

# The Chief

Civil Service **LEADER**

**THE CIVIL EMPLOYEES' WEEKLY**

NEW YORK, FRIDAY, DECEMBER 29, 2006

## Know Your Rights

# Pre-Disciplinary Mediation

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As an employment lawyer, I am often frustrated when disciplinary charges are filed against my clients for alleged "misconduct" which, at its core, represents a failure to communicate. The communication failure may be between an employee and his or her co-worker, or with supervision. When two employees feud, or simply stop talking to each other, too often disciplinary charges follow.

The disciplinary charges typically allege disruption of service, workplace altercation, insubordination, etc. Yet do all conflicts between employees require a disciplinary response? The New York City Center for Mediation Services, with its "early intervention" approach to workplace conflict, offers a different approach to the usual discipline. It deserves our attention.

### Voluntary Mediation

Established in 2003, the Center for Mediation Services makes mediation available to all city employees. Your employer may choose to refer a conflict for mediation at the Center. For example, employers may refer an employee's EEO discrimination complaint (provided the complaint is in its pre-investigation stage or is found to be "unsubstantiated"). Employers may also refer matters for which disciplinary charges appear imminent. Because participation in the program is purely voluntary, mediation requires the em-



ployees' consent. In other words, employees cannot be compelled to mediate their disputes; rather they must agree to participate. Employees, too, may request mediation.

At mediation, two or more employees state their points of view before the mediator. Union representatives are welcome at mediation (and even attorneys may attend). In an informal process, the mediator—without deciding who is right or wrong—will ultimately try resolving the employees' differences. All matters disclosed at mediation remain confidential except: (a) matters alleging corruption or serious misconduct; (b) matters involving threats, or incidents, of violence; or (c) where the participants agree to waive confidentiality.

### Resolving Conflict

The Mediation Center reports that its mediations have addressed all forms of conflict, including destructive workplace gossip. In one case, a supervisor was angered when she believed a subordinate was spreading lies about her. At mediation, the two employees were able to speak directly to each other and "clear the air." After the mediation concluded, the employer withdrew the disciplinary charges it had drafted.

At another mediation, a mid-level supervisor was upset that his supervisor was repeatedly making disparaging, ethnic jokes. The subordinate did not want to get his supervisor in trouble, but clearly wanted the jokes to stop. Mediation provided a

forum in which the two employees could better understand each other, and the joking ceased.

Other mediations have addressed disputes over how employees co-exist in shared work stations, or how supervisors issue direction to subordinates and, conversely, how subordinates respond to supervision.

A mediation may conclude with a written Resolution Agreement or no written agreement at all. Certain resolutions (i.e. when an employee agrees to change workstations, shifts or work duties) require the consent of the employee's agency. In such cases, any Resolution Agreement must be predicated on the agency's willingness and ability to implement any agreed-upon changes.

### No Remedial Power

If your "conflict" is based on a hostile work environment and you believe you are being unlawfully harassed, you should not view the Mediation Center's work as a substitute for pursuing any discrimination claim in court or at the Equal Employment Opportunity Commission (or other administrative agencies). In part, this is because the Center does not "order" remedies, and cannot award money damages, as a part of any resolution.

Fortunately, the Mediation Center does not require

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## Mediation Rights

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you to waive any discrimination claims if you elect mediation. You must simply make certain that your right to file your discrimination claim does not become time-barred pending the outcome of the Center's (relatively quick) mediation.

Any process which attempts to offer an alternative to disciplinary charges is of value. In order for the Center to fully succeed, municipal unions must further consider the program and then, together with management, identify those developing conflicts that can possibly be resolved at mediation. Once those conflicts are identified and the employees consent to participate, a different path may emerge than the usual, punitive one.

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