

October 2017

Alternative Dispute Resolution

Jessie Clayton Dye

Follow this and additional works at: <http://scholarship.law.stjohns.edu/tcl>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Jessie Clayton Dye (2017) "Alternative Dispute Resolution," *The Catholic Lawyer*: Vol. 33 : No. 1 , Article 12.
Available at: <http://scholarship.law.stjohns.edu/tcl/vol33/iss1/12>

This Diocesan Attorneys' Papers is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

ALTERNATIVE DISPUTE RESOLUTION

JESSIE CLAYTON DYE, ESQ., ARCHDIOCESE OF SEATTLE

To start out, I would like to tell you two stories about the program that I run, which is called the Office for Due Process, in Seattle—two prosaic little stories that I am sure are very familiar to you. But before I tell you those stories, I would like to ask you to raise your hand if you have dealt with a corporate ombudsman in a private sector company. Has any one had dealings with a corporate ombudsman? No one. My goodness!

Well it won't be long, and if I came back in five years I think probably half of you would raise your hand because increasingly ombudsmen positions are opening up in the private sector, and private employers are starting to use them. The Due Process Program in our Archdiocese, as I envision it, is really a corporate ombudsman position. So let me tell you my stories and then we will talk about how I see these incidents falling into the ombudsman's purview.

As I said, these are two cases that will sound very familiar to you, very prosaic. They have come to me in the month of April. They both involve young women who had their employment contracts cancelled three months before they expired, at the end of March in both cases. We adhere to yearly contracts. I understand from Jack Hammel that a lot of you do, and my understanding of the contract is that it is good for one year, and after that, that is it. So this is not a "just cause" kind of situation but there is a year of binding.

The first woman came to me because her contract was cancelled at the end of March. She admitted to me in my office that she had, in fact, been a very poor performer. She had some foster children and she was getting a nursing degree. There were also some political issues going on in the parish, some conflict with the pastor and the youth Commissioner, whomever it was. She had basically withdrawn and rarely showed up from January to April. She felt very badly about that. The pastor fired her, which on its face, would seem to be a reasonable decision.

However, she said she had a concern because (and she listed three male employees who had worked for the same parish, same pastor) in the last three or four years the same thing happened to three male employees

who were given severance pay. The males, in her opinion, had not been competent, had performance problems, had been fired mid-contract and had contracts paid out through the end of the year. She volunteered this information and then I followed up with her by reality testing, trying to identify exactly what her story was—who the people were, and so forth. I had some concerns about this case.

My role is not to give her legal advice, nor to represent her, but to do what I could to facilitate the resolution of the conflict. She did not want to talk to the pastor. They were not on the best of terms by that point. So I contacted the pastor. Not on her behalf, not as her representative, simply to have a chat with him about the conflict and see what we could come up with. He agreed with her story. He felt that she had not been competent. It was not anything personal, she just had not shown up. He felt that he made a reasonable decision in terminating her. And when I ran by these three male comparators, he talked about each one. She had given them to me by name, so we knew who we were talking about. Two, it turns out, were not really comparators. One had been someone who had accrued a lot of overtime and was not really paid out on his contract, but was paid out for his overtime. I forget what the other one was, but it was not a comparator either. But the third was in fact a man who had been fired for incompetence in March and had his contract paid out through the end of June for the following three months. As the pastor got to thinking about it, he said, "What do you think?" And I said, "It is really not my role to give you my opinion or my advice. I am not your lawyer. I am not the one who had to live with her incompetence, and I am not the one that will have to face the Human Rights Commissioner at EEOC should she decide to file a charge there."

I didn't mean that cynically. He is the one that made those decisions, so he is the one that needs to think about what he wants to do. I am not in a position to make recommendations. I am not a manager and I am not his attorney. At any rate, he thought about it and he said, "You know what I'd like to do? I would like to offer her this three months severance pay to pay out her contract. But because she didn't come into the office January and February, I would like to deduct two months for the time that she missed. So, I would like to offer her one more month severance pay." And I said that was fine. I had talked with him a little bit about negotiating a resolution, not just an all or nothing resolution. How could we work this out? What sort of negotiation could be entered into? I then conveyed his offer to the employee and she was willing to accept it. She felt bad about not having performed, but she wanted some kind of fairness in the situation regarding the way the male comparators were treated.

Now, it was not my place to say to either of them, "Well you could have gotten more" or "You shouldn't have given that much." That is not

my role. The fact is, she was satisfied with what was offered and so was he. The only thing that I did in that case was suggest to the pastor that if he were in fact going to give her some extra money, he ought to get a waiver of all claims from her. And, in fact, whenever we have a settlement that involves money, I do suggest that the management or the Archdiocese get a waiver so that they get something in exchange. That takes a variety of forms in different kinds of cases because it may not even be money that we are settling for. It may be a good letter of recommendation. But nonetheless, I like to see that kind of exchange in those cases. So I did intrude myself to that extent.

The second case was the young woman whose contract was also cancelled with three months to go. She came into my office feeling that she was competent. There was no issue of discrimination that I could determine. And she hated the pastor. She hated him, was practically "foaming at the mouth" about him. She wanted a year of severance pay. A year after her contract ended. Again, my role was not to represent her, not to give her advice, not to tell her what she could or could not get. I told her that the general parameters of what we saw would make it very unlikely that he would offer another year. That wasn't the way that contract cases were usually settled. But I told her that if she wanted I would certainly ask him for her. That was acceptable to her.

I did go to him and talk about it. He wasn't as angry about the situation, but needless to say, he wasn't happy with her. He agreed that it was not a performance issue. She did a good job. The fact is the two of them just didn't get along. They just were not communicating. And that had been going on for some time. And he had not been perfect in terms of his communication. He had in his mind, before I even became involved, to pay her through the end of August. Which means that her contract would expire the end of July, but he would pay her through the end of August—which he was going to do anyway had she approached him herself—because he felt in fairness that she should have time to find another job. He was a nice man and just wanted to handle it fairly.

Well of course, she didn't think that was a very fair resolution. But in her mind what she wanted, when I talked with her, was to be paid one more month. She wanted to be paid through the first of October, meaning July, August and September. So, I got back to him and conveyed that request to him. That was the day I left for the conference so I don't know how this is going to turn out. But the reason I tell you this story is because, in the event that she is not satisfied with what he offers her, I will recommend that the two of them go into mediation. Now, in a mediation proceeding, we would hire a professional in dispute resolution from the Seattle community to sit down with these two individuals to help them work out differences.

In the first case I described, there were not a lot of feelings involved.

It was pretty much having this woman's contract issue come to closure. In the second case, there was a strong feeling level between the two, and it would actually be helpful if they were able to sit down together, get those feelings out with a professional there to help them, and resolve the issue. So we will see how it goes. But I am not going to be the one to settle this case. The parties are going to settle it. Now those are my stories, and I tell them to you because I want to make some points about the concept of due process, what in my mind is a corporate ombudsman kind of position.

The first thing, and I think this is one that I hope you would take away from what I have to say today, is that "Due Process" is an organizationally neutral position. For attorneys, this is a conceptual leap. This is different from the way you normally think. You represent one side. You are an advocate for the management of the Archdiocese. I suppose technically, the Bishop is your client. An ombudsman is neutral in an organization. I do not represent management; I do not represent employees. My role is to listen to both sides and to help them, together, work out their differences. So that is a very different role. And it's hard if you have been an advocate for a number of years and are deeply involved in that system and understand how that system works. It is hard to think about a different way to approach things, but it is possible. It is a different profession. While I am an attorney, I do not consider myself to be practicing law and I am not representing the Archdiocese.

In terms of being neutral, one point I would like to make from my stories is that I don't make recommendations. I did not tell the first pastor, "at least pay out her contract." And I didn't tell the second pastor that he didn't have to pay her a dime. That is not my role. It is your role because you represent these people and they pay you to give them advice. They pay me to listen and to help the parties talk to each other. But I do, as I shared with you, some reality testing in terms of the case. This can be about facing the Human Rights Commission or the fact that you may go to court and not win anything, as in the case of the women who wanted an extra year. I can do that kind of reality testing but not by way of giving advice.

As part of the reality testing, as I pointed out, I do discuss legal liabilities. And that is really different from your role. I also never force a settlement. It is not good dispute resolution at my level to force people to come to a resolution. The parties themselves will make the decision. They are the ones that have to deal with the problem, and they are the ones that will have to deal with the resolution, not me. And so, our principle is to leave the resolution process in their hands. I help; I facilitate their association with each other. But I don't settle it, and I don't force it.

You have heard a description of conciliation, mediation and arbitration, and those are the steps that I have in my bag of tricks. I consider conciliation a slightly different definition than I think general documents

do. From my perspective conciliation is helping the parties talk to each other without someone else there. So frequently, a manager, a principal, a pastor will come to me, or a staff person will come to me, and say "I am having this conflict and I am upset about it and I don't know what to do." And I will sit down with them and help them think through what they want, what the parameters are for them to resolve it, and help them put together a negotiating strategy to go back and deal with the other party. And if I never hear from them again, that's wonderful. That means that they have settled it themselves; that is conciliation.

Mediation takes two forms. I do shuttle diplomacy where I am the mediator, as in the two cases that I described to you. One phone call here, one phone call there. And I settle a lot of cases that way. We have had about fifty employment-related cases a year in our Archdiocese, which has 2,800 employees. So that is not very many, really, that actually became cases. (This is not including single conversations with individuals). Of those, eighty percent were resolved through either conciliation or shuttle diplomacy, if you will. Five cases a year actually go to mediation, where we bring in a neutral party from the community who meets with these parties and talks with them. The people we bring in are professionals; we pay them usually \$60 to \$80 an hour. The meetings takes from two to four hours, sometimes as long as eight hours. The parties who meet will usually be principals and teachers, pastors and employees or whomever. We have had 100% success rate in our mediations. We have never had a case not settle that went to mediation.

Now, contrary to what Donna has said, while I have the authority to run arbitrations, I have never done one and I hope I never have to. I used to work for an arbitration company so it is something that I can do in my sleep. But I don't want to, because I think it is a failure of our program if we get to arbitration. And by the way, the literature coming out of the corporate ombudsman's offices in big corporations around the country supports that. McDonald Douglass, for instance, doesn't do any, and AT&T Labs don't do any, and that is significant. First of all, managers don't like to turn over their power. A manager has to live with the decision. A principal fires somebody, and they are the ones who have to live with it! And for them to have to go to arbitration and defend themselves legally is really tough on them. Much better, we should resolve it before it gets to a win/lose level.

So, I have never done an arbitration. We have done one non-binding arbitration, that was an advisory sort of settlement conference that Pat Crowley will tell you about. And I will say to you that if a case came to me where there were definite legal rights involved, where the Archdiocese had some legal exposure, and where there was going to be an ugly, horrible lawsuit that was going to last five years, I would insist on arbitration, so we could get it over with. In terms of working with legal counsel how-

ever, I would never insist on arbitration without total approval and support of our counsel and plaintiff's counsel. So there would be situations where we might do an arbitration, but I hope not to get there.

The second point that I want to make is that it is a professional position. When I first came on there was a sexual harassment charge going on. A principal in one of the schools had fired a teacher in midyear, and she had charged him with sexual harassment. Well, the parish had this little due process committee that they were running at the school, and by the time I had arrived on the scene, the parish due process committee had pretty much handled the case and they had done a fact finding. When I asked them about it, they said, "Well, the first thing we did was we didn't talk to any of the witnesses that either side gave us." And I said, "You didn't talk to any of the witnesses?" And they said, "No, we felt that they would be biased." So they talked to other people in the school. And I thought, that's a great way of doing an investigation! I don't want to be cynical but, it is sort of a "do good" mentality without a real grasp of how to run a dispute resolution program. And my fear in speaking with you is that you have already had bad experiences with due process. Because I think a lot of these programs around the country, the ones that Donna was describing, either have not existed at all or they have been sort of bumbled because they haven't been professional.

I am an attorney. You don't have to be an attorney to do this. But you do have to know conflict resolution. There are courses, books and graduate programs, and even law schools now have extensive programs in alternate dispute resolution. So there are a lot of ways you can get training and experience. I think that is required. Certainly, I am an advocate of that. Because, if you don't have it, you can run into serious problems. And I am afraid you already have.

Just a few other points that I would like to make. We have discovered that this program is very, very cost effective for us. I am the short-stop for the diocesan attorney. I handle a lot of cases before they get to Pat Crowley. And it works well because it is a much more cost-effective way to settle problems, with a less invasive method, than to get into more expensive legal action. So it is very cost effective. We have not had an employment-related lawsuit since I started.

The other way that it is cost effective, and I think that this is the most interesting (we haven't played this out yet so ask me in a couple of years), is we are beginning negotiations with our insurance company to reduce the premiums we pay for employment disputes, for litigation of employment claims, because we have greatly reduced our liability in that area. And I think our four-year track record seems to support that. It is like insurance companies giving non-smokers lower rates. We think that because of our program and the principles that we use, and the success of it, we ought to have lower rates. I don't know if they are going to do it,

but we are certainly going to make that argument. And we feel that we have the actuarial grounds to prove that.

Finally, I want to stress that this kind of program, besides being cost effective and practical, is very good for morale in an organization. The majority of the cases are terminations. People that have been let go and are leaving employment with the Archdiocese. And it is very helpful for them to be able to leave with a sense of self-esteem, instead of to leave feeling that they got the axe and that they really were not treated fairly. So even if I don't do anything more than listen to them, and hear them, and give them some positive attention, that allows them to leave saving face much more than if they simply have to pack up their things and just leave. It gives them a place to go to be heard.

We do a survey of people that have used the program, both sides, management and staff, after they have used the program. We have had an eighty-five percent user-satisfaction rate among those who have been surveyed. That pleases me a lot. The people have said that they felt it was a good use of their time to go through the program, and that they would recommend other people use it.

We also did a survey of all central agency programs in the last year. Due process rated in the top ten percent of the programs, right under the Archbishop's office. That pleases me. It means we are doing what we set out to do. This is very much in keeping with the mission of the Church. It promotes the resolution of conflict. It promotes reconciliation among the parties. Now, if I were to tell you that everybody walks out of here loving each other, that would be absolutely wrong. And you know that. But at least they have some satisfaction of having had a process that was fair that they could use. It upholds the sense of community and gives people someone to hear them, and to at least bring a compassionate close to their time with the Archdiocese.

So it is good for fiscal reasons; it is also good human resource management. Increasingly in the coming years, you all will be dealing with corporate ombudsmen in the private sector. I would encourage you to think about doing this kind of program in the work force of your Archdiocese because it is such good human resource and fiscal management.