb. Other contract articles occasionally come into play, but Article 29 primarily guides this process.

29-1 – Establishes just cause standard for discipline

29-2 – Establishes the 4-step progressive warning process itself

29-3 – Establishes employee rights to union representation through the course of the discipline process

29-4 – Establishes discipline review procedure for discipline for teachers

29-5 – Establishes discipline review procedure for PSRPs

29-6 – Establishes requirement of professional administration of disciplinary policies and procedures

29-7 – Establishes procedure for notices of discipline to the employee and the Union

29-8 – Prohibits discipline based solely on anonymous complaints

29-9 – Establishes 3-year period after which discipline is considered stale and cannot be relied upon by the Board for any labor relations purpose

Big Picture Items

With the exception of the few PSRP dismissal cases, all of the cases addressed in med/arb deal with an employee and a principal who are still going to be working together after the session regardless of the outcome. In view of that, this process works best when it is focused on resolving the issues underlying the discipline so the employee and the principal can move forward and work to serve students together effectively. To that end, there may be times where the parties will ask that certain caucus discussions be kept in confidence and not shared with the other side and we ask that the neutrals respect this to the extent possible.

Scheduling

The parties typically schedule two mediation sessions per month. For 2020, because the caseload is currently low, we will be scheduling one session per month. The parties reserve the right to increase the number of mediation sessions should the need arise. For the past several years, we have created a schedule where each neutral has a set day of every other month as his/her default CTU/CPS med/arb day (e.g., the second Wednesday of odd-numbered months). Early on, we can schedule based on mutual availability. And we can deviate from scheduling for the default day if it won't work for the neutral or the parties in a particular month. However, using default days as the norm has proven helpful.

BOARD OF EDUCATION OF THE CITY OF CHICAGO

By: _____

DATED: 3/16/20

CHICAGO TEACHERS UNION

By: _____

DATED: 3/13/2020

Sample Warning Resolution [redacted]

[redacted]

WARNING RESOLUTION – [redacted], TENURED TEACHER, ASSIGNED TO [redacted] SCHOOL

TO THE CHICAGO BOARD OF EDUCATION

THE CHIEF EXECUTIVE OFFICER RECOMMENDS THE FOLLOWING:

That the Chicago Board of Education adopts a Warning Resolution for [redacted] and that a copy of this Board Report and Warning Resolution be served upon [redacted]

DESCRIPTION: Pursuant to the provisions of 105 ILCS 5/34-85, the applicable statute of the State of Illinois, and the Rules of the Board of Education of the City of Chicago, a Warning Resolution be adopted and issued to [redacted], Tenured Teacher, to inform her that she has engaged in unsatisfactory conduct

The conduct outlined in the Warning Resolution will result in the preferring of dismissal charges against [redacted] pursuant to the Statute, if said conduct is not corrected immediately and maintained thereafter in a satisfactory fashion following receipt of the Warning Resolution Directives for improvement of this conduct are contained in the Warning Resolution

LSC REVIEW: LSC review is not applicable to this report

AFFIRMATIVE ACTION REVIEW: None

FINANCIAL: This action is of no cost to the Board

PERSONNEL IMPLICATIONS: None

Respectfully submitted,

Janice K Jackson, Ed D
Chief Executive Officer

Approved as to legal form:

Joseph T Moriarty
General Counsel