

456 CMR: DEPARTMENT OF LABOR RELATIONS

456 CMR 21.00: RULES FOR INTEREST MEDIATION, FACT-FINDING AND INTEREST ARBITRATION IN DISPUTES INVOLVING PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES; PRIVATE SECTOR INTEREST MEDIATION

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21.01: Scope

456 CMR 21.00 regulates the conduct of mediation and fact-finding proceedings in public employment, including state, county, municipal, and district government.

21.02: Confidentiality

Any person acting as a mediator, including a fact finder or interest arbitrator, shall not be required by any administrative, arbitration, or non-criminal judicial tribunal to disclose any files, records, documents, notes, or other papers or be required to testify with regard to any information obtained while functioning in a mediatory capacity.

21.03: Initiation of Interest Mediation and Fact-finding

(1) Petition for Mediation and Fact-finding. If a public employer and an employee organization have negotiated for a reasonable period of time and an impasse exists over one or more issues arising out of the negotiations, the public employer, the employee organization, or the parties jointly, may file a Petition for Mediation and Fact-finding with the Department, in accordance with 456 CMR 12.12: *Filing with the Department*.

(2) Unilateral Petitions. A petitioning party proceeding unilaterally shall serve the petition on the principal representative of the other party in accordance with 456 CMR 12.02: *Service: When Required*. The petition shall state in the appropriate place that a copy of the petition has been served on the other party in accordance with the requirements of 456 CMR 12.02. Failure to so state shall suspend the processing of the petition.

21.04: Voluntary Interest Mediation

At any time during bargaining, whether or not a Petition for Mediation and Fact-finding has been filed, an employee organization and a public employer may jointly request mediation assistance in resolving a collective bargaining dispute. The Department shall provide mediators for this purpose.

21.05: Appointment of a Mediator

- (1) Investigation. Upon receipt of the petition, the Department shall commence an investigation to determine if the parties have negotiated for a reasonable period of time and if an impasse exists. If the Department determines that the parties are not at impasse, it shall notify the parties of this determination within ten days of the filing of the petition. Failure to notify the parties within ten days shall be deemed to mean that an impasse exists.
- (2) Appointment. Within five days of the determination of an impasse, the Department shall promptly appoint a mediator to assist the parties in the resolution of the impasse.
- (3) Selection. The mediator may be appointed from the Department's staff unless the parties have stated in the Petition for Mediation and Fact-finding that they jointly request that the Department appoint an outside mediator. If the parties request an outside mediator, they shall specify on the Petition for Mediation and Fact-finding the name, address, and telephone number of the person selected. The Department, in its discretion, may allow a joint request by the parties for the appointment of a particular staff mediator.
- (4) Disqualification or Withdrawal of the Mediator. Prior to accepting an appointment, the mediator shall disclose to the Department any circumstances likely to create a presumption of bias, or which the mediator believes might disqualify him or her as an impartial mediator.
- (5) Fees. The filing fee for a Petition for Mediation and Fact-finding filed pursuant to 456 CMR 21.03 or for Voluntary Interest Mediation filed pursuant to 456 CMR 21.04 is the amount established by 801 CMR 4.02: *Fees of Licenses, Permits, and Services to Be Charged by State Agencies*. The cost of the filing fee shall be equally divided between the parties. The cost of an outside mediator, selected by the parties, shall be equally divided between the parties unless the parties agree otherwise.

21.06: Mediator's Function

- (1) The function of a mediator is to assist employers and employee organizations in reaching a voluntary agreement. A mediator may hold separate or joint meetings for this purpose. The mediator shall consult with each party concerning the time, date, and place of each mediation session; however, the mediator shall make the final decision on scheduling.
- (2) The mediator may order the parties to provide specific representatives authorized to enter into a collective bargaining agreement to be present at meetings held for the purpose of resolving the impasse and negotiating such an agreement.

21.07: Public Access

There shall be no public access to mediation sessions.

21.08: Mediator's Report

After concluding mediation, the staff or outside mediator shall report in writing to the Department the results of the efforts to resolve the impasse. The report is confidential and shall contain the following information:

- (1) The names of the parties;
- (2) A statement of the dates of the first contacts with both the employer and the employee organization;
- (3) A brief description of the unresolved issues which existed at the beginning of the mediation effort;
- (4) A statement of the issues that have been resolved through the mediation effort;
- (5) A statement of the issues that are still unresolved, if any; and

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- (6) A recommendation as to whether the Director should invoke fact-finding.

21.09: Designation of a Fact-finder

(1) Appointment by the Department. If the mediator's report reveals that an impasse continues to exist, the Department shall send written notice to both parties informing them that mediation has not resolved the impasse and that the Department intends to act upon the Petition for Mediation and Fact-finding by appointing a fact-finder. Promptly thereafter, the Department shall initiate the process to appoint a fact-finder from its list of qualified individuals.

(2) Selection by Alternative Means. If the parties jointly agree to select the fact-finder in an alternative manner, they shall jointly inform the Department before the Department appoints a fact-finder, along with the selected fact-finder's name, address, and telephone number.

(3) Letter of Appointment. After a fact-finder has been selected or appointed, the Department shall promptly send a letter of appointment and a copy of the petition to the fact-finder, and a copy of the letter to both parties. The fact-finder shall promptly notify the Department whether the fact-finder accepts the appointment.

(4) Disqualification or Withdrawal of the Fact-finder. If the fact-finder has represented an employer or an employee organization within the last 12 months, the appointment shall be revoked by the Department. The fact-finder is required to disclose to the Department and the parties any circumstances likely to create a presumption of bias, or which the fact-finder believes might be disqualifying as an impartial fact-finder. Following such a disclosure, the Department shall revoke the fact-finder's appointment unless both parties waive this presumptive disqualification. If a fact-finder is disqualified, resigns, withdraws, or otherwise becomes unavailable from the fact-finding duties, the Department shall appoint another fact-finder in accordance with 456 CMR 21.09(1).

21.10: Withdrawal of Fact-finding Petition

A fact-finding petition may be withdrawn by the petitioning party in the case of a unilateral filing, or by agreement of both parties in the case of a joint filing, at any time prior to the appointment of a fact-finder. After the appointment of a fact-finder, a fact-finding petition may be withdrawn only by joint agreement of the parties. The parties shall compensate the fact-finder for such services performed in accordance with 456 CMR 21.17.

21.11: Fact-finder's Responsibilities

(1) Authority. The appointed fact-finder shall have the authority and responsibility for the conduct of the fact-finding proceedings, and shall have sole discretion in deciding any issues of procedure. The fact-finder shall immediately advise the Department if a work stoppage has occurred or is imminent.

(2) Scheduling of Conferences and Hearings. The fact-finder shall consult with each party concerning the time, date, and place of each meeting or hearing. The fact-finder shall make an effort to expedite the process. The fact-finder shall be the sole judge of scheduling, and the fact-finder's ruling as to time, date, place, adjournment, or continuance of any meeting or hearing shall be final and binding. Prior to any hearing, the fact-finder shall serve upon each party and the Department a written notice of the time, place, and date of such hearing.

21.12: Mediation During Fact-finding

(1) Authority. The fact-finder or mediator has the authority to mediate the dispute.

(2) Report to the Department. If the dispute is settled through mediation by the fact-finder, the fact-finder shall promptly notify the Department of the date and terms of the settlement.

21.13: Hearing Before the Fact-finder, Subpoenas

- (1) Proceeding in the Absence of a Party. Fact-finding may proceed in the absence of a party who, after notice given in accordance with 456 CMR 21.11, fails to appear for a conference or hearing or to obtain a continuance. The fact-finder may choose not to base the report solely upon the presentation of the appearing party. If any party to the dispute fails to appear or to cooperate with the fact-finder, the fact-finder may determine what further evidence is required and may obtain and use any evidence deemed relevant by the fact-finder. The fact-finder shall disclose to the appearing party the evidence intended to be considered, and shall give the appearing party an opportunity to respond to such evidence.
- (2) Waiver of Fact-finding Hearing. The parties may agree to waive the fact-finding hearing. The fact-finder is authorized to issue the report on the basis of the documents and stipulations submitted by the parties.
- (3) Representation. Any party may be represented by counsel or other person of its choosing. Such counsel or representative has exclusive authority to present that party's case.
- (4) Third Party Intervention. The fact-finder has authority to decide, in consultation with the parties, whether to permit third party intervenors to file any statements, memoranda, or briefs.
- (5) Order of Proceedings. The fact-finder shall:
 - (a) Obtain from the parties a statement of the issues in dispute;
 - (b) Determine the order in which the parties present their cases. In the case of a unilateral petition, the petitioning party shall ordinarily present its case first;
 - (c) Afford each party a full and fair opportunity to present all relevant evidence;
 - (d) Rule on all objections.
- (6) Fact-finder's Authority to Issue Subpoenas and Administer Oaths. The fact-finder shall have the authority, upon delegation of the Department, to administer oaths, take the testimony of any person under oath, and issue subpoenas to compel the attendance of witnesses or the production of documents. A request for a subpoena shall be allowed unless it is overbroad, oppressive, or otherwise legally defective.
- (7) Briefs. Upon the close of the hearing, each party has the right to make an oral argument or to file a brief. The time limits on submission of briefs shall be established by the fact-finder after consultation with the parties. Should the parties wish to make oral arguments, the order of proceeding shall be at the discretion of the fact-finder.

21.14: Fact-finding Report

- (1) Form and Contents. After the close of the hearing and the submission of briefs, if any, the fact-finder shall prepare, sign, and date a written fact-finding report. It shall include:
 - (a) A statement of the issue(s);
 - (b) The findings of fact regarding the issue(s);
 - (c) A statement of the recommendation for each issue;
 - (d) The rationale for the recommendation reached on each issue; and
 - (e) A summary cover sheet containing a complete statement as to the fact-finder's recommendations on all issues.
- (2) Service of the Report. The fact-finder shall send a copy of the fact-finding report to the Department and to each party to the dispute. The fact-finder shall send the report in accordance with 456 CMR 12.12: *Filing with the Department*.
- (3) Clarification of Report. One or both parties may request that the fact-finder clarify any recommendation in the fact-finding report. This request must be received by the Department within seven days of the date of the report. The party(ies) making this request shall send a copy to the fact-finder. The fact-finder shall attempt to dispose of such request within ten days of the Department's receipt of the request. The fact-finder shall notify the parties and the Department in writing or by conference of the disposition of the request for clarification.

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(4) Action on Report. If the parties fail to notify the Department that they have reached an agreement on the issues in dispute within ten days after the Department's receipt of the fact-finder's report, the Department shall assume that the impasse remains unresolved.

(5) Publication of the Report. If the impasse remains unresolved ten days after the Department's receipt of the fact-finder's report, the Department shall make it public.

21.15: Termination of Fact-finding

Unless the parties agree otherwise, the fact-finder shall perform no further service in connection with the dispute once the fact-finding report and clarification, if any, have been served. If the fact-finder performs further service, the fact-finder shall keep the Department informed of any activities, and shall notify the Department promptly of any settlement of the dispute and of the terms of the settlement.

21.16: Mediation after Fact-finding

If the parties are unable to come to agreement after the receipt of the fact-finder's report, the Department may appoint a staff mediator to assist them in resolving the dispute.

21.17: Compensation of Fact-finder

The fact-finder shall be entitled to the compensation rate contained in the resume on file with the Department, for each day or portion thereof spent in hearing, preparation, and issuance of the fact-finder's report, including clarification, if any, and in mediation. The fact-finder shall also be entitled to reimbursement for necessary and ordinary expenses. The costs for fact-finding shall be equally divided between the parties unless they agree otherwise.

The fact-finder's bill showing the amount payable by each party must accompany the final fact-finding report. The fact-finder may submit interim bills to the parties in the course of the proceedings, and copies of such interim bills shall also be sent to the Department. The parties shall make payment directly to the fact-finder.

21.18: Certification of Completion of the Collective Bargaining Process

Either or both parties may request the Department to certify to the parties that the collective bargaining process, including mediation, fact-finding, or arbitration, if applicable, has been completed. If the Department determines that the dispute resolution mechanisms provided for in M.G.L. c. 150E, § 9 have been exhausted, it shall certify to the parties that the collective bargaining process has been completed.

21.19: Voluntary Interest Arbitration

Upon joint request of the parties, the Department shall administer any written agreement to enter into final and binding interest arbitration of a collective bargaining dispute.

21.20: Private Sector Interest Mediation

Upon request, the Department may appoint a mediator to assist in the resolution of a private sector interest mediation dispute.

REGULATORY AUTHORITY

456 CMR 21.00: M.G.L. c. 23, §§ 9O, 9P, 9Q, 9T(c), (d); c. 30A; c. 150 and c. 150E, § 9.