

Fundamentals of Collective Bargaining

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Continuing Challenges

- Increased Inflation = Increased Demands
- Sustaining programs and staffing shortages
- Increased healthcare costs
- Tax Levy Limit Law
 - “Allowable tax levy growth will be limited to 2% for a fourth consecutive year...” (NYS Comptroller Website).
- “Triborough”
 - To ensure that public services, like education, are not disrupted by labor disputes.



Know Your Starting Point

- The Triborough Amendment. (Civ. Serv. L. 209-a(1)(e)) Requires a municipality to continue most terms of the collective negotiations agreement until a new agreement is reached.
 - Assures the following, absent a contractual provision to the contrary, after expiration of current collective bargaining agreement:
 - Step advancement
 - Longevity
 - Graduate credit
 - Health insurance
 - All other terms of expired agreement.
 - Consider cost containment strategies...



Know Your Starting Point

- **The Sunset Doctrine.** The parties may preclude the application of the Triborough Amendment by using language that causes a contractual term to “sunset” or expire at the conclusion of the agreement or at some other point in time.
 - Allows for the right to revert to previous *status quo* concerning any term and condition on a date certain. For example:
 - “The terms of this agreement will sunset, becoming no and void in all regards, effective close of business on June 30, 2024.”
 - More practically, a sunset clause can be used to provide temporary measures to address temporary challenges.
- **The Conversion Doctrine.** Under PERB’s “conversion theory,” if a non-mandatory subject is incorporated into the contract, it can convert to a mandatory subject.
 - Once a non-mandatory subject is placed in a collective bargaining agreement, it cannot be changed except through negotiations (*e.g.*, class size).



Know Your Starting Point

- **“Past Practice.”** Certain past practices may be enforceable either through specific contract language protecting such practices, or through PERB’s improper practice procedures for those practices which are unequivocal, consistently long-standing and for which there is a reasonable expectation that the practice would continue.
 - A school district may be bound not only by the terms which are spelled out in negotiated agreements but also by practices that have developed over a period of years. If they constitute terms and conditions of employment they generally may not be changed without negotiation.
- **Management Rights and Current Contract Language.** Be sure to fully assess your current right to implement changes based on current contract language. Be careful not to underestimate or overestimate your authority.

Evaluate Mandatory and Non-Mandatory Subjects of Bargaining



- Mandatory Subjects - Matters which, if raised, **must** be negotiated. Note: Just because a subject is mandatory does not mean that either side is required to agree.
- Examples: wages, hours, health insurance benefits, paid leave, subcontracting.

- Non-Mandatory - Matters which, if raised, need not be negotiated but which may be negotiated by mutual agreement. Note: Sometimes referred to as "permissive."
- *Examples:* class size, minimum staffing, other management prerogatives.



Evaluate Mandatory and Non-Mandatory Subjects of Bargaining

- *Prohibited* - Matters which may not be negotiated under any circumstances. **Note:** Resultant agreements on such subjects usually held void.
 - *Examples:* Board of Education's authority to grant or deny tenure; pension benefits outside of state retirement systems, provisions that violate law.
- Impact Bargaining – Although a school district need not bargain over decisions regarding permissive or non-mandatory subjects of negotiations, it must, upon demand, bargain over the impact of such decisions.



Starting Negotiations

- What approach to negotiations is most likely to achieve desired results?
 - Traditional
 - “Win-Win”
 - Informal

- Remember that no matter what approach is used, it is still “negotiations” under the “Taylor Law” (*Civil Service Law*, Article 14) unless the parties explicitly agree otherwise.

Obligation to Bargain in Good Faith



- The Taylor Law requires that the Public Employer and the Union negotiate in “good faith” (*Civil Service Law, § 204[3]*)
 - Meet at reasonable times and places (*e.g.*, Employers’ silence for two and one-half months, despite two union requests for negotiations, is a violation [*Town of Huntington, 27 PERB ¶ 3039*]; *c.f.*, permissible to delay bargaining on economic items while awaiting information on state aid [*New Rochelle CSD, 4 PERB ¶ 3060*])
 - Confer in good faith on wages, hours, and other mandatory terms and conditions of employment
 - No obligation compelling either party to agree to a proposal or to make a concession.

Obligation to Bargain in Good Faith



- Summary of “good faith” bargaining – Evidence a sincere desire to reach agreement:
 - Must present comprehensible proposals;
 - Must be able to explain the objectives of the proposals; and
 - May have to provide information to substantiate the basis for the proposals

- *Matter of Buffalo City School District*, 50 PERB ¶ 4532 (2017).



Obligation to Bargain in Good Faith

- “Hard bargaining” is acceptable and, arguably, encouraged by the Taylor Law. On the other hand, “surface bargaining,” i.e., going through the motions without actually intending to reach a final agreement, constitutes an improper practice.
- “Regressive bargaining” may be permissible if explained by intervening circumstances, *e.g.*, decline of budget and/or economic situation, loss of benefit of health insurance cost reductions, etc. Cannot be used to retaliate, or to “teach a lesson.”



Persuasion and Leverage

- Use what you have:
 - Tax rate impacts
 - Area economic/demographic data
 - Comparables (?)
- Show analysis of fixed costs (i.e., tax cap limit, health insurance premiums, retirement contributions, etc.).
- Health insurance trend information and GASB 45/75 numbers
 - ***Don't concede retroactivity
 - ***Important: Portray the union's choice as being between your offer and the status quo.



Integrate the Possibility of Impasse into Your Strategy

- Impasse: If good faith negotiations with respect to a mandatory subject of negotiations fail to yield an agreement, the Taylor Law sets forth a detailed procedure for impasse resolution. (*Civ. Serv. L., § 209*).
- Normal part of the process – does not mean failure!

Integrate the Possibility of Impasse into Your Strategy



- Declaring Impasse:
 - May be a single or joint declaration
 - Strategic concerns regarding a declaration of impasse
 - Consider the desirability of communications to the public and/or unit members

The Limits and Possibilities of Mediation/Fact-Finding



- Mediation:
 - PERB appoints a mediator to meet with parties and try to encourage settlement
 - Neither party has any obligation to agree to anything (only to act in good faith)
 - Mediator is not your friend, simply there to achieve settlement regardless of whether the settlement is fair or unfair for either side

The Limits and Possibilities of Mediation/Fact-Finding



- Fact-finding:
 - Only mandatory terms are submitted to the fact finder
 - Fact finder produces a recommendation only
 - Carefully prepare the employer's position at fact finding
 - Consider the impact of the fact finder's report on the public and the unit membership

The End of the Impasse Process



- School districts have an on-going obligation to bargain in good faith for so long as it takes to reach a new agreement.
- Remember – No matter the twists and turns of the bargaining process, no one can compel you to grant a pay raise or enhance a benefit.



Confidentiality

- Open Meetings Law (Public Officers Law §§ 100-111) permits a school board to move to executive session to discuss contract negotiations (*see*, § 105, *id*).
- Section 805-a(1)(b) of the General Municipal Law provides that municipal officers cannot “disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests,” which includes disclosure of confidential information obtained at an executive session.



Public Communications

- A school district may communicate directly with union members and/or the general public to explain its bargaining positions and/or to respond to inaccurate statements by the union.
- However, any such communications which are deemed to constitute “direct-dealing” with employees, or which threaten reprisals for protected activity, may be improper under the Taylor Law. *e.g., City of Rochester*, 9 PERB ¶ 4542; *County of Onondaga*, 14 PERB ¶ 4503.
- Be factual (*e.g.*, permissible to publish a union’s proposals in local newspaper together with analysis of impact on tax rate [*Brookhaven CSD*, 6 PERB ¶ 3018]).



Some Takeaways...

- Management Rights = Flexibility
 - Grants rights to an employer and exempts the employer from a duty to negotiate matters not contained within a collective bargaining agreement. *See Deer Park UFSD*, 28 PERB ¶ 3038 (1995).
- Past Practice = Flexibility
 - One instance cannot establish an unequivocal past practice. *See Westfield Teachers' Ass.*, 54 PERB ¶ 4521 (2021).
 - A party may not unilaterally alter a past practice that impacts a mandatorily negotiable subject of bargaining without first negotiating the change. *See Town of Islip v. PERB*, 23 N.Y.3d 482 (2014).
 - Always check the CBA! Provisions in a CBA that address past practices may divest PERB of jurisdiction on the question of whether the Union can enforce a purported past practice.

Some Additional Takeaways...



- Understand the history.
 - Review prior CBAs, MOAs, don't be afraid to ask questions as to why something was added, review prior union demands, etc.
- Pick the "right" bargaining team.
- Ensure the commitments that you are agreeing to bind the school district to are reasonable, sustainable, and provide flexibility for it to adapt to an ever-changing financial landscape.
- Tentative agreements must be in writing and are subject to ratification by the entire governing board.
- Use your informational advantage.
 - Bargaining is an exercise in persuasion, so use what you have (*e.g.*, comparables, do accurate cost-outs, area economic/demographic data, etc.)
- Build trust.
 - Open/honest communication; maintaining respectful dialogue.

Questions?



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