

November 10, 2005

The Question

As a certified circuit court mediator who mediates, among other things, disputes between public employers and collective bargaining agents where impasse has been declared regarding terms and conditions of employment to be incorporated in a collective bargaining agreement, I would like to elicit the opinion of the Mediator Ethics Advisory Committee concerning the following:

Question A: Suppose a public employer and a bargaining agent secure the services of a mediator pursuant to the authority set forth in Florida Statute 447.403(1). During the mediation, the parties negotiate and reach a written tentative agreement on disputed terms and conditions that will be incorporated into a collective bargaining agreement.¹ Are the mediation participants, including the mediator, required to treat the mediation as a “negotiation” for purposes of Florida Statute 447.605(2) and Florida Statute 286.011(3) so that the press and general public may attend joint sessions and private caucuses?

Question B: If the answer to question 1 is yes, what should the mediator tell the mediation participants with respect to the confidentiality of mediation communications if the press and general public are permitted to attend both joint sessions and private caucuses?

Florida Statute 447.403(1) provides that a public employer and a bargaining agent may appoint or secure the appointment of a mediator to assist in the resolution of an impasse concerning the terms and conditions of employment that are to be incorporated in a collective bargaining agreement.

Florida Statute 44.102(3) provides that “All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119.”

Florida Statute 44.405(1) (2004) provides, in relevant part, as follows: “Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel. A

¹ The mediated resolution of terms and conditions that will be incorporated in the collective bargaining agreement are reduced to writing in a tentative agreement which is not binding on the public employer until it is ratified by the public employer and the public employees who are members of the bargaining unit. See Fla. Stat. 447.309(1).

violation of this section may be remedied as provided by s. 44.406.” While section 44.405(4) authorizes disclosure of certain mediation communications under very limited circumstances, nothing in section 44.405 authorizes disclosure of mediation communications revealed during a mediation conducted pursuant to Florida Statute 447.403(1).

Florida Statute 44.403(1) defines a “mediation communication” as an oral or written statement, or nonverbal conduct intended to make an assertion, which is made by a mediation participant during the course of a mediation.

Florida Statute 44.403(2) and (3) define “mediation participant” and “mediation party,” respectively. These definitions narrow the scope of participants to: (a) a named party; (b) a real party in interest; or (c) a person who would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

Florida Statute 447.605(2) provides that the collective bargaining negotiations between a chief executive officer, or his or her representative, and a bargaining agent shall be in compliance with the provisions of Florida Statute 286.011. Section 447.605 does not address whether mediations conducted pursuant to section 447.403(1) are considered “negotiations” for the purposes of complying with the provision of Florida Statute 286.011 and 447.605(2).

Florida Statute 286.011(1) provides in relevant part that all meetings at which official acts are to be taken are declared to be public meetings open to the public at all times. No resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

After reviewing the relevant statutory provisions, I am unclear about whether the press and general public must be permitted to appear at a mediation conducted pursuant to section 447.403(1). On the one hand, the mediation participants (including the mediator) are statutorily obligated to respect and preserve the confidentiality of mediation communications. This is particularly important since it is fairly well established that confidentiality during mediation promotes free flow of information and often leads to dispute resolution. On the other hand, the public employer and the bargaining agent may be compelled to comply with section 286.011 if the mediation conducted pursuant to section 447.403(1) is considered a “negotiation” for the purposes of section 447.605(2).

I am aware of a provision in an unrelated statute which expressly states that mediation attended by a quorum of the board of directors for a homeowner’s association is not a board meeting for purposes of notice and participation. See Fla. Stat. 720.311(2)(a). However, the relevant statutes at issue with respect to collective bargaining negotiations and mediations are silent in this regard.

A search of Florida case law has not yielded any meaningful guidance. The first case, Bassett v. Braddock, 1971 WL 14847 (Fla. Cir. Ct. 1971), discusses whether Florida Statute 286.011 requires governmental employers, when engaged in collective bargaining, to do so in public rather than in private. Unfortunately, this case is merely a circuit court decision and it clearly predates the relevant statutory provisions, more specifically, section 447.403(1), 447.605(2), and the Mediation Confidentiality and Privilege Act of 2004. Although this case is factually and legally distinguishable, it does at least recognize “that meaningful collective bargaining will be destroyed if full publicity is accorded to each step [in the collective bargaining process].”

The second case, News-Press Publishing Company, Inc v. Lee County, 570 So.2d 1325 (Fla 2nd DCA 1990), involves the media’s attempt to secure the right to attend a court ordered mediation, but it does not involve collective bargaining or an interpretation of the relevant statutes.

I would appreciate your review and opinions concerning the two issues presented above.

Submitted by Circuit Mediator
Central Division

Authority Referenced

Sections 44.401 – 44.406, Florida Statutes

Summary

The Committee lacks the jurisdiction to determine whether a mediation should be treated as a negotiation for purposes of sections 447.605(2) and 286.011(3), Florida Statutes. However, if a mediation falls within the scope of the Mediation and Confidentiality and Privilege Act, then all mediation participants are obligated to adhere to its provisions.

Opinion

A. The Committee declines to engage in statutory interpretation to answer your question because doing so would be beyond the Committee’s jurisdiction. The Attorney General and the Public Employee Relations Commission [PERC] would be the appropriate offices from which to seek an advisory opinion on the issue of whether the mediation you describe should be treated as a negotiation for purposes of sections 447.605(2) and 286.011(3), Florida Statutes.

B. Regardless of the answer to the first question, the Committee notes that a mediator must answer the fundamental question of whether “mediation” is taking

place within the scope of the Mediation Confidentiality and Privilege Act, sections 44.401 – 44.406, Florida Statutes. If it is, then all mediation participants are obligated to adhere to section 44.405, Florida Statutes. Breaches of confidentiality by any mediation participant are subject to civil remedies pursuant to section 44.406, Florida Statutes. In addition, a mediation party may prevent any other person present at the mediation from testifying in a subsequent proceeding regarding mediation communications, section 44.405(2), Florida Statutes.

Date

Fran Tetunic, Committee Chair