



Employment *Mediation In lieu of disciplinary action*

by

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**2022 NM ADR Symposium
October 19, 2022**

Alternatives in ADR

- **Negotiation** between parties
- **Mediation** is often best option
 - **Conciliation** strategies
 - **Fact finding** hearings
 - **Ombuds** intervention
- **Facilitation**/problem solving
- **Arbitration** for intractable disputes

Objectives of *mediation* in workplace

- Repairing team bond
- Resolving conflict
- Restoring *trust*
 - Respecting *confidentiality*
- Allowing voluntary participation



Potential *participants* in employment mediation

- Co-workers/team members
 - Supervisor/subordinate
- Employee & client/citizen
 - ADR coordinator



Mediation In lieu of (MILOD)

different from mediation

- **Coercive or voluntary?**
- ***Mandatory mediation?***
- **Does discipline go away if mediation fails; even if mediated in *good faith*?**
- **Similar to Last Chance Agreement?**
 - Is it *fair* to others disciplined?

Discipline vs ***mediation***

Discipline

- ***Mandatory*** participation
- **Transparency**
- ***Past*** wrongs
- ***Open*** hearing
 - Adversarial
- Punitive penalty

Mediation

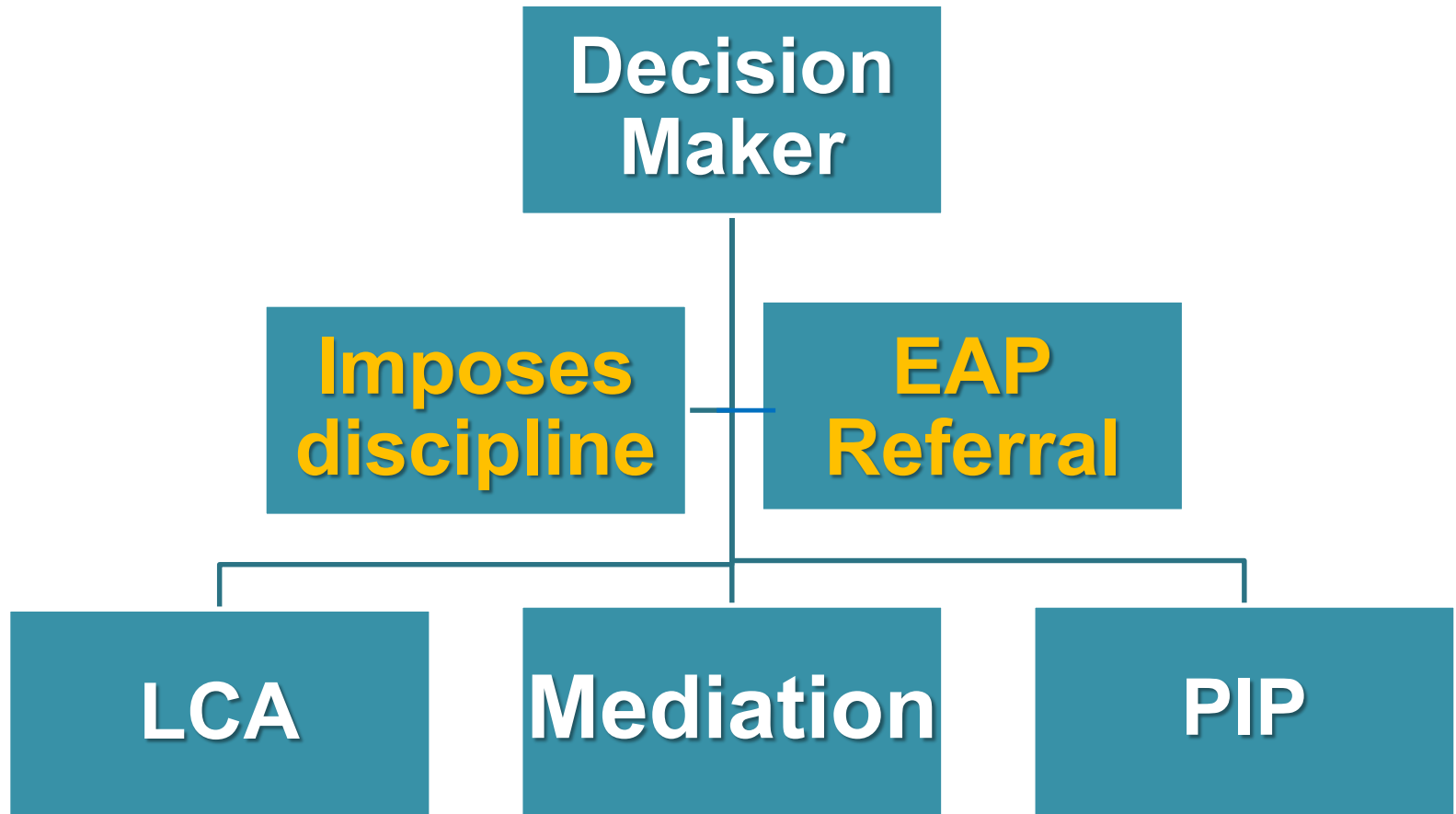
- ***Voluntary*** participation
- **Confidentiality**
- ***Future*** relations
- ***Private*** talks
- Respectful
 - Agreed settlement

When and whom?

- **When** is MILOD most effective?
- **When** is it least effective?
 - **Who** should **propose** MILOD?
 - **Who** should **approve** MILOD?



Decision maker *options* to disciplinary action



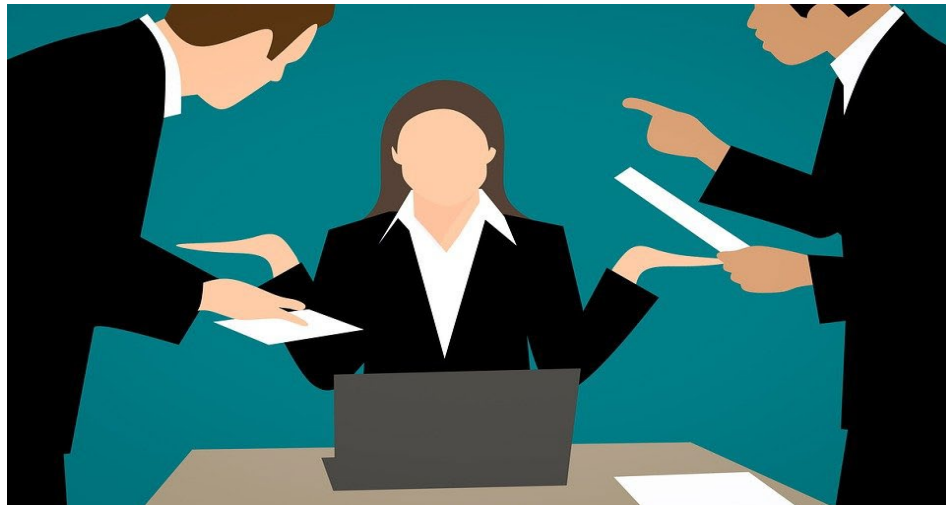
Decision maker options

- **PIP**: unacceptable performance issue
 - **LCA**: discipline & retain job
- **EAP**: counseling & psychotherapy
 - **MILOD** to restore relationship



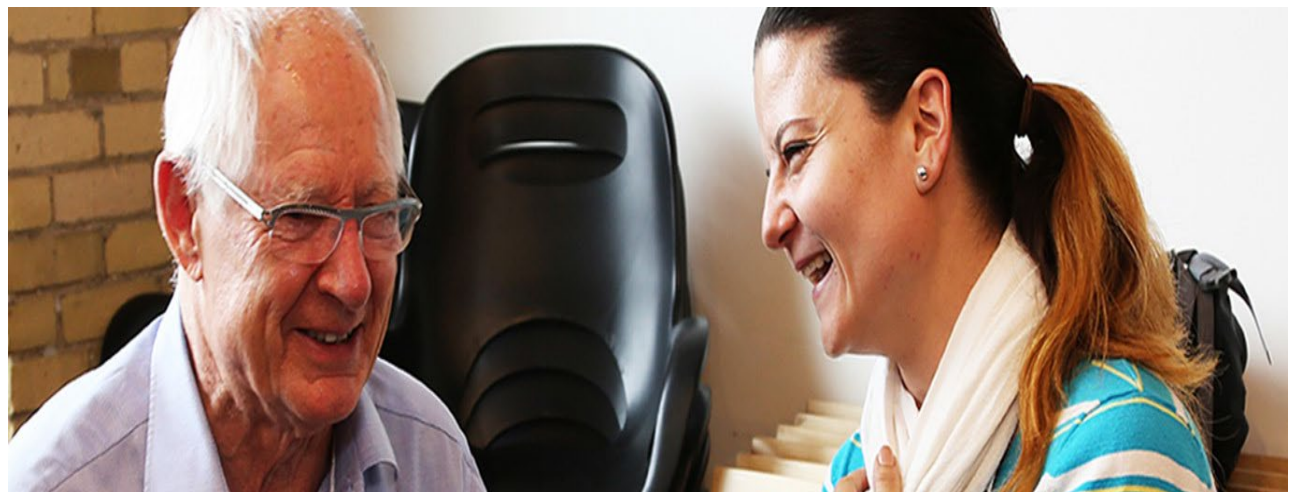
MILOD should *depend on:*

1. Nature of **issue**
2. **Stage in** discipline/grievance
3. **Employee** *disciplinary history*
4. Potential for *reform* & *reformation*



***Best issues* for MILOD**

- ***Random*** incident, not behavior pattern
 - Genuine desire to change behavior
 - Remorsefulness for actions
 - ***Mitigating*** factors present



Worst issues for MILOD

- Establishing *precedent* is critical
- Lack of demonstrated *good faith*
 - Sexual abuse & misconduct
 - Criminal & violent behavior



When: **Stages** in discipline & grievance process

- Workplace **problems** emerge,
 - Corrective actions applied,
 - **Disciplinary** action imposed,
 - **Grievance** appealed,
- Arbitration/Fact finding ruling

Best *step* to try mediation?

**Arbitration/
Fact finding**

**Grievance
appeal**

**Disciplinary
action**

Corrective actions

Problems emerge

Mediation *before* discipline in ABQ

902.2 ...After giving the employee the **notice of contemplated action** and before the employee makes any written or oral response, the **supervisor contemplating the discipline shall request review** by the City Employee Mediation Program Coordinator of the circumstances on which the contemplated action *is based in an effort to avoid the discipline*. Mediation shall occur if it is deemed appropriate by the Coordinator. After this review or *if mediation is unsuccessful, the supervisor may continue with the contemplated disciplinary procedure* by giving the employee the right to respond to the notice of contemplated action.

Mediation *after* discipline, before grieving

903.3 Grievance Procedure

- A. The grievance procedures consists of three (3) steps:**
- 1. Review by the City Mediation Program.**
 - 2. Review by the department director.**
 - 3. Investigation and recommendation by the Grievance Resolution Committee if the dispute is determined to be grievable.**

Employee *disciplinary history*

- Matters of **fact** are public
- Matters of opinion are **confidential**
- Privacy of employee misconduct
- *Discipline records* are protected



To discipline or not to discipline?

- Value of exposing “**bad apples**”
- Mediation success **negates** discipline
- Mediation avoids internal investigation
 - **Risk involved** with mediation first?



Police officer records in *#Blacklivesmatter* era

- Make disciplinary records public?
 - Track citizen complaints
- Unproven *use of force* accessible
- Records never to be *expunged*
 - Names of officer-involved shootings
 - Open up performance evals

Identifying *whom to accept* in MILOD program

- Potential for employee *reform* and *rehabilitation*

Reform: can *stop* unacceptable behavior/ erratic attendance

- *Rehabilitation*: can be restored to *trustworthy* status over time



Positive *indicators* for possible *reform*

- Periods of *positive work history*
- No recent /active disciplinary actions
 - Truly remorseful behavior
 - Has *learned* from mistakes
 - Is deeply apologetic
 - Was provoked by others
 - In *recovery* program

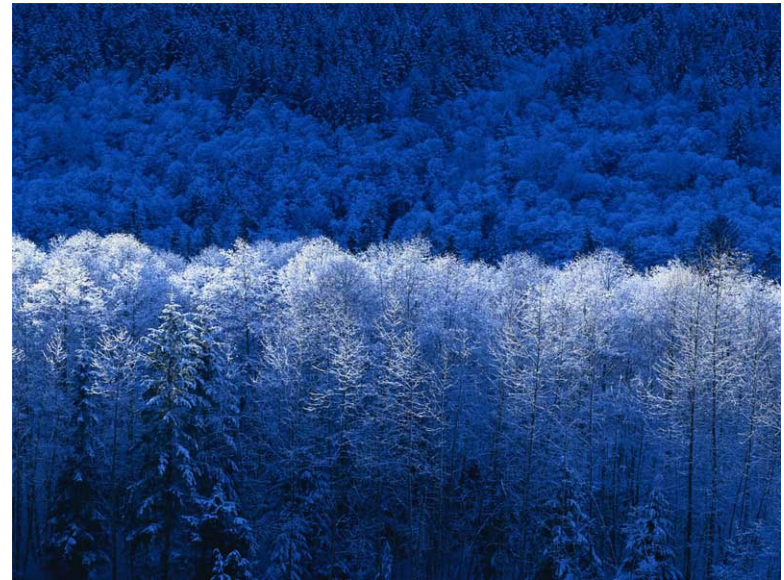
Positive *potential* for *reform*

- Seeking EAP help
- No intent to defraud
 - No guile
 - Trust in **character**
 - Trust in **competence**
- Admits guilt



Negative reform indicators: During *investigation* was...

- Untruthful
- Uncooperative
 - Deceptive
- Unresponsive
 - Misleading
 - Resistant
- Contradictory



Negative indicators for mediation referral: *attendance*

- attendance abuse
- 80% pattern
- sick leave entitlement
- **accepts no responsibility for change**



Negative *reform* indications: *behavior*

- *Blames supervisor* for their poor performance
- *Blames co-workers* for problems
- Highly critical & abrasive



Negative *reform prospects*

- No effort to seek professional help for problems, i.e. **EAP**
- Does not *admit* they have problem
 - Is non-responsive when asked
 - Thinks supervisor out to get them
- Continually **disrespects** supervisor & co-workers

Negative *reform indicators*: Refuses self-improvement

- Complete **lack** of self-criticism
 - No commitment to PIP
- Arrogance without portfolio
 - Delusions of greatness
 - **Denial** of reality
- Content with mediocrity
 - Avoids serious work
 - Plays games

Scenario #1

- **During 2 ½ years of service with Parks and Recreation, Julius used up accrued sick leave hours as fast as they were earned. Claude, the supervisor, repeatedly warned Julius of possible disciplinary consequences, but to no avail. Claude complains to you, the HR Manager. How do you respond? Do you recommend mediation in lieu of discipline?**

Scenario #2

Barney, a custodian enjoys telling a good joke to anyone who will listen. Barney particularly enjoys off-color jokes and sexual innuendos. Barney frequently comes into the reception area on breaks and tells jokes to Sue, who is embarrassed and tries to stay busy and ignore Barney, but to no avail. Finally, Sue complains to you, the HR manager. What do you do? Is mediation a possibility? Explain why.

Scenario #3

- **New supervisor Melissa has given long time Letter Carrier Lester 2 reprimands. Lester unexpectedly returns from mail route requesting “stress leave,” to which Melissa agrees. Lester leaves to bring in mail, with 8” knife in open hands, palms up, that must be returned to owner. Melissa panics, calls police, handcuff & arrest Lester. Melissa demands that you as Postmaster terminate Lester for creating a “violent workplace.” What do you do?**

Scenario \$4

- **Fred is high school choir director & planning a “Christmas Concert” with a solo “O Holy Night.” Because of pressure from parents, Superintendent Sam orders Fred to replace “Christian” carols with a mixture of secular and other religious music. Fred officially agrees, but at the performance the choir performs mostly songs celebrating Christ’s birth. Sam is furious and intends to terminate Fred. You are HR director. What advice will you give the Superintendent & Fred?**