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Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government^A

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I. INTRODUCTION: NEW YORK CITY'S WORKPLACE MEDIATION PROGRAM IN CONTEXT

The Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, and various employer "affirmative action" policies have ushered in an era marked by increased diversity in the American workplace, **including** state and local government workplaces.¹ Today, employers face the challenge of fostering harmonious working relationships among a diverse workforce.² The City of New York, a municipal employer of approximately 300,000 workers, is no exception.³

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• Law Clerk., New York City Office of Administrative Trials and Hearings; J. D., University of Miami School of Law (2003). It should be noted at the outset that this Paper was prepared by employees of the New York City Center for Mediation Services and the New York City Office of Administrative Trials and Hearings, rather than an external consultant. Nevertheless, the views presented herein represent those of the Authors, and not necessarily those of the Agency. The Authors would like to thank the staff of the New York City Office of Administrative Trials and Hearings, especially Chief Administrative Law Judge (ALJ) Roberto Velez, Deputy Chief ALJ Charles McFaul, and ALJ Ray Kramer for their advice and insight. The Authors would also like to thank the Director of the New York City Center for Mediation Services, Justo A. Sanchez, and Professors Maria Volpe, James Kornbluh, and Sarah Burns for their valuable guidance and support.

¹ See Barbara Coyle McCabe & Christopher Stream, *Diversity by the Numbers: Changes in State and Local Government Workforces, 1980-1995*, 29 PUB. PERSONNEL MGMT. 93 (2000), available at http://www.ipma-hr.org/newsfiles/2000_1-mccabe.pdf.

² Federal Employment discrimination actions increased both in raw numbers and as a percentage of federal courts' caseloads in the 1990s. See Marika F. X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990-98*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/creusdc.pdf>. There has been a recent trend of such actions being filed by currently employed or terminated workers, rather than prospective employees. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

³ As of June 30, 2004, the City employed 259,085 full-time workers, and 32,519 part-time workers. CITY OF NEW YORK, *THE GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK* 657-58 (Krishna Kirk ed., 2004).

When New York City employees are faced with a workplace dispute, they may attempt to resolve it themselves or in consultation with management; they may consult with their union; or they may file complaints with their agency's Equal Employment Opportunity (EEO) office, the Federal Equal Employment Opportunity Commission, or the city or state civil rights enforcement agencies.⁴ If the employee files a complaint within the agency, New York City's Equal Employment Opportunity Policy applies, as implemented by each agency's own rules.⁵ The city's EEO policy forbids a broad swath of discriminatory behavior in the workplace,⁶ but it, like "[t]itle VII and similar laws do[es] not enact a `generalized code of workplace civility.'"⁷ No process exists to address complaints of unfair or disrespectful treatment, for example. So to address interpersonal conflict, employees are often left "viewing every conflict involving a member of a protected class through . the lens of forbidden bias."⁸ This leads to unsubstantiated EEO complaints-and, presumably, lingering workplace conflict-in many city agencies.

In addition, Administrative Law Judges (ALJs) at the New York City Office of Administrative Trials and Hearings (OATH)-the city's central administrative tribunal-noticed on many . occasions that disciplinary actions pending before them originate as, and remain at core, interpersonal workplace disputes.⁹ In the opinion of the ALJs, the interpersonal dispute at

⁴ See generally, CITY OF NEW YORK, EQUAL OPPORTUNITY EMPLOYMENT POLICY (2005), available at <http://www.nyc.gov/html/dcas/downloads/pdf/misc/eeo.pdf> [hereinafter NYC EEO Policy]

⁵ *Id.*

⁶ See *id.* at 1-2 (forbidding illegal discrimination in the .agency workplace based on perceived or actual age, marital status, alienage, national origin, color, prior arrest or conviction, creed, race, disability, religion, sexual orientation, and gender; permitting agency head to take corrective disciplinary measures against violators).

⁷ Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 498 (2003) (quoting Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 611 (2001)).

⁸ Berger, *supra* note 7, at 525.

⁹ OATH has been an independent, central tribunal for New York City government since 1979. Office of Administrative Trials and Hearings, <http://www.nyc.gov/htgil/oath/> (last visited Dec. 14, 2005). OATH's ALJs hear cases covering a range of topics, including vehicle forfeiture, real estate and land use, licensing, civil rights, city contracts, and regulatory enforcement of city environmental health and safety codes. See *id.* About 66% of OATH's cases involve city agencies disciplining employees pursuant to section 75 of the New York State Civil Service Law. See *OATH Annual Report*, OATH BENCHNOTES, Spring 2004, at 7, 7 (noting that 1,442 out of 2,189 cases docketed at OATH in Fiscal Year 2004 were employee discipline cases), available at

the heart of many such cases could have been addressed in its early stages, and would never have needed to appear for formal adjudication. Recognizing the potential for early mediation of such workplace disputes, OATH launched its Center for Mediation Services (the Center) in spring 2003.¹⁰ Although such programs exist in many private corporations,¹¹ states,¹² and agencies of the federal government,¹³ the Center is one of a very small number of municipal workplace mediation programs.¹⁴ To date, such programs have been evaluated for effectiveness by focusing on a number of indicators, including resolution rates, participant satisfaction surveys, and reduction in complaint volume.¹⁵ Cost-benefit and value analysis of such

<http://www.nyc.gov/html/oath/pdf/benchnotes30.pdf> These cases may involve employees violating their agency's EEO policy. *See id.*

¹⁰ See *Message From Chief Judge Roberto Velez, OATH BENCHNOTES*, Spring 2003, at 1, available at <http://www.nyc.gov/html/oath/pdf/benchnotes28.pdf>. *see also* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 PEPP. J. NAT'L Ass'N ADMIN. L. JUDGES 1, 11, 21, 39 (2004) (describing alternative dispute resolution as a natural and necessary tool for administrative law judges' docket management). *See generally* Berger, *supra* note 7, at 487 (arguing in favor of early, broad-gauged mediation of workplace disputes).

¹¹ *See generally* DAVID B. LIPSKY & RONALD L. SEEBER, *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* (1998).

¹² Such states include Minnesota, *see* Minnesota Alternative Dispute Resolution, Workplace Mediation; <http://www.mnadr.state.mn.us/workplace.htm> (last visited Dec. 14, 2005); Ohio, *see* The DAS Workplace Mediation Program, <http://das.ohio.gov/hrd/pmdrmediation.html> (last visited Dec. 14, 2005); and Virginia, *see* Mediation Services, <http://www.edr.state.va.us/mediation.htm> (last visited Dec. 14, 2005).

¹³ *See, e.g.*, Department of Energy Office of General Counsel, Dispute Resolution, http://www.gc.doe.gov/index_adr.html (last visited Dec. 14, 2005); U.S. Department of Agriculture, Conflict Prevention and Resolution, <http://www.usda.gov/cprc/> (last visited Dec. 14, 2005); U.S. Department of the Navy, Alternative Dispute Resolution, <http://adr.navy.mil> (last visited Dec. 14, 2005).

¹⁴ Other city workplace mediation programs include the City of Seattle. *See* Seattle Personnel Department, Personnel Rules, available at http://www.ci.seattle.wa.us/personnel/personnelrules/rule_1.2.asp (last visited Dec. 14, 2005). It bears noting that the City of New York is the largest city in the United States, with a population in excess of eight million. *See* New York City, http://en.wikipedia.org/wiki/New_York_City (last visited Dec. 14, 2005). In fact, if it were a state, New York City would be the eleventh largest state. *See* <http://www.census.gov> (last visited Dec. 14, 2005). Thus, to some degree, it is also appropriate to compare the Center's operations with some state and federal workplace mediation programs.

¹⁵ *See* Indiana Conflict Resolution Institute, Project: United States Postal Service, <http://www.spea.indiana.edu/icri/usps.htm> (last visited Dec. 14, 2005) (listing ways in

programs is exceedingly rare. This may be because "[t]raditional cost-benefit analysis does not capture many of the benefits derived from ADR service programs because these benefits are often intangible and not easily quantifiable."¹⁶ Nevertheless, estimates of cost savings have been made.¹⁷

This paper reports the results from the first two years of the Center's services, evaluates these results, and discusses ways to begin measuring the value of a centralized workplace mediation program. Part II details the Center's operations, noting time and cost savings, and participant satisfaction with the program. Part III discusses the value that centralized mediation brings to the city, noting that the Center tends to generate good return on investment, reduce opportunity costs, and contribute to a productive work environment. Part IV addresses challenges faced by the Center. Finally, Part V concludes that the Center's model provides a valuable service to New York City, one that will likely lead to greater benefits if expanded.

II. REPORTING AND EVALUATING THE CENTER'S FIRST TWO YEARS

The Center has three main programs. First, the Center offers workplace dispute mediation to all city employees.¹⁸ Second, the Center's staff members provide training in conflict management to any interested city agency.¹⁹ And third, the Center serves as a conflict research and resource center, offering information and consultation to address disputes involving the city.²⁰ This section describes the Center's three programs, reports data and evidence of customer satisfaction from the first two years of the

which the U.S. Postal Service workplace mediation program was evaluated). Evaluations of mediation programs generally address factors including time savings (compared to adjudication), cost avoidance (compared to adjudication or inaction), and customer satisfaction. See Evaluation of Federal ADR Programs, 65 Fed. Reg. 59,200, 59,208 (Oct. 4, 2000); see also Jennifer E. Shack, *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs* (2003), available at <http://www.caads.org/downloads/MedStudyBibliography.pdf> (summarizing evaluations of court-connected mediation programs in Illinois).

¹⁶ See Evaluation of Federal ADR Programs, *supra* note 15.

¹⁷ See JEFFREY SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 3-5 (2004) (summarizing time and cost savings associated with federal government ADR programs).

¹⁸ See City of New York Center for Mediation Services, <http://www.nyc.gov/html/oath/html/mediation.html> (last visited Dec. 14, 2005).

¹⁹ Id.

²⁰ See City of New York Center for Mediation Services, About the Center [hereinafter About the Center], http://www.nyc.gov/html/oath/html/med_about.html (last visited Dec. 14, 2005).

mediation program, and compares those results with other dispute resolution processes available to city employees.

A, Mediation at the Center

Mediation at the Center is a confidential, voluntary process, offered at no charge to city agencies or employees.²¹ The Center uses a facilitative single or co-mediation model, where trained staff facilitates discussions between the participants and allow the participants to come to their own resolution.²² Resolution agreements reached in mediation are structured by the participants.²³ No money exchange or disciplinary action takes place. The agreement can involve such terms as participants treating each other with respect, or not interacting with each other in the future. Details on how terms of the agreement will be carried out are also explored and incorporated into the agreement, so that the agreement serves as a roadmap for the parties' future relationship. The mediators "reality test" agreements with the parties, a technique designed to result in more durable and realistic agreements.

The cases can best be characterized as various types of "workplace disputes," involving managerial or interpersonal problems in workplace relationships.²⁴ Essentially, the parties' working relationship forms the subject of negotiations.²⁵ The Center's mediation program is designed to be "plenary in scope, encompassing virtually all employment-related issues instead of dealing solely with claims of violations of legal rights."²⁶ The cases come from a variety of city agencies, and tend to be referred early in the course of a dispute.²⁷ If not referred to mediation, these workplace disputes could persist at the agency, leaving open the possibility that they could evolve into actionable legal claims, or simply continue to drain time, energy, and resources away from the agency's work.

Referrals to the Center come primarily from agency EEO officers and disciplinary advocates.²⁸ Cases referred from agency EEO officers have been

²¹ See City of New York Center for Mediation Services, Frequently Asked Questions, http://www.nyc.gov/html/oath/htmUmed_faq.html (last visited Dec. 14, 2005) [hereinafter FAQs].

²² For more detail on the method of mediation used at the Center, see JOSEPH B. STULBERG, *TAKING CHARGE / MANAGING CONFLICT*, 59-126 (1987).

²³ See FAQs, *supra* note 21.

²⁴ See *id.*

²⁵ See *id.*

²⁶ Berger, *supra* note 7, at 523.

²⁷ For a discussion of the benefits of early mediation, see *id.* at 516-23.

²⁸ See FAQs, *supra* note 21.

subject to a preliminary investigation and often a finding that the underlying complainant lacks a factual basis for a viable EEO complaint. Pursuant to the city's EEO²⁹ policy, complainants and respondents have the right to request mediation. However, the decision whether a case will be mediated is ultimately the EEO officer's.³⁰ To assist EEO officers in making good decisions about the type of cases that are appropriate for mediation, the Center is currently in the process of tailoring a screening tool, which will contain uniform referral criteria.

The Center also receives referrals from agencies seeking resolution of disputes that led to, or could lead to disciplinary hearings. Like agency EEO officers, agency disciplinary advocates also carefully screen for cases where interpersonal disputes form the core of complaint, and where the costs of administrative litigation would be disproportionate to the disciplinary sanction likely to be imposed. Agencies are authorized under the city's charter to address matters subject to administrative adjudication through alternative dispute resolution.³¹ Although criteria differ in each agency, generally, any case involving severe power imbalances or physical violence, corruption, repeated instances or allegations of discrimination, threats to public safety, or claims filed with outside agencies or organizations will not be referred.

The cases range in scope and severity. For example, one case involved two co-workers, one an African-American female and the other a Caucasian male. They sat in adjoining cubicles, and had such a close relationship that others in the office referred to them as "husband and wife." However, on a few occasions, the woman engaged in loud telephone conversations the man could not help but overhear. One of the conversations was about her daughter. He asked her to quiet down on one occasion, and she yelled at him. At some point, an investigator from the city's Administration for Children's Services appeared at the woman's home, inquiring as to the well-being of the woman's daughter. The woman blamed her male co-worker, and filed an EEO complaint against him. He then filed a cross-complaint against her. The agency referred the case for mediation, and it was resolved amicably.

Another case involved five medical professionals from a city hospital. One of these workers experienced personality conflicts with her supervisors and co-workers, and the agency sought to have her disciplined. In three separate sessions involving five parties and three mediators, the case was resolved.

²⁹ NYC EEO Policy, *supra* note 4.

³⁰ *Id.*

³¹ New York City Administrative Procedure Act (NYC Charter § 1046(d)).

The Center takes several measures to guarantee fairness to parties in the mediation of their workplace disputes.³² First, employees are informed from the outset by Center staff what the mediation process entails. After a referral, the staff directly contacts parties and informs them about the mediation process, including the core principles of confidentiality and party self-determination, and discusses potential outcomes.³³ The goal is for parties to understand and be well-informed about the full range of mediation potentials and limitations.³⁴ Second, mediation at the Center is totally voluntary. Nowhere in their terms of employment are city employees required to attend mediation if they are engaged in a workplace dispute. And once in mediation, parties are not required to enter into any agreements.³⁵ Third, employees maintain the right to be represented in mediation' at the Center.³⁶ Representatives can be attorneys, union representatives, or any other person selected by the participant. Fourth, all mediators are professionally qualified.³⁷ Mediators are a combination of OATH ALJ's and staff attorneys, Center staff, and independent mediators.³⁸ All OATH ALJ's and staff attorneys have experience and expertise in issues arising from city employment, including federal, state, and local employment and anti-discrimination laws.³⁹ All mediators attend a 32 hour mediation' training given by a mediation trainer certified in the State of New York.⁴⁰ Although

³² These measures are informed by AMERICAN ARBITRATION ASSOCIATION, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), available at <http://www.adr.org/sp.asp?id=22078>.

³³ City of New York Center for Mediation Services, The Mediation Process, http://www.nyc.gov/html/oath/htmlVmed_process.html (last visited Dec. 14, 2005).

³⁴ See *id.*

³⁵ FAQs, *supra* note 21.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Although the Center already offers mediators with diverse professional backgrounds and different racial, ethnic, and gender profiles, plans are underway to develop a roster of independent, specialized mediators who will be compensated with a small stipend.

³⁹ OATH's jurisdiction includes city employment discrimination and disciplinary cases. See, e.g., Jaggi v. Police Dep't, OATH Index No. 1498/03 (2004) (ordering police department to reinstate and provide reasonable accommodation for Sikh police officer who requests to wear turban on duty); Fire Dep't v. Silvestri, OATH Index No. 613/05 (2005) (recommending that fire department commissioner terminate firefighter for violating department rules against possession of alcohol and assaulting co-worker).

⁴⁰ The amount, of training is designed to meet or exceed standards for New York State court-annexed mediation programs. For more on such programs see Court Annexed

some mediators are city employees, they are. employed by a neutral agency, and are precluded from assignments involving adjudication of the rights of any party appearing in a case they mediated. Finally, because mediation referrals come to the Center in the early stages of a dispute, it remains possible that certain actionable facts unknown to referring agency personnel could be communicated in mediation. If such facts compromise the parties' self-determination, the integrity of the process, or the mediator's neutrality, the mediator may bring it to the parties' attention, and, if the situation so warrants, end the mediation and refer the case to a different mediator, or return the case to the agency.⁴¹

Also, if communications made in mediation include any specific allegations or acknowledgments of corrupt, criminal, or other serious misconduct by or against agency personnel, such allegations are exempt from the confidentiality provisions that otherwise bind the mediator.⁴² Serious misconduct includes not only corrupt or criminal conduct, but also any egregious breach of agency rules for which one could reasonably expect to be terminated from employment, including serious violations of EEO policy, illegal drug use, theft of agency time or property, falsification of agency records, or lying under oath.⁴³ This exception to the confidentiality policy was developed because city employees are bound by reporting requirements.⁴⁴ Specifically, all city employees are required to report any information concerning corruption, criminal activity, or conflicts of interest,⁴⁵ and managerial employees are obligated to report potential EEO

ADR Programs, <http://www.courts.state.ny.us/ip/adr/court> annexed.shtml (last visited Dec. 14, 2005).

⁴¹ FAQs, *supra* note 21.

⁴² See The City of New York Center for Mediation Services, Mediation Guidelines (on file with the Ohio State Journal on Dispute Resolution).

⁴³ See, e.g., Transit Auth. v. Kerr, OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Auth. Dec. (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Item No. CD03-22-M (Feb. 5, 2003) (issuing suspension for violation of EEO policy); Dep't of Correction v. Potter, OATH Index No. 969/96 (Apr. 29, 1996), *affd*, NYC Civ. Serv. Comm'n Item No. CD97-40-A (June 4, 1997) (terminating correction officer for illegal drug use); Health & Hosp. Corp. v. Corsini, OATH Index No. 218/03 (Mar. 25, 2003) (recommending termination for employee who facilitated theft of time by falsifying overtime records); Dep't of Correction v. Wilder, OATH Index No. 1636/00 (June 20, 2001), *affd*, NYC Civ. Serv. Item No. CD03-63-SA (Sept. 23, 2003) (terminating employee for lying under oath). All decisions are available at <http://www.citylaw.org/cityadmin.php>.

⁴⁴ See, e.g., NYC Mayor's Exec. Order No. 16 (July 26, 1978), available at <http://www.nyc.gov/htmlVdoi/html/whistblr-eo16.html>.

⁴⁵ *Id*

violations⁴⁶ In addition to its current mediation guidelines, the Center's staff is currently developing codified standards of conduct for its mediators, incorporating these reporting requirements, and elements of the Model Standards of Conduct for mediators developed by leading professional organizations⁴⁷

The Center's mediation program is thus, in some respects, a work in progress. Nevertheless, the Center has achieved outstanding results in its first two years of operation.

B. Mediation Data & Comparison of Mediation with Alternatives

In the first two years of operations—from March 2003 to March 2005—the Center received fifty-four referrals for mediation, of which thirty-six cases involved participants agreeing to participate in mediation.⁴⁸ Of the thirty-six mediations conducted at the Center, thirty-one resulted in mutually acceptable resolution.⁴⁹ This gives the Center a resolution rate of eighty-six percent in cases where mediation was commenced.⁵⁰ With a few exceptions, all cases resolved in mediation involved a written resolution agreement signed by both parties.⁵¹ The average time from filing to resolution was thirty-three and one-half days, with average mediation session time of only two and seven-eighths hours.⁵²

Forty of the fifty-four referrals came from EEO officers, of which twenty-four cases went to mediation, and twenty were resolved in mediation.⁵³ Of the fourteen disciplinary cases that were referred to mediation, twelve were mediated and eleven were resolved in mediation.⁵⁴ This higher rate of participation and resolution in disciplinary cases may be because the possibility or reality of pending disciplinary charges—as opposed to unsubstantiated EEO complaints—provided more incentive for workers to mediate, and ultimately resolve disputes.

⁴⁶ See NYC EEO Policy, *supra* note 4.

⁴⁷ See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsotConductforMediatorsfinal05.pdf>.

⁴⁸ See *infra* Figure 1; NYC Center for Mediation Services Tracking Sheet [hereinafter Case Tracking Sheet] (on file with the Ohio State Journal on Dispute Resolution).

⁴⁹ See *infra* Figure 1.

⁵⁰ See *id.*; Case Tracking Sheet, *supra* note 48.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Most of the referrals for mediation came from the New York City Police Department (NYPD) and the New York City Health and Hospitals Corporation (HHC).⁵⁵ All of the NYPD's thirty referrals were from EEO officers, with sixteen being mediated and thirteen resolved in mediation.⁵⁶ By contrast, all of the HHC's twelve referrals came from labor relations officers processing disciplinary charges.⁵⁷ Of those referrals, ten were mediated and nine were resolved in mediation.⁵⁸

These figures compare favorably with the time and cost of conventional means of resolving city workplace disputes. The resolution rate for the Center's mediations is significantly higher than OATH's Fiscal Year 2004 (FY04) pre-hearing settlement rate of fifty-five percent.⁵⁹ The average time to disposition at OATH in FY03 by way of adjudication was seventy-nine days from initial filing,⁶⁰ and the average time to disposition by way of settlement was sixty-five days, both significantly longer than the mediated cases took.⁶¹

The data presented here comes from an admittedly small sample, and data gathering and analysis is ongoing.⁶² Nevertheless, conclusions may still be drawn, albeit at a lower confidence level and with a greater confidence interval than if a larger sample size was possible. This is acceptable because the Center is a local government agency using its own data to make operational and budgetary decisions, rather than, for example, an academic research institution seeking definitive research findings. Even taking into account the small sample size, one can be ninety-five percent confident that, for example, the entire city workforce of 300,000 would experience

⁵⁵ Id.

⁵⁶ See id.; *infra* Figure 1.

⁵⁷ Case Tracking Sheet, *supra* note 48.

⁵⁸ Id.

⁵⁹ NYC MAYOR'S MANAGEMENT REPORT 212 (2004). This rate also compares favorably to other court-connected mediation programs. For example, in the United States District Court for the Eastern District of New York, 53.64% of all mediated cases settled. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK: MEDIATION REPORT, JULY 1, 2003 To JUNE 30, 2004, available at <http://www.nyed.uscourts.gov/adr/MediationReport0704.pdf> (last visited Dec. 14, 2005). The lower resolution figures from the Eastern District may reflect the hardening of parties' positions by the time a federal complaint has been filed. If so, these figures would reinforce the case for early mediation.

⁶⁰ OATH Monthly Management Report (June 2004) (on file with the Ohio State Journal on Dispute Resolution).

⁶¹ Id.

⁶² Between March 31, 2005 and July 31, 2005, the Center received 13 more referrals. See Case Tracking Sheet, *supra* note 48.

mediation resolutions at a rate of roughly between seventy-five to ninety-seven percent⁶³ Thus, it is evidenced that mediation at the Center results in a higher resolution rate, and takes less time than traditional case processing.

C. Participant Satisfaction

After a mediation session has concluded, the participants fill out an evaluation form. Those participating in mediation at the Center reported a high degree of satisfaction with the process⁶⁴ Of those who completed evaluations, eighty-seven percent of participants agreed that mediation was a better way of handling their dispute than a more formal process would have been.⁶⁵ Ninety percent of participants also agreed that in a similar situation they would use mediation again.⁶⁶ And notably, ninety-two percent agreed that they would recommend mediation to co-workers.⁶⁷ A follow-up participant survey is currently underway to assess whether participants remain as fully satisfied as they indicated immediately after mediation, why certain parties who were referred did not agree to appear, and why other parties failed to resolve their dispute in mediation.

D. Management /Interested Party Satisfaction

Agency management personnel and municipal employees' unions also express satisfaction with the Center's mediation program.⁶⁸ An associate director of human resources at a City hospital noted that all of the employees he referred to mediation at the Center have upheld their agreements, and the result has been improved camaraderie in the workplace⁶⁹ In addition, he perceives a "ripple effect" extending to other employees, and he sees fewer overall workplace problems. He describes himself as a "deeply satisfied customer."⁷⁰

Municipal employee union representatives also view the Center's program as a success. A representative of District Council 37, the largest

⁶³ See Sample Size Calculator, <http://www.surveysystem.com/sscalc.htm> (last visited Dec. 14, 2005).

⁶⁴ See Case Tracking Sheet, *supra* note 48; see also *infra* Figure 2.

⁶⁵ *Id*

⁶⁶ *Id*

⁶⁷ See Figure 2, *infra*.

⁶⁸ *Center for Mediation Resolves Disputes*, PUS. EMP. PRESS, Feb. 2004, at 2.

⁶⁹ Interview with John Perez, Associate Director of Human Resources, Woodhull Medical and Mental Health Center, in N.Y., N.Y. (2004).

⁷⁰ *Id*.

municipal employees' union in New York City, described mediation at the Center as "an excellent program."⁷¹ Referring agencies have taken note, and case referrals to the Center increased thirty-five percent from year one to year two.⁷²

Thus, in its first year of operations, the New York City Center for Mediation Services has proven itself a highly successful dispute resolution center, increasing dispute resolution efficiency, improving employee morale, and satisfying participants and other interested parties.

E. Training

The Center also serves as a conflict management training center for city employees and law students.⁷³ In the Center's first year, its staff, with the assistance of outside training consultants, presented conflict management training programs to employees at the New York City Fire Department, the New York City Department of Housing Preservation and Development, EEO officers from various agencies, and law students from the New York University School of Law Mediation Clinic.⁷⁴ The Center's trainers tailored each training to the needs of the particular group, and according to evaluations from trainees—each *was well*, received.⁷⁵

Once trained in conflict management methods, city employees can more adeptly resolve their own conflicts or those of their subordinates and co-workers. In addition, employees who are aware of the Center's mediation services can more easily refer cases for early resolution, effectively moving back the starting point for early intervention.

F. Research & Resource Center

The Center also serves as a data collection and dissemination point for value-added research projects, and as a process expert, convener, and resource center for conflicts involving city agencies.⁷⁶ Staff members collect and analyze data while conducting research on "best practices" in mediation. Staff members also observe trends in particular agency workplace settings and communicate those trends directly to the agency decision makers. And

⁷¹ *Center for Mediation Resolves Disputes*, *supra* note 68.

⁷² Case Tracking Sheet, *supra* note 48.

⁷³ *See* About the Center, *supra* note 20.

⁷⁴ *Id.*

⁷⁵ For more detail on these training sessions, see City of New York Center for Mediation Services, *supra* note 18.

⁷⁶ *See* About the Center, *supra* note 20.

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the Center serves as a centralized resource for city agencies and parties to conflicts involving City agencies, employees, and the public.. Recently, the Center responded to a city agency's request for assistance in analyzing issues in conflict and selecting a mediator for negotiations between a major university located in the city and the surrounding community, arising from the university's physical expansion of its campus.

III. FINDING VALUE IN MEDIATION

As outlined above, the first two years' results for the Center paint a picture of a successful and growing program. The main drivers of success in this view are: settlement rate, decrease in time to disposition, and customer satisfaction at the end of the mediation. While these criteria are perhaps well suited for analysis of an individual program's performance, they tell us little with respect to the overall, generic value proposition, i.e., does a successful mediation program actually deliver value to the city? And if so, how?

The remainder of this paper lays out the preliminary value points for a centralized workplace mediation program.. *Further* study and evaluation are in order, but even with the limited data reported, one can ascertain that such programs generate return on investment, opportunity cost- savings, and improvement in working condition??

A. Return on Investment

The Center has developed its mediation program; so far on a modest budget. With, each case it resolves, it generates return on investment for the city. In terms of actual hourly cost, mediation proves to be a far cheaper process than litigation, because it requires less time. This can be illustrated using rough approximations based on cases tried at OATH. The average case litigated at OATH in Fiscal Year 2003 took approximately thirteen hours of AU trial time, at a rate of forty-six dollars per hour.⁷⁸ This figure accounts for all types of cases, rather than just disciplinary, EEO, or Commission on Human Rights cases. However, this figure does not account for decision-writing time, which can be equal to or greater than trial time⁷⁹ Thus, a conservative estimate of the total average cost to the City of litigating a case

⁷⁷ These three concepts overlap, but are presented separately to facilitate easier understanding.

⁷⁸ See OATH Monthly Management Report, *supra* note 60 (3.18 trials were completed in 169 seven-hour work days).

⁷⁹ *Id.*

at OATH is at least twelve hundred dollars.⁸⁰ By contrast, mediating at the Center takes on average five hours, with the actual mediation taking less than three hours, plus perhaps two hours of preparation.⁸¹ Mediators have been paid at an average rate of forty dollars per hour, making the total average cost of mediating at OATH about two hundred dollars, over eighty percent less than the average cost of litigating a disciplinary case. Thus, the return on investment (ROI) for the Center's mediation program so far involves at least eleven thousand dollars, from the eleven disciplinary cases that have been resolved in mediation.⁸²

Assuming lawsuits-and possibly costly settlements and verdicts-can be avoided by resolving workplace disputes before they can escalate into actionable claims, ROI increases exponentially. Over the past five years, New York City has paid over \$29,000,000 in verdicts and settlements in⁸³ connection with approximately 320 employment discrimination lawsuits. Although those cases are generally qualitatively different from the cases currently being referred to the Center, it is plausible that any case, if left unaddressed, could develop into a more serious situation where legal rights are violated. To the extent that early mediation prevents such situations, the Center saves the city from costs associated with defending against litigation, and possibly from paying huge> verdicts.

Put another way, for the past five years, the city paid - an average of approximately sixty employment discrimination verdicts per year, with an average payout of \$90,000, worth about \$5,400,000 in annual liability. One may ; assume that many of these cases-especially "hostile work environment" cases-began as simple workplace disputes or misunderstandings, which, if mediated early on, could have been resolved. Resolving these . disputes before tf y turn into lawsuits would yield substantial ROI.

Even if no lawsuits are ultimately avoided through mediation, the Center generates returns by resolving cases that may otherwise linger and devour agency resources. In other words, there 'is likely to be a significant improvement in operating efficiency. The cost of lingering workplace

⁸⁰ This figure does not account for support staff time or agency attorney time, both at OATH and the referring agency, which can range from approximately twenty-five to fifty dollars per hour, depending on seniority. Nor does it account for the hidden costs of possible ongoing conflict in the workplace while cases are pending, or after cases have been adjudicated. These costs may well exceed the costs associated with ALJ bench time and decision-writing time.

⁸¹ See Case Tracking Sheet, *supra* note 48.

⁸² See *infra* Figure 1.

⁸³ NYC EEO Lawsuits & Settlements (NYC Law Dep't) (on file with the author).

conflict cannot be underestimated.⁸⁴ By some estimates, thirty to forty percent of a manager's daily activities are spent addressing some form of workplace conflict.⁸⁵ Such conflict can involve perceived unfairness or lack of respect. These types of issues take management and workers away from other tasks and can lead to lost work time, decreased morale and productivity, poor decision-making, and other problems.⁸⁶ The aggregate cost of these items can add up to a significant sum. For instance, an assessment of a mediated conflict between three New England medical professionals estimated the cost of their conflict at over \$60,000.⁸⁷

To use a simplified example focusing only on paid time, assume that two employees, both paid thirty dollars per hour, wasted a total of 100 hours during a six-month period because of an interpersonal conflict at work. The agency would lose a minimum of \$6,000, the amount of salary paid for those hours of work. Now assume that same conflict is resolved earlier in mediation, and only ten hours of paid time was wasted. In this case, the agency saves \$5,400, or ninety percent of the original cost. Such specific savings can be multiplied by the number of mediations where amicable resolution results. If the details above were the average case for each of the thirty-one cases the Center resolved in mediation between March 2003 and March 2005, savings would equal \$167,400.

As the Center's caseload increases, these kinds of savings will far surpass the operating cost of the mediation center. The amount of savings in excess of the operating cost is return on investment. Assuming a consistent resolution rate, return on investment increases in direct proportion to the Center's caseload.

B. Opportunity Cost Savings

By settling cases through mediation, the Center also provides opportunity cost savings throughout the city's conflict resolution systems. "Opportunity cost" can be defined in different ways, but the central concept involves

⁸⁴ See James A. Cram & Richard K. MacWilliams, *The Cost of Conflict in the Workplace*, THE BCC CONNECTION, Jan. 2000, available at <http://www.crambyriver.com/costofconflict.html> (noting the problems associated with unaddressed workplace conflict).

⁸⁵ Rian Thomas, Conflict Management Systems: A Methodology for Addressing Conflict in the Workplace (Sept. 2002), <http://www.mediate.com/articles/thomasR.cfm> (analyzing Carol Watson & L. Richard Hoffman, *Managers as Negotiators*, 7 LEADERSHIP Q. 1 (1996) and Kenneth W. Thomas & Warren H. Schmidt, *A Survey of Managerial Interests with Respect to Conflict*, ACAD. MGMT. J., June 1976).

⁸⁶ See Cram & MacWilliams, *supra* note 84.

⁸⁷ See *infra* Figure 5.

comparing the cost of one alternative with the cost of another.⁸⁸ As noted above, on the micro-level, the Center's mediation program, on average, saves the city approximately ninety percent of the cost of unaddressed EEO cases, and at least one thousand dollars, or about eighty percent of the cost per disciplinary case resolved in mediation. In this section, the comparison is on the macro-level, between the cost of the City's current workplace dispute resolution systems-involving disciplinary and anti-discrimination litigation-and mediation of appropriate cases at the Center. It is important to note that even though actionable claims remain in the system, the Center lowers the overall volume of conflicts in the dispute resolution system by resolving cases at an early stage. The difference between the costs expended processing the old conflict volume and the costs associated with processing the new volume represents the opportunity cost savings the Center creates.

The Center's training and research functions add to the opportunity cost savings by fostering knowledge of conflict management tools and skills. Where city employees and managers are conscious of conflict and know how to approach interpersonal disputes constructively, fewer disputes develop into formal cases, requiring less expenditure of agency resources resolving those disputes. By having fewer conflicts and fewer cases to process, those managing the City's dispute resolution process-EEO officers, union representatives, disciplinary advocates, agency attorneys, and ALJs-have more time and resources to allocate to each remaining case. This ought to continue to reduce conflict volume over time by allowing more attention to be focused on the more difficult or more serious conflicts. Opportunity cost savings thus comprise a major benefit of the Center's program.

Figure 3 depicts a cross-section view of how the mediation program generates opportunity cost savings. The uppermost diagonally descending line labeled "1," represents the mean conflict resolution slope. The slope begins with a fixed pool of disputes, say 125,000 total disputes per year one for every other full-time City employee-and slopes down when more conflicts are resolved over time. The end point for this diagonal is the average number of fully litigated claims the city pays for per year.

Presently, there are a number of points on this line where conflicts are resolved in one fashion or another. One such benchmark is the point at which a complaint is filed. Fewer complaints are filed than there are total workplace disputes. Hence, the pool of 125,000 total existing disputes is "cleaned" of the conflicts that resolve themselves before escalating to an EEO or disciplinary complaint.⁸⁹

⁸⁸ See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 816 (10th ed. 2002).

⁸⁹ Conflicts that resolve themselves should not be confused with conflicts that, although not memorialized in an EEO complaint, will nevertheless persist, causing

high satisfaction levels in their post-mediation surveys.⁹² Over time one can reasonably expect that this satisfaction translates into a more comfortable, and thus more productive, working environment. This benefit of the Center's mediation program will also likely increase in direct proportion to the Center's caseload.

IV. CHALLENGES & FUTURE IMPROVEMENTS

As demonstrated above, the value of the Center's services increases as the Center's caseload grows. However, after two years of operations, only eight city agencies have referred cases for mediation, and only two agencies have referred more than three cases.⁹³ This may have to do with the lack of an executive mandate or legislation requiring agencies to refer cases for mediation. Such mandates and legislation have already been issued at both the state⁹⁴ and federal level,⁹⁵ with significant results⁹⁶

A similar mandate to mediate has already been created for another New York City Agency. The Civilian Complaint Review Board (CCRB) is authorized under the City Charter to:

receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse

⁹² Case Tracking Sheet, *supra* note 48.

⁹³ See *infra* Figure 1.

⁹⁴ See, e.g., Fla. Exec. Order No. 02-87, § 1 (Mar. 20, 2002), available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2002/march/eo2002-87-03-20-02.html ("Each executive agency Secretary shall: (a) review the agency's processes, for managing conflicts and controversies to ensure that its dispute resolution and conflict management processes are efficient and effective; (b) determine whether those systems could be improved through the use of facilitation, mediation, negotiated rulemaking, and/or other ADR processes; and (c) take the necessary steps to implement those improvements").

⁹⁵ 5 U.S.C. § 572 (2005) ("An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding,"); see also SENGGER, *supra* note 17, at 11-16, (summarizing federal legislation and executive orders and memoranda promoting the use of ADR in federal government).

⁹⁶ According to EEOC statistics, 1,546 federal government workplace disputes in which a formal complaint had been filed were resolved in ADR processes in Fiscal Year 2003. FY 2003 EEO Activities-Agencies in Alpha Order Formal Complaints, <http://www.eeoc.gov/federal/adr/datatables/fy03/fcalphaorder.html> (last visited Dec. 14, 2005); see also SENGGER, *supra* note 17, at 3-5 (summarizing time and cost savings associated with federal government ADR programs).

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of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.⁹⁷

As part of its functions, the CCRB was authorized to "establish a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation."⁹⁸ In 1997, its first year of operation, the CCRB mediated, two cases⁹⁹ Its case load rose steadily until, in 2004, the CCRB successfully mediated 113 complaints, the highest level in the agency's history, and a significant increase compared to the prior years.¹⁰⁰

Based on its own success, and the success of other state, federal and city agencies, including the CCRB, the Center would like to see the Mayor issue an Executive Order mandating agencies to evaluate and refer appropriate EEO and disciplinary cases for mediation at the Center. The increased case load that would result from such an order would, over time, generate significant return on investment, promote cost savings, and ultimately improve the city's workplace culture.

In the absence of an executive or legislative mandate, the Center would like to receive more referrals from different agencies' EEO and disciplinary officers. However, over the past two years, a number of EEO officers have expressed reservations or resistance to referring cases for mediation at the Center. Some EEO officers prefer to keep the management of their agency's conflict "in house." Other EEO officers are concerned about personal and agency liability. And still others see their case load in narrower terms, meaning that if a complaint leads to a substantiated violation of the agency EEO policy, it warrants corrective measures, and if the complaint is unsubstantiated after investigation, no further action need be taken. At present, staff members are meeting with a focus group of EEO [officers](#) to address some of these concerns. As mentioned above, the group's first undertaking will be to develop a case assessment tool that determines which cases are appropriate for mediation.

The Center would also like to see that a higher percentage of cases referred are actually mediated. The first two years saw only two-thirds of referrals go to mediation (of fifty-four referrals, thirty-six times both participants agreed to mediation, but eighteen times one or more parties did

⁹⁷ NYC Charter § 440(c)(1).

⁹⁸ NYC Charter § 440(c)(4).

⁹⁹ See *infra* Figure 4.

¹⁰⁰ CCRB Performance, <http://www.nyc.gov/html/ccrb/html/about.html> (last visited Dec. 14, 2005); see also *infra* Figure 4.

not want to go to mediation).¹⁰¹ To improve, this percentage, the Center has developed a website¹⁰² and a user brochure for participants-or possible participants-in mediation.¹⁰³ Part of this effort involves continued clarification of the Center's relationship with OATH. Employees facing disciplinary charges come to OATH for hearings, and the Center would like to avoid confusion with OATH's adjudication function. Toward this end, the Center has developed its own logo, and secured devoted office space separate from OATH's offices.

V. CONCLUSION

The first two years of operations at OATH's Center for Mediation Services proved to be very successful. A high rate of settlement achieved in a shorter period of-time than litigation, all within an average session time of about three hours is certainly a good start. By reducing the number of conflicts in city agencies, the Center is able to achieve good return on investment, realize opportunity cost savings, and improve working conditions for city employees. Thus, there is clearly value in a centralized mediation program. Based on its early success, the Center hopes to dramatically increase its caseload over the course of the next few years, and generate further decreases in workplace conflict and its associated costs.

¹⁰¹ See Case Tracking Sheet, *supra* note 48; see also *infra* Figure 1.

¹⁰² See City of New York Center for Mediation Services, *supra* note 18.

¹⁰³ See City of New York Center for Mediation Services Mediation Brochure, available at http://www.nyc.gov/html/Voath/pdf/med_brochure.pdf.

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Figure 1: Cases Referred to the Center (March 2003.-March 2005)¹⁰⁴

TOTALS BY AGENCY

Referring Agency	Referred,	Mediated	Resolved
Police Department -	30	16	13
Health & Hospitals Corporation	12	10	
Fire Department			
Dep't of Environmental Protection			
Dep't of Health & Mental Hygiene			
Law Department			
Department of Employment			
Commission on Human Rights		1	
Totals	54	36	31

TOTALS BY AGENCY AND TYPE OF CASE

Referring Agency	EEO Referrals	EEO Mediated	EEO Resolved	Disciplinary Referrals	Disciplinary Mediated	Disciplinary Resolved
Police Department	30	16	13	0		
Health & Hospitals Corp.				12	10	9
Fire Department	3			0	0	
Dep't of Env't'l Protection	1		1		1	
Dep't of Health			1	0		
Law Department	2					1
Department of Employment			1	0	0	
Comm'n on Human Rights			1	0	0	0
Totals	40	24	20	14	12	11

¹⁰⁴ As of January 1, 2006, the Center's total referrals are above 80, and total number of cases mediated above 50, with over 45 resolved.

Figure 2: Mediation Evaluations

Participants were asked to respond to twelve statements:

1. The Center's offices were a good setting for mediation.
2. The Mediation Center staff was helpful.
3. Before coming, I was provided with all the information I need to participate.
4. The mediators did not take sides.
5. The mediators took time to listen to my concerns.
6. I feel the agreement (if onee was reached) represents a fair arrangement.
7. Mediation helped me understand the concerns of the other participants.
8. Mediation was a better way of handling this situation than pursuing a more formal action.
9. In a similar situation, I would use mediation again.
10. Mediation helped me learn something I can use in the future to solve problems.
11. I would' recommend mediation to other employees.
12. I found the forms easy to read. and understandable.

Participants rated their response to these statements on the following scale:

1 = strongly disagree * 2 = disagree * 3 = no opinion * 4 = agree * 5 = strongly agree

Sixty-one participants responded. The responses were as follows:

Statement	Average Score	Agree. or Strongly Agree
1	4.49	90%
2	4.66	95%
3	4.39	85%
4	4.74	95%
5	4.84	97%
6 ¹⁰⁵	4.84	91%
	4.43	90%
8	4.52	87%
9	4.51	90%
10	4.49	92%
11 ¹⁰⁶	4.57	92%
12	4.64	95%

¹⁰⁵ 57 participants responding.

¹⁰⁶ 60 participants responding.

Figure 3: Opportunity Cost Savings Curve

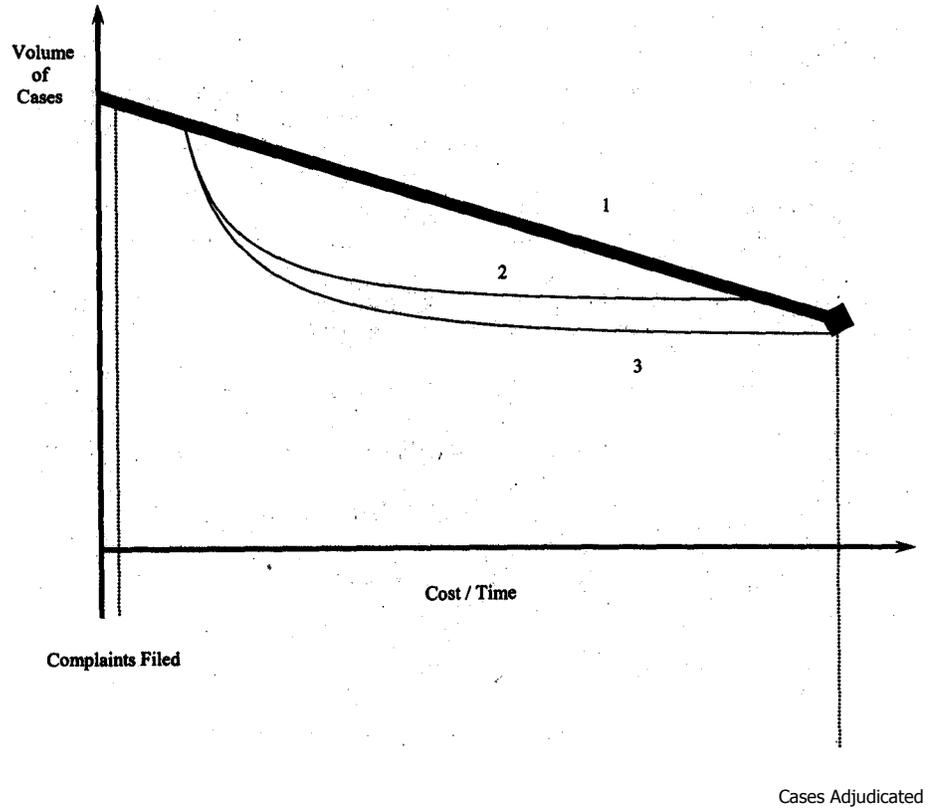
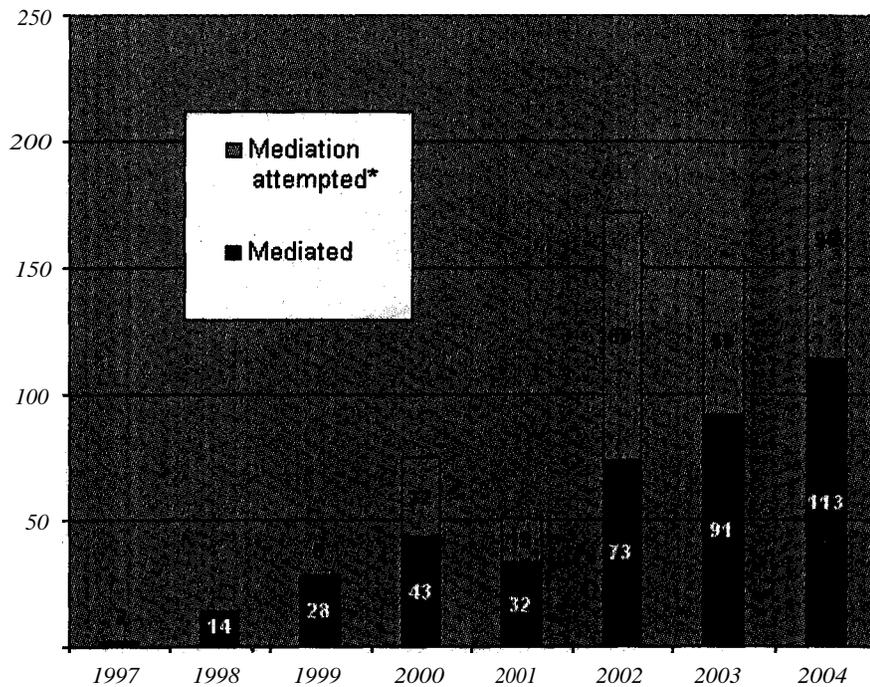


Figure 4: CCRB Mediation¹⁰⁷



* A case is closed as, mediation attempted when the civilian and officer both agree to mediate but the civilian fails to appear for the scheduled mediation twice without good cause, or fails to respond to phone calls and letters to set up such a session.

¹⁰⁷ See CCRB Performance, *supra* note 100.

Figure 5: Dana Measure of Cost of Conflict¹⁰⁸

A. Employees Involved

Employee	Annual Salary	Salary + Benefits	Workweek Hours	Length of Unresolved Conflict (In Weeks)
Nurse 1	\$22,000	\$33,000	37.5	52
Nurse 2	\$33,500	\$50,250	28.0	12
Doctor	\$100,000	\$150,000	37.5	52

B. Cost of Conflict (based primarily on employee salaries & benefits)

Factor	Subtotal
1) Wasted time & energy	\$4,526.13
2) Reduced decision quality	\$1,500
3) Loss of skilled employees	\$42,000
4) Restructuring	\$1,858.33
5) Lowered job motivation	\$2,938
6) Lost work time	\$9,300
7) Health costs	\$ 293.85
Total Costs	\$60,746.31

¹⁰⁸ These tables are a simplified version of calculations from Mediation Institute Training International, The Dana Measure of Financial Cost of Organizational Conflict, *available at* <http://www.mediationworks.com/mti/costs1.htm> (last visited Jan. 10, 2006). This analysis was generated by the Dana Mediation Institute based on a conflict involving a doctor and two nurses in a patient care facility in New England. Although exact calculations may vary, it is clear that conflict has a significant quantifiable impact on the workplace.

