

MAINE STATE LEGISLATURE

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Paul R. LePage
Governor

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Hon. John L. Patrick, Senate Chair
Hon. Erin D. Herbig, House Chair
Joint Standing Committee on Labor,
Commerce, Research and Economic Development
Room 208 Cross Office Building
Augusta, Maine 04333

January 7, 2014

Dear Senator Patrick, Representative Herbig and Members of The Joint Standing Committee on Labor, Commerce, Research and Economic Development:

The following is the report submitted pursuant to Resolve, Directing the Maine Labor Relations Board To Convene a Task Force To Examine Compensation for the Panel of Mediators.

Background

The “Panel of Mediators” referred to in statute does not operate as a panel but rather is 5-10 mediators who are nominated by the Maine Labor Relations Board and are appointed by the Governor for three-year terms. State mediators work independently from each other and provide mediation services, state-wide, to assist public employers and public employee bargaining agents in negotiating collective bargaining agreements. Mediators are assigned upon request when parties are unable to settle their differences in face-to-face negotiations. Although State mediators have no authority to force parties to make any concession or to agree to any proposal, the Panel has been successful in resolving 70% of the disputes referred over the past 5 fiscal years. Successful mediators resolve disputes by persuading the parties to alter their positions sufficiently to permit agreement. Effective labor mediators must be knowledgeable and experienced in labor-management negotiations. Typically, negotiating experience is gained through work as a partisan representative of management or labor for a period of several years. Not many people are available with such experience.

Under current law last amended in 1997, parties who require mediation assistance in negotiating collective bargaining agreements each pay one-half of the State mediators’ *per diem* and necessary expenses. 26 M.R.S.A. § 965(2)(C). The statutory *per diem* is \$100 for up to 4 hours of mediation services provided and \$100 for each consecutive period of up to 4 hours thereafter.

Labor negotiations occur state-wide and mediators often are required to drive several hours to participate in a mediation session. Mediators are not compensated for travel time beyond receiving mileage at the State rate of \$.44 per mile.

L.D. 689 and subsequent Resolve, Directing the Maine Labor Relations Board To Convene a Task Force To Examine Compensation for the Panel of Mediators

State mediators have expressed concern for a number of years that they are often required to spend several hours of uncompensated time travelling to and from the location of a mediation session. L.D. 689, An Act to Clarify Compensation for the Panel of Mediators, was intended to alleviate this problem. The bill provided that, in instances when a mediator is required to travel in excess of 43 miles one way to provide mediation services, the mediator is entitled to an amount equal to ½ of the mediator’s hourly fee for services for the time spent travelling in excess of 43 miles one way. A practical problem with the bill was that there is no “hourly fee for services” in current law and compensation is tied to the provision of services in blocks of time up to 4 hours in duration. The Maine Labor Relations Board suggested that, rather than clarify the language of L.D. 689 a better course would be a comprehensive examination of the broader question of mediator compensation in Maine. To that end, this bill was converted into a Resolve, directing the Board to convene a task force, including representatives of the public sector labor-management community and members of the Panel of Mediators, to study the question of mediator compensation and its impact, not only on the recruitment and retention of able labor mediators but also on the public sector bargaining process as a whole. The Resolve required a report to the Joint Standing Committee on Labor, Commerce, Research and Economic Development by January 15, 2014, with recommendations and necessary implementing legislation to provide reasonable compensation for the members of the Panel of Mediators.

History of Mediator Compensation

Prior to 1991, the mediators received compensation of \$100 per day of mediation, plus necessary expenses, funded through a general fund appropriation. Due to a significant shortfall in State revenues in 1991, the law was amended to provide that parties who require mediation assistance in negotiating collective bargaining agreements each pay one-half of the State mediators’ *per diem* and necessary expenses. In 1997 the statutory *per diem* was increased from \$100 per day to

\$100 for up to 4 hours of mediation services provided and \$100 for each consecutive period of up to 4 hours thereafter.

Public sector mediations in Maine typically involve several mediation sessions. Over the past 5 years, there were an average of 54 mediation requests per year and the number of days of mediation for cases closed each fiscal year has ranged from 2.38 days to 4.07 days. The average number of mediation-days per case during that period was 3.16. A number of factors contribute to this pattern of use, including the amount of compensation paid to the mediator.

Experience in other Nearby States

As part of its study, the Board surveyed other public sector labor relations agencies in our region. Massachusetts, Connecticut and New York use regular state employees to provide public sector mediation services. Vermont and New Hampshire rely on private providers; however, Vermont does not collect information regarding mediator compensation. In New Hampshire the Public Employment Labor Relations Board maintains a list of neutrals from which parties can select a mediator and parties can petition the PELRB to appoint one: however, in practice parties select their own mediators and very few use the petition process. Review of the resumes submitted by mediators available to work in New Hampshire shows *per diem* fees that range from \$750 to \$3,000/day. The average *per diem* fee is \$1,337, median fee is \$1,200 per day. In New Hampshire, mediation fees are shared equally by the parties but are not determined by statute or agency rule.

Meeting with public sector labor management community and comments received

A broad cross-section of representatives of the Maine public sector labor management community met with the Maine Labor Relations Board to discuss the question of State mediator compensation on October 11, 2013. Present for the Board were Chair Katharine I. Rand and Employer Representative Karl Dornish, Jr. State mediators in attendance were John Alfano, Denis Jean and Robert Lyman. Labor and management representatives in attendance were David Barrett, Maine Municipal Association; Timothy Belcher, Maine State Employees Association, Local 1989 SEIU; C.J. Betit, Maine Education Association; Robert Bourgault, Professional Fire Fighters of Maine; Cornelia Brown, Maine School Management Association; John Chapman, Kelly & Chapman (representing public sector employees and private sector employers); Daniel Felkel, Troubh, Heisler (representing public sector employees); Peter Lowe, Brann & Isaacson

(representing public employers); Vianney Soucy, Teamsters Union Local 340; and Matthew Tarasevich, Bernstein, Shur (representing public employers). Additional representatives of labor and management were invited, but were unable to attend. Executive Director Marc Ayotte moderated the meeting.

The following is a summary of the comments received on October 11, 2013.

Recruitment/Retention

- Negotiating, analytical, and problem-solving skills and experience in collective bargaining are required for an effective mediator; this skill set results in a limited pool of qualified candidates.
- Historically, State mediators in Maine have been retired union business agents, management labor-relations officers, consultants, or management officials. Two long-time mediators have come from higher education.
- While a commitment to public service and an interest in continuing relevant work in retirement have motivated some to serve as State mediators, it is becoming increasingly difficult to recruit good candidates.
- Two of the mediators present described how they must often travel long distances to provide mediation services and how they frequently receive more in mileage and expenses than in per diem. Service as a State mediator interferes with more lucrative involvement in other neutral dispute resolution work.
- Over-night stays necessitated by long-distance travel preclude more gainful activity over 2 days, even if the mediation was completed in one day.
- The mediators present understand the public service aspect of the work, but they still need to receive sufficient compensation to supplement retirement or other income.
- It is becoming increasingly difficult to recruit qualified candidates and the quality of the pool as a whole could be stronger. Three or four of the mediators are responsible for the overwhelming majority of the settlements.
- The agency has lost at least two effective mediators to higher-paying work as advocates for labor or management.
- Attendees and the executive director report knowing skilled persons who were not interested in serving due to the low compensation.

Impact on the collective bargaining process

- Historically, mediation has been the cornerstone of the collective bargaining process. In the past five years, including years where resources to fund agreements have been scarce, mediation has successfully resolved 70.1% of disputes submitted.
- State mediator John Alfano described his experience in New Hampshire, where he charges \$1,300/day, as follows:
 - 1) Parties seem to view mediation more seriously, they come to first meeting better prepared, and most cases resolve in one day, either through reaching final tentative agreement or the parties' realizing that they are at impasse and fact-finding is required. Very few cases require an additional ½ day of mediation.
 - 2) Parties meet during the day and seek to maximize their use of the mediator-day for which they have paid; parties are more productive in mediation.
 - 3) Higher fees help create an artificial deadline for the process, resulting in more pressure on the parties to resolve their differences.
- There was a consensus among the attendees that parties who meet during business hours are fresher and are more likely to have productive mediations than during evening sessions. Higher fees may well result in more sessions starting earlier in the day.
- A labor attorney and a management attorney echoed Mr. Alfano's comments regarding the degree of preparation being proportional to the cost of the service. Both lawyers stated that parties in higher-priced mediations are better prepared, the parties are more productive, and settlements frequently occur in a single session. Both lawyers agreed that, despite the high cost of the neutral mediator, resolution in such cases was cost-effective.
- Other attendees noted the limited means of small, unaffiliated labor organizations and small public employers and the necessity of balancing public service with reasonable compensation for the mediators. A union person who represents several small locals stated that a higher fee would not deter his filing for mediation, but would spur him to maximize the value of the meeting, especially through greater use of the pre-mediation telephone process.
- The consensus among attendees was that the real cost of mediation is the cost of productivity lost by the time expended by the employer's chief executive officer, business manager, and one or more department heads, as well as the cost of representation by the party advocates. Higher mediation fees that result in better party preparation and in their taking the process more seriously may well result in lower transactional costs.

- Another item of consensus is the value of pre-mediation telephone work with the mediator, what one attendee dubbed the pre-game show. Mr. Alfano stated that, perhaps due to higher fees, parties in NH have negotiated earnestly and done the preliminary work before mediation. Such may include agreeing on a common basis for costing out a 1% wage adjustment or health insurance premium shift or even agreeing on the number of employees in the bargaining unit. In Maine this work often does not happen until the initial session, but it could occur through pre-mediation phone work.
- All attendees agreed that this work conducted by phone and electronic means is invaluable to an effective initial session and should somehow be compensated time.

Types of compensation scenarios considered

- Although the hourly rate is perhaps a natural extension from the current mode of compensation, it was promptly rejected by the attendees. Some attendees considered the approach not to be good because mediators may have to travel long distances for a meeting that could end abruptly after convening. This would exacerbate the compensation problem.
- Others suggested that an hourly approach encourages clock-watching and detracts from the effectiveness of the process. Some of that happens under the present system and, rather than continuing a session beyond 4 hours, parties adjourn to save money and this results in additional meetings.
- The mediators stated that the State meals and incidental expenses rate, as well as State hotel rate, are appropriate, if the *per diem* rate is adjusted.
- The mediators also indicated that an adequate *per diem* rate would cover travel time, without specific compensation for that.
- After much discussion regarding whether pre-mediation work should be compensated separately, the consensus was that an adequate *per diem* for the mediation would cover the pre-mediation work and, should the pre-mediation work result in settlement, the *per diem* would be paid.
- An attorney who represents both large and small employers stated that his clients prefer a fixed *per diem* cost for mediation, rather than an hourly rate. The former facilitates planning and budgeting.

Amount of per diem compensation

- The discussion regarding an appropriate amount for the *per diem* sought to balance the need for adequate compensation for the mediators with the limited means of small independent bargaining agents and small public employers. The consensus was that mediation saves more money than it costs.
- The discussion began with a suggested rate of \$600. No one claimed any special knowledge or expertise but the discussion considered all of the competing interests mentioned above. The consensus reached was for a *per diem* of \$750 for each calendar day, regardless of the actual number of hours worked.
- One attendee suggested tying the amount of per diem to changes in some external standard, such as the consumer price index. Legislative action is required and attendees familiar with the Legislative process noted that such external controls are generally not favored by the Legislature.

Conclusions

A higher per diem fee for mediation will likely result in parties being better prepared for mediation, taking the process more seriously, and result in improved productivity of each mediation session, fewer sessions, and lower the over-all cost of the process.

Although the settlement rate achieved by State mediators remains acceptable, it is becoming increasingly difficult to recruit qualified candidates and the quality of the pool as a whole could be stronger. Three or four of the mediators are responsible for the overwhelming majority of the settlements. The agency has lost at least two effective mediators to higher-paying work and there are skilled persons who are not interested in serving due to low compensation.

The compensation should be in the form of a *per diem* rate, covering work done in preparation for mediation as well as the mediation session itself, plus mileage and other necessary expenses.

The amount of the *per diem* rate should be a balance between the market rate and the current low rate, in recognition of the public service inherent in the work.

While the consensus among the participants at the task force meeting with the Board was that the sum of \$750 was a reasonable rate of *per diem*, the Maine Labor Relations Board recommends that a per diem in the amount of \$600 is reasonable at the present time, taking into account all of the factors mentioned above.

Attached is proposed legislation to implement these recommendations.

Respectfully submitted,

Marc P. Ayotte, Executive Director
Maine Labor Relations Board

Title 26 MRSA § 965, sub-§2, ¶C, as amended by PL 1997, c. 412, §2, is further amended to read:

C. The Panel of Mediators, consisting of not less than 5 nor more than 10 impartial members, must be appointed by the Governor from time to time upon the expiration of the terms of the several members, for terms of 3 years. The Maine Labor Relations Board shall supply to the Governor nominations for filling vacancies. Vacancies occurring during a term must be filled for the unexpired term. Members of the panel are entitled to a fee for services in the amount of \$ 600 per calendar day for services for the time actually employed in the discharge of their official duties ~~100 for up to 4 hours of mediation services provided and \$100 for each consecutive period of up to 4 hours thereafter~~ and also are entitled to traveling and all other necessary expenses. ~~Notwithstanding the provisions of Title 5, section 12003-A, subsection 9, members of the panel who provide mediation services in more than one dispute in a given day are entitled to the compensation as provided in this paragraph in each such case. The necessary expenses incurred by the members must be allocated to the mediation session that required the costs.~~ The costs for services rendered and expenses incurred by members of the panel and any state cost allocation program charges must be shared equally by the parties to the proceedings and must be paid into a special fund administered by the Maine Labor Relations Board. Authorization for services rendered and expenditures incurred by members of the panel is the responsibility of the Executive Director of the Maine Labor Relations Board. All costs must be paid from that special fund. The executive director may estimate costs upon receipt of a request for services and collect those costs prior to providing the services. The executive director shall bill or reimburse the parties, as appropriate, for any difference between the estimated costs that were collected and the actual costs of providing the services. Once one party has paid its share of the estimated cost of providing the service, the mediator is assigned. A party who has not paid an invoice for the estimated or actual cost of providing services within 60 days of the date the invoice was issued is, in the absence of good cause shown, liable for the amount of the invoice together with a penalty in the amount of 25% of the amount of the invoice. Any penalty amount collected pursuant to this provision remains in the special fund administered by the Maine Labor Relations Board and that fund does not lapse. The executive director is authorized to collect any sums due and payable pursuant to this provision through civil action. In such an action, the court shall allow litigation costs, including court costs and reasonable attorney's fees, to be deposited in the General Fund if the executive director is the prevailing party in the action.

Legislation recommended pursuant to Resolves, Chapter 26, Directing the Maine Labor Relations Board to Convene a Task Force to Examine Compensation for the Panel of Mediators.

January 7, 2014