



**PUBLIC SERVICE COMMISSION**

**GUIDELINES FOR MEDIATION, CONCILIATION AND NEGOTATION**

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# GUIDELINES FOR NEGOTIATION, CONCILIATION AND MEDIATION

## 1.1 INTRODUCTION

These guidelines are formulated pursuant to the provisions of Article 252(1) (b) which empowers the Commission to apply conciliation, mediation and negotiation in dispute resolution.

The guidelines provide an alternative dispute resolution (ADR) mechanisms which affords an opportunity to create solutions that are uniquely tailored to address issues at hand. The guidelines will enable the Commission conduct conciliations, mediation or negotiation in a structured manner that is understood by all stake holders in the Public Service.

The objective of an ADR process is to assist parties create a voluntary functional, durable and mutually satisfactory agreement that all parties believe is beneficial.

## 1.2 RATIONALE

The growth in common law and statutory protection against wrongful dismissal has provided employees with a broader array of tools with which to challenge employer behaviour in court. In the industrial courts alone, the number of claims filed concerning employment grievances grew to a large extent in the last two years when the Industrial Courts were elevated to the status of the high court. Appeals and review applications lodged with the Commission have also risen as almost every decision to dismiss an officer by Authorized Officers has resulted in an appeal and subsequently to a review application.

The explosion of litigation has imposed significant costs on employers and employees. Parties to these suits pay huge sums to lawyers involved in handling both meritorious and non-meritorious claims. Moreover, even for those employees properly situated to file suit, the pursuit of a legal claim through litigation often proves stressful and unsatisfying. Overburdened judicial system mean that years often pass before an aggrieved employee is able to present his or her claim in court.

Alternative dispute resolution (ADR) as a generic concept connotes the entire class of mechanisms which facilitate private resolution of disputes. The Alternative Dispute Resolution can take three forms namely; Mediation, Conciliation and Negotiation. The goal of the three mechanisms is securing a solution both parties will accept voluntarily.

## 1.2 DEFINITION OF TERMS

In this Guidelines;

‘Commission’ – means the Public Service Commission

“Conciliation” – process where a commissioner meets with parties in a dispute and explores ways to settle it by agreement

**‘expert mediator’** means a person knowledgeable in the subject matter of the dispute

“Mediation” – Voluntary, non-binding dispute resolution process in which a neutral third party helps the parties reach a negotiated settlement which, when reduced into writing and signed by all parties become binding.

“Negotiation” – Bargaining process between two or more parties seeking to discover a common ground and reach an agreement to settle a matter of mutual concern or resolve a conflict.

## 1.3 APPLICATION

The ADR procedures shall apply to all human resource management related disputes in the public service that can be resolved without litigation. The provisions of these guidelines should as far as possible be applied to all disputes before any other recourse is considered.

The existence of the guidelines shall not in any way foreclose other methods of dispute resolution.

#### 1.4 CHOICE OF ADR PROCEDURE

The choice of ADR procedure will be determined by the nature of the dispute. One or more procedures may apply depending on the circumstances of the matter. However in general the following shall apply in addition to any other guidelines as shall be given by the Commission from time to time:

1. disputes involving Unions and touching on terms and conditions of service may be determined through negotiations
2. disputes involving officers within a ministry or a state department and touching on allocation of work, deployment and transfers among others may be resolved through mediation
3. disputes between ministries, state departments or State organs and touching on responsibilities of ministries, state departments and state organs among others may be resolved through conciliation

#### 1.5 MEDIATION

Mediation is a process in which a neutral third party actively assists disputing parties in reaching a settlement. The mediator facilitates dialogue in a structured process that helps parties reach a conclusive and mutually satisfactory agreement. It is a voluntary non-binding process.

### **1.5.1 Choice of Mediator**

The subject matter of the dispute will determine the selection of mediator. A mediator will be required to have the necessary expertise relevant to the dispute.

### **1.5.2 Disputes Involving the Commission**

In disputes involving the Commission and another party, both parties shall agree on a mediator.

In the event that parties do not agree on a mediator, the Commission on Administrative Justice or the Chartered Institute of Arbitrators shall appoint a mediator upon request by the parties.

### **1.5.3 Disputes External to the Commission**

In disputes where the Commission is not a party the Commission shall be the mediator unless the parties express, in writing, the wish to have a different mediator in which case the parties shall appoint a mediator of their choice.

In the event the parties do not agree on a mediator, the Commission or the Commission on administrative justice or the Chartered Institute of Arbitrators shall appoint a mediator in consultation with the parties.

### **1.5.4 Procedure for appointment of Mediator**

1. Appointment of mediator (s) shall be as follows;

- a) The requesting party shall, within 7 days after the registration of the request, propose to the other party the appointment of a sole mediator or of a specified uneven number of mediators and specify the method proposed for their appointment;
- b) Within 5 days after receipt of the proposals made by the requesting party, the other party shall:
  - (i) accept such proposals; or
  - (ii) make other proposals regarding the number of mediator and the method of their appointment;
- c) Within 5 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- d) The communications provided for in paragraph (c) shall be made or promptly confirmed in writing and shall be transmitted directly between the parties with a copy to the Commission where the latter is the mediator.

## **1.6 Role of Mediator**

The mediator shall help the parties define the issues in dispute and guide them towards their own resolution of the dispute. The mediator shall hold both joint and separate sessions with the parties. He or she shall not impose a resolution on the parties or decide the settlement or even compel parties

to settle but shall guide the parties in arriving at their own mutually agreeable resolution.

The mediator may give to each party an expert unbiased view of the overall strength and weakness of the case and may also discuss with the parties what might happen if the dispute is not settled.

### **1.7 Mediation Process**

1. The mediator shall schedule the first mediation meeting within 7 days of his/her appointment as mediator.
2. Before dealing with the substance of the dispute, the parties and the mediator will discuss preliminary matters, such as possible modification of the procedure, place and time of meetings, and each party's need for documents or other information in the possession of the other.
3. The parties and the mediator shall at the first meeting lay ground rules for the mediation. The ground rules shall include the following subject to any changes on which the parties and the mediator agree;
  - a) Each party may withdraw at any time after attending the first session, and before execution of a written settlement agreement, by written notice to the mediator and the other party or parties.
  - b) The mediator shall guide the procedural aspects of the mediation and the parties shall control the process
  - c) The mediator shall be free to meet and communicate separately with each party.

- d) The mediator shall decide when to hold joint meetings with the parties and when to hold separate meetings.
- e) The mediator shall fix the time and place of each session and its agenda in consultation with the parties.
- f) Formal rules of evidence or procedure will not apply.
- g) Each party may be represented at each mediation conference by a person authorized to negotiate a resolution of the dispute, unless excused by the mediator as to a particular conference.
- h) The mediator may limit the number of persons representing each party.
- i) The process will be conducted expeditiously.
- j) Each representative will make every effort to be available for meetings.
- k) Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, in so far as they can do so without prejudicing their legal rights.
- l) Unless all parties and the mediator otherwise agree in writing, the mediator and any persons assisting the mediator shall be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to the mediation).
- m) If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless the parties and the mediator otherwise agree in writing.

- n) The mediator may obtain assistance and independent expert advice, with the prior agreement of and at the expense of the parties.
  - o) Any person proposed as an independent expert will be required to disclose any circumstances known to him or her that would cause reasonable doubt regarding his/her impartiality.
  - p) The mediator shall not be liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct.
  - q) The mediator may withdraw at any time by written notice to the parties for the following reasons;
    - (i) if the mediator believes that a party is not acting in good faith;
    - (ii) if the mediator concludes that further mediation efforts would not be useful; or
    - (iii) for any personal reasons which the mediator shall not be required to state.
4. At least 7days before the first substantive mediation conference, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute.
5. It is desirable for the submission to include an analysis of the party's real interests and needs and of its litigation risks. The parties may agree to submit jointly certain records and other materials. The mediator may request any party to provide clarification and additional information.

6. The parties shall identify the problem from both perspectives and shall state the issues in dispute.
7. The mediator shall assist the parties clarify and understand the issues and the opinion of each party on the same.
8. The parties shall then caucus for purposes of separate discussions with the mediator.
9. During the caucus with each party the mediator shall help the parties focus on their underlying interests and concerns, explore resolution alternatives, develop settlement options and propose solutions.
10. The mediator may facilitate settlement in any manner that he/she believes is appropriate
11. The parties are expected to initiate and convey to the mediator proposals for settlement.
12. Each party shall provide a rationale for any settlement terms proposed.
13. If the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, the mediator may;
  - (a) submit to the parties a settlement proposal; or
  - (b) give the parties an evaluation in writing of the likely outcome of the case if it were tried to final judgment, subject to any limitations under any applicable mediation rules, court rules or ethical codes.
14. Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.
15. Efforts to reach a settlement will continue until either;
  - (a) a written settlement is reached; or

(b) the mediator concludes and informs the parties that further efforts would not be useful; or

(c) one of the parties or the mediator withdraws from the process

16. If there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

## **1.8 Exchange of Information**

If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall attempt to agree thereon. Should they fail to agree, either party may request a joint consultation with the mediator who shall assist the parties in reaching an agreement.

The parties shall exchange with each other, with a copy to the mediator, the names and job titles of all individuals who will attend the joint mediation session.

At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies.

At the conclusion of the mediation process, upon request of a party, the mediator will return to that party all written materials and information which that party had provided to the mediator without retaining copies thereof or certify as to the destruction of such materials.

## **1.9 Settlement**

If a settlement is reached, a preliminary memorandum of understanding or a preliminary written agreement shall be prepared and signed or initialed before the parties separate.

Thereafter, unless the mediator undertakes to do so, representatives of the parties will promptly draft a written settlement document incorporating all settlement terms. This draft will be circulated, amended as necessary, and formally executed.

If litigation is pending, the settlement may provide that the parties will request withdrawal of the case. The parties also may request the court to enter the settlement agreement as a consent judgment.

## **1.10 Failure to Agree**

If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on advisory or binding arbitration, “last offer” arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless all parties agree.

## **1.11 Confidentiality**

The entire mediation process is confidential. Unless agreed among all the parties or required to do so by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding.

If litigation is pending, the participants may, however, advise the court of the schedule and overall status of the mediation for purposes of litigation management. Any written settlement agreement resulting from the mediation may be disclosed for purposes of enforcement.

The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.

## **2.0 CONCILIATION**

Conciliation is a process through which two or more parties may explore and reach a negotiated solution to their conflict with the help of a neutral third party, the conciliator.

The conciliation process finds its most solid foundation and eventual success on the will of the parties to engage in meaningful dialogue regardless of the depth of their differences.

## **2.1 Choice of Conciliator**

Parties will choose an experienced, impartial, independent, and professional conciliator. The choice will largely depend on the nature of the dispute. A conciliator will be required to have the necessary expertise relevant to the dispute.

### **2.1.2 Disputes Involving the Commission**

In disputes involving the Commission and another party, both parties shall agree on a conciliator.

In the event that parties do not agree on a conciliator, the Commission on Administrative Justice shall appoint a conciliator upon request by the parties.

### **2.1.3 Disputes External to the Commission**

In disputes where the Commission is not a party the Commission shall be the conciliator unless the parties express, in writing, the wish to have a different conciliator in which case the parties shall appoint a conciliator of their choice.

In the event the parties do not agree on a conciliator, the Commission or the Commission on administrative justice shall appoint a conciliator in consultation with the parties.

### **2.3 Procedure for appointment of Conciliator**

1. Appointment of conciliator(s) shall be as follows;

- (a) The requesting party shall, within 7 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number of conciliators and specify the method proposed for their appointment;
- (b) Within 5 days after receipt of the proposals made by the requesting party, the other party shall:
  - (i) accept such proposals; or
  - (ii) make other proposals regarding the number of conciliators and the method of their appointment;
- (c) Within 5 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- (d) The communications provided for in paragraph (c) shall be made or promptly confirmed in writing and shall be transmitted directly between the parties with a copy to the Commission where the latter is the conciliator.

## **2.4 Acceptance of Appointments**

1. Parties shall seek an acceptance of the appointment from the appointee (s).
2. If a conciliator (s) fails to accept his appointment within 7 days, the parties shall proceed to appoint another conciliator (s) in accordance with the method followed for the previous appointment.

## **2.5 Role of Conciliator**

The conciliator's role is to lower tension, improve communication, interpret issues, provide technical assistance, explore potential solutions and bring about a negotiated settlement. A conciliator should help parties understand the motives and needs of all involved.

The conciliation process does not seek a solution at any cost, nor may a conciliator impose a solution upon the parties, instead, the conciliator will endeavour to explore common grounds upon which the parties may build an agreement acceptable to all involved.

The conciliator shall offer alternatives proposals having in mind the parties varied interests.

## **2.6 Preliminary Procedural Consultation**

- (1) As early as possible, the conciliator shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose the conciliator shall convene a meeting in which he/she shall, in particular, seek their views on the following matters:

- (a) the evidence, oral or written, which each party intends to produce or to request the Conciliator to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
  - (b) the number of copies desired by each party of instruments filed by the other; and
  - (c) The manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Conciliator shall apply any agreement between the parties.

## **2.7 Conciliation Process**

- (1) The conciliator shall call the first session within 10 days after his/her appointment or such other period as the parties may agree.
- (2) The date of the session shall be fixed by the conciliator (s) after consultation with parties.
- (3) The dates of subsequent sessions shall be determined by the conciliator, after consultation with the parties.
- (4) The meeting shall be held at such place as may be agreed by the parties.

### **2.7.1 Conciliator's Opening Statement**

The conciliator's opening statement shall include a brief description of the conciliation management process, opinions as to the issues of factual or legal dispute between the parties; advice on cost implications; other non- legal consequences and any ground rules.

### **2.7.2 Parties' Statements**

1. Each party or their representative shall provide a statement about the dispute from their perspective.
2. Emerging interests, needs and options for resolution shall be acknowledged for use later in the conciliation.

### **2.7.3 Joint Exploratory Session and Discussion**

The conciliator shall take an active role, summarising views and options and may also discuss with the parties the strength and weaknesses of their case. The conciliator shall encourage parties to communicate directly with each other. He/she will further clarify the parties' interests.

### **2.7.4 Private Meetings**

The conciliator may hold private meetings with each of the parties. The conciliator may reality-test alternatives and options and comment about potential outcomes and the strengths and weaknesses of each party's case.

### **2.7.5 Concluding Joint Session**

Additional joint sessions shall be held where the conciliator will assist parties to narrow the issues in dispute. The conciliator shall facilitate final negotiation and fine-tuning of the agreement.

## **2.8 Deliberations of the Conciliation**

1. The deliberations of the Conciliation shall take place in private and shall remain confidential.
2. Only parties to the conciliation shall take part in the deliberations. No other person shall be admitted unless the parties decide otherwise.

## **2.9 Representation of the Parties**

Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the conciliator, who shall promptly inform the other party.

## **2.10 Exchange of Information**

1. If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall attempt to agree thereon.
2. In the event of failure to agree, either party may request a joint consultation with the conciliator who shall assist the parties in reaching an agreement.
3. The parties shall exchange with each other and with the conciliator, the names and job titles of all individuals who will attend the joint conciliation session.
4. At the conclusion of the conciliation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party

without retaining copies.

## **2.11 Settlement**

1. The parties shall consider proposals made by the conciliator and shall, upon discussion, arrive at a final agreement on the matter. The agreement shall be in writing and shall be binding on the parties.
2. If litigation is pending, the settlement may provide that the parties will request withdrawal of the case. The parties also may request the court to enter the settlement agreement as a consent judgment.

## **2.12 Failure to Agree**

1. If the matter has not been resolved, the conciliator shall discuss with the parties the next steps to be taken, including the need to obtain any further materials or information.
2. In the absence of a settlement, the conciliation shall be adjourned or terminated.

## **3.0 NEGOTIATION**

Negotiation is a dialogue between two or more parties intended to seek a common ground, reach an understanding, resolve points of difference and arrive at an agreement to settle a matter of mutual concern or resolve a conflict. It is a strategic discussion that resolves an issue in a way that both parties find acceptable.

### **3.1 Preliminary Procedure**

1. The parties shall at the first meeting appoint co-chairpersons and joint secretaries, one each from both teams.
2. The two chairpersons shall either co-chair the meetings or agree on the chairing.
3. The joint secretaries shall be responsible for taking and preparing joint minutes for the meetings that will be signed by both chairpersons and secretaries.
4. The parties shall each appoint a lead negotiator who shall be the official spokesperson of the parties and who shall represent the agreed position of the parties;
5. The parties shall speak through their lead negotiators;
6. The parties shall each have an equal number of persons in the negotiating teams and the persons identified as forming the negotiating team shall remain so until finalization of the negotiations.
7. Should a party decide to change a member or members of the negotiating team then notice of the change shall be issued to the other party at least three days before the next meeting and the other party shall not have a right to object to the new membership unless for compelling reasons such as conflict of interest;

### **3.2 Negotiation Process**

1. At the first meeting, the parties shall lay the ground rules for the negotiation which may include the following, subject to any changes on which the parties may agree:

- i) Negotiations shall be conducted in good faith and with respect;
- ii) There shall be no use of abusive or uncivilized language;
- iii) The joint chairpersons shall fix the time, length and place of each session and its agenda in advance of all meetings;
- iv) Parties shall be required to attend all meetings and to give notice of any intended postponement of meetings at least three days before the date of meeting;
- v) The process will be conducted expeditiously and parties shall avoid unnecessarily and unreasonably prolonging the negotiations;
- vi) Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the negotiation process or for a set period of time, in so far as they can do so without prejudicing their legal rights;
- vii) The parties shall have the liberty to consult an independent expert at a joint cost and the report of the expert shall be discussed and adopted by the parties as appropriate;
- viii) Each party shall be free to consult an independent expert at their own costs but the report of a party's independent expert shall not be adopted by the joint negotiating team and shall be only for use by the party seeking it;
- ix) During the negotiation meetings, the parties shall be free to seek a time-out to deliberate on the offers or counter-offers made by the other party;
- x) Parties shall avoid rigidity and consider alternatives and compromises in good faith;

- xi) Parties shall as much as possible avoid making unreasonable demands or offers and shall be objective and keep an open mind;
- xii) The joint minutes, once confirmed, shall be binding on the parties
- xiii) The cost of negotiations shall be met jointly by both parties unless a party volunteers to meet the cost.
- xiv) The parties shall agree on the issues for deliberation at the first meeting;
- xv) At least 7 days before the second meeting, the party requesting action from the other party shall present to that party an offer on the issues at hand and the responding party shall present a counter-offer at least 3 days before the second meeting.
- xvi) The offers by the parties shall include an indication of any accepted offers so as to reduce the issues in dispute.
- xvii) At the second meeting, the parties shall make representations of their initial offers so as to clarify the goals, interests and viewpoints of both parties. The goals interests and viewpoints shall be listed in order of priority and the common goals and interests shall be identified.
- xviii) At any stage of the negotiations, if the chairpersons conclude that the negotiation is stagnating at the same point without meaningful progress, they shall be at liberty to adjourn the meeting to give the parties time to separately consider the issues at hand before another meeting is convened;
- xix) At the subsequent meeting, any new ideas, alternative solutions and interests shall be taken into account and the situation looked at afresh.
- xx) The parties shall be at liberty to form sub-committees to deliberate on any issue and present a joint report to the full negotiating committee of both parties which shall adopt the report as appropriate.

xxi) The negotiations shall continue as agreed by the parties tackling one issue at a time until an agreement is reached.

### **3.3 Exchange of Information**

1. If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall agree thereon. Parties shall not unreasonably withhold documents from each other.
2. At the conclusion of the negotiation process, upon the request of a party which provided documents or other material to the other party, the recipients shall return the same to the originating party without retaining copies.

### **3.4 Settlement**

1. Any interim settlements shall be recorded in the minutes and shall be binding on the parties until conclusion of negotiations. If a final settlement on all issues is reached, an agreement by the parties shall be drawn and signed by the joint chairpersons, the joint secretaries and the lead negotiators and the individual members of the both negotiating teams shall sign as witnesses to the agreement.
2. If litigation is pending, the settlement agreement may provide that the parties will request withdrawal of the case. The parties may request the court to enter the settlement agreement as a consent judgment.

### 3.5 Failure to Agree

In the event of complete failure of negotiation, the parties shall officially disband the joint negotiations committee and each party shall be at liberty to pursue other means of dispute resolution.

### 3.6 Confidentiality

1. The entire negotiation process shall be confidential. Unless agreed among all the parties or required to do so by law, the parties shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceedings.
2. If litigation is pending, the participants may, however, advise the court of the schedule and overall status of the negotiations for purposes of litigation management. Any written settlement agreement resulting from the negotiations may be disclosed for purposes of enforcement.

### 4.0 REVIEW OF GUIDELINES

These guidelines may be reviewed from time to time as circumstances shall determine.

Dated the.....of .....2014

**Prof. Margaret Kobia, CBS**  
**Chairperson**  
**Public Service Commission**

APPENDIX I

REPORT FORM

PUBLIC SERVICE COMMISSION

DISPUTE REPORT FORM

Name of the Employee.....

Employee Number.....

Department:.....

Job Title:.....

Nature of the Dispute .....

Other parties to the dispute .....

.....

.....

Signature.....