

Massachusetts Selectmen's Association

GETTING TO YES: COLLECTIVE BARGAINING FUNDAMENTALS

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Preparation is Essential

- Selection of the Team
- Training of the Board and Team
- Doing Your Due Diligence/Research
- Brainstorming/Free Thinking/Scenario Planning
- Developing A Comprehensive Strategy
- Setting Ground Rules

Preparation is Essential

- Drafting Proposals
- Understanding The Negotiation Process – Duty to Bargain in Good Faith
- Becoming Familiar with the Different Types of Subjects of Bargaining: Mandatory, Permissive and Illegal
- Knowing What You Can Do If You Reach Impasse
- Participating Successfully in Mediation
- Preparing for Next Time

Selection of Team

■ Factors to Consider

- What positions/capabilities/knowledge are needed?
- Effect of presence of members/majority of funding body
- Experience and training in negotiations
 - N. B.: Bargaining in the public sector is similar in many ways but also quite different from the private sector.
- Availability
- Personality issues/temperament

Selection of Team

- Consider carefully who should be at the table as part of the team
 - Town Administrator/Manager
 - Department Head
 - Labor Counsel
 - Member(s) of the Board of Selectmen – The Board should think about the pros and cons as it determines the extent to which it will delegate this process

Training of the Team

- The extent of training will depend somewhat on the knowledge and experience of the team. Remember the Unions devote extensive resources to training their bargaining agents – so should you.
- Basic Training in Labor Relations
- Negotiations Training
 - Duty to Bargain
 - Effective and Ineffective Techniques
 - Dos and Don'ts

Training of the Team

- Understanding the Roles and responsibilities of
 - The Board of Selectmen
 - The Bargaining Team
 - The Chief Spokesperson
- Developing effective methods of interaction
 - Among the team
 - With the full Board
 - With the Union teams
 - Other interested parties

Training of the Team

- “Basic Training”
 - Mandatory vs. Permissive vs. Illegal Subjects of Bargaining
 - Issue vs. Effects Bargaining
 - Prohibited Practices
 - Negotiation Jargon
 - Effect of using phrases such as
 - We cannot afford.....
 - Of course we will always keep the substation active
 - OK
 - Importance of Chief Spokesperson Role

Doing Your Due Diligence: Research

- Review by-law or charter provisions regarding collective bargaining
- Review all existing Town contracts
 - Look for similarities and differences
- Review contracts in neighboring communities
- Develop a list of comparable communities and review those contracts; determine how to distinguish outliers
- Compare “apples to apples” within contracts
- Talk to your colleagues in other communities

Due Diligence: Know How you Stack Up

- Do your homework on what neighboring towns are paying
- What benefits do they provide?
- Are you considering major changes to health benefits, such as moving to GIC?
- How about work schedules?
- Other benefits: paid time off, details, education incentives, longevity, uniform/cleaning allowance; differentials

Try to Envision the Future and What the Town Might have to do to Adapt

- Team must be aware of any impediments posed by the contract or practice to future ability to act in the town's best interest
- Review with town's labor attorney any pending litigation including past grievances
- Give serious thought to
 - How can future litigation be avoided?
 - How can flexibility to act be preserved/accomplished?
- Think about the Town's priorities.

Brainstorming/Free Thinking About Future/Scenario Planning

- Develop a number of scenarios based on different economic/funding assumptions
- Determine what changes may need to take place
- At these early initial stages, create an atmosphere where administration will feel free to come forward and brainstorm including “pie in the sky” ideas
- Always plan for the worst

Develop A Negotiating Strategy

- Experienced Labor Counsel will help Board its strategy
- Don't get lost in the trees – keep your focus on the big picture
- Important to look at a comprehensive strategy and consider how discussions in one set of negotiations will affect another, *e.g.*, meeting with School Committee?
- Do you/should you have staggered termination dates for the various collective bargaining agreements?
- Have a clear understanding of items that require negotiating v. items that do not require negotiations
- Establish bargaining priorities

Develop A Negotiating Strategy

- Know what the Town can afford
 - Requires a meeting with financial officials
 - Collector Treasurer – Town Accountant – Finance Director
 - Finance or Advisory Board Representative
- Language is critical: Have Labor Attorney review and craft all proposals and counterproposals

The Importance of Process: Ground Rules

- Attorney will draft proposed ground rules after consultation with you
- Topics could include:
 - Who are the respective bargaining teams?
 - Who will act as the chief spokesperson for each team?
 - How and when proposals and counterproposals will be made?
 - When/how will meetings be scheduled? Cancelled?
 - How about caucuses?
 - Where will meetings be held?
 - What time of day? Or night?

The Importance of Process: Ground Rules, cont'd.

- For how long?
 - Will others be allowed to attend?
 - Will employees be paid/docked for time at negotiations?
 - What is the effect of agreeing on an item?
 - Reducing agreements to writing and initialing?
 - Putting together a “MOA” once final agreement is reached.
 - Need for ratification and funding – duty to recommend
 - Pre-impasse press releases
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- The process is important – listen to your attorney.

Develop Proposals

The proposals you put forward are dependent on

- Your end goal
- Your strategy for getting to that goal

Your labor counsel should help you draft a set of initial proposals suitable to your needs.

Develop Proposals

Areas to consider:

- Management rights
- Grievance and arbitration procedure
- Past Practice
- Staffing
- Reductions in Force and layoffs
- Term of contract

Negotiating Tips From An Experienced Town Manager

- Everything has a price
- Does 0% = 0% always?
- You want to think/promote win-win negotiations but recognize it is can be “lose-lose” without careful planning and execution
- Always keep the dialogue constructive and respectful

Negotiating Tips From An Experienced Town Manager, cont'd.

Some additional areas to consider:

- Longevity
- Sick leave buy back
 - Difficult to plan
 - Cash payouts strain budget
 - No proof benefit improves attendance
- Biweekly pay
- Mandatory direct deposit for all employees

Negotiating Tips From An Experienced Town Manager, cont'd.

- Any Board/Team member talking to any union member about negotiations
- Any Board/Team member talking to press or public about negotiations
- Relying on assumptions that may prove false or illusory, for example, adding one or more positions to reduce overtime

Management Rights: Introduction

- Generally speaking, the employer retains the right to manage its organization except as restricted by a collective bargaining agreement.
- A management rights clause contained in a collective bargaining agreement may reserve specific rights to an employer.
- A zipper or scope clause can affect when either party can force the other to bargain mid-contract.
- An evergreen clause (about which more later) can limit the employer's right to implement changes.

Legal Background: The Duty to Bargain

- The duty to bargain is found in Section 6 of M.G.L. c. 150E
- It provides that an employer and union must:
 - ⌚ Meet at reasonable times (including meetings in advance of the employer's budget-making process), and
 - ⌚ Negotiate in good faith about wages, hours, standards of productivity and performance, and any other terms and conditions of employment.

Legal Background: The Duty to Bargain

- Neither party is compelled
 - to agree to a proposal, or
 - to make a concession.
- The obligation is to bargain in good faith to agreement or impasse.
- The general rule is that upon reaching impasse, an employer may implement its last position.

Legal Background: Subjects of Bargaining

Three Categories of Bargaining Subjects

- (1) Mandatory – a party may insist on its inclusion and the other party cannot refuse to discuss it.
- (2) Permissive – neither party may insist on bargaining, but both sides may agree to bargain.
- (3) Illegal – violates public policy.

Legal Background: Mandatory Subjects of Bargaining

- Mandatory subjects of bargaining are wages, hours, standards of productivity and performance and other terms and conditions of employment.
- Wages can include:
 - Base pay
 - Overtime Rate
 - Incentive/bonus pay
 - Premium pay
 - Longevity pay
 - Deferred wages or pensions/403(b)

Legal Background: Mandatory Subjects of Bargaining

- Hours of Work – including:
 - Starting time
 - Quitting time
 - Duration of Shift
 - Overtime Practices
 - Shift Bidding Practices
 - Days Off
 - Breaks / Meal Time

Legal Background: Mandatory Subjects of Bargaining

- Other Terms and Conditions of Employment - including:
- Benefits
 - Health Insurance
 - Disability
 - Life Insurance
- Paid or unpaid time off – including:
 - Vacation
 - Holidays
 - Sick Time
 - Personal Time
 - Leaves of Absence

Legal Background: Mandatory Subjects of Bargaining

- Standards of Productivity and Performance (*e.g.*, class size)
- Job Duties/Work Assignments
- Work Rules
- Attendance Policies
- Discipline and Discharge
- Layoffs/Reductions in Force/Bumping
- Subcontracting/Bargaining Unit Work

Legal Background: Mandatory Subjects of Bargaining

- Seniority
- Drug Testing
- Grievance and Arbitration
- Union Dues/Union Security

Legal Background: Permissive Subjects of Bargaining

- Permissive subjects of bargaining are those about which neither party may insist on bargaining, but both sides may agree to bargain or a party may waive its right not to bargain by not being careful not to preserve its right not to bargain.
- Permissive subjects are those which involve core managerial decisions.

Legal Background: Permissive Subjects of Bargaining

- Examples of some matters which have been found to be core managerial decisions under the circumstances include:
 - Whether to provide certain services to the public
 - Whether to hire additional employees to do bargaining unit work
 - Whether to abolish or create positions
 - Whether to reorganize/restructure

Legal Background: Permissive Subjects of Bargaining

- Examples of subjects found to be permissive subjects of bargaining **under the circumstances** include:
 - Minimum manning decisions
 - The loss of *ad hoc* or unscheduled overtime opportunities
 - Discontinuing providing private police details at liquor service establishments
 - Using polygraph examinations in the investigation of criminal activity by police officers
 - School curriculum decisions.

Legal Background: Permissive Subjects of Bargaining

- Decisions that are outside the employer's control, but the impact of such decisions generally must be bargained.

Legal Background: Illegal Subjects

- Bargaining over “illegal” subjects of bargaining violates public policy.
- An example of a subject found to be an illegal subject of bargaining was a parity provision.
- A recent case involved an Evergreen Clause that would cause a CBA to continue beyond 3 years. See Boston Housing case.

Mandatory vs. Permissive Subjects

- Balancing Test: Employer's legitimate interests in maintaining its managerial prerogative to effectively govern vs. impact on employees' terms and conditions of employment
- Factors
 - the degree to which the subject has a direct impact on terms and conditions of employment or whether instead it is far removed from employee's terms and conditions of employment
 - whether the subject involves a core governmental decision

What are an Employer's Bargaining Obligations?

- Decisional Bargaining – An employer has an obligation to provide notice and an opportunity to bargain to resolution or impasse over the *decision* and impact before it makes a change to a pre-existing condition of employment, or implements a new condition of employment.

Examples:

- Health Insurance Premium Percentage Contribution
- Work Hours
- Promotional Procedures

What are an Employer's Bargaining Obligations?

- Impact Bargaining – An employer has an obligation to provide notice and an opportunity to bargain to resolution or impasse over the *impact* of the decision on mandatory subjects of bargaining.
 - Decision to reduce workforce is a core managerial decision, and employer need not bargain over the decision itself
 - However, the implementation of the decision will impact employees' wages, hours, and other terms and conditions of employment, and must be bargained
 - e.g., method of accomplishing the reduction (layoffs vs. attrition), timing, terms of separation, etc.

Recent Case Law: Supreme Judicial Court

- Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, 458 Mass. 155 (2010)
 - Decided by Supreme Judicial Court on October 22, 2010
 - An appeal of an arbitrator's award that found that the employer violated the parties' collective bargaining agreement when it laid off sixteen employees
 - SJC finds that arbitrator exceeded the scope of his authority when ordered reinstatement of the employees.
 - An Evergreen clause extending a contract beyond three years is invalid under M.G.L. c. 150E, § 7(a)

Recent Case Law: Supreme Judicial Court

- BHA case highlights several aspects of management rights and impact bargaining:
 - The parties' collective bargaining agreement contained a minimum staffing provision. Provisions such as this serve as an express limitation on an employer's right to reduce force
 - The parties in this case met and exchanged proposals over the impact of the employer's decision to lay off employees

Recent Case Law: Supreme Judicial Court

- The BHA case could have a significant impact on labor relations going forward:
 - Grievance and arbitration procedure provision lapses at the expiration of contract
 - Potential for parties to begin negotiating earlier and settling quicker
 - Union requests for bridge agreements
 - Expected proposed legislation by unions to overturn decision

Recent Case Law: Division of Labor Relations Response to BHA

- Public employers are prohibited from making unilateral changes in established conditions of employment that affect mandatory subjects of bargaining both during the term of the CBA and after it expires
- If there is a conflict between expired contract language concerning a mandatory subject of bargaining and a practice that exists between the parties, it is likely that the Division would require the employer to continue prevailing practices regarding wages, hours, and working conditions

Recent Case Law: DLR Response to BHA continued:

- While the DLR has not ruled affirmatively, it is questionable whether a contractual waiver of bargaining rights would survive the expiration of the contract
- Issue of whether employer obligated to arbitrate grievances after expiration of the contract is fact specific inquiry
- Employer has continued obligation to continue dues checkoff practice after expiration of CBA

Recent Case Law: Division of Labor Relations

- Sheriff's Office of Worcester County and NEPBA, Local 555, 36 MLC 147, SUP-09-5462
 - Decided by the DLR on April 1, 2010
 - The issue in this case was whether the Sheriff's Office unilaterally implemented a new promotion policy for bargaining unit members without first notifying and bargaining with the Union in violation of M.G.L. c. 150E, §§ 10(a)(5) and 10(a)(1)

Recent Case Law: Division of Labor Relations

- Facts of Case:

- The parties' collective bargaining agreement contained a Management Rights clause that contained the following language:

“[T]he County and the Sheriff will not be limited in any way in the exercise of the functions of management and will have retained and reserved unto itself the right to exercise, without bargaining with the Union, all the customary powers, authority and prerogatives of management and government, including but not limited to the following items.”

Recent Case Law: Division of Labor Relations

- That clause was followed by 37 specific management rights that included descriptions as well as the employer's bargaining obligations (impact and/or decision)
- Examples of these include:
 - Management could make the determination of new employee classifications and ranks; provided that the wages for such classifications and ranks would be subject to negotiations with Union
 - Management reserved the right to increase, diminish, change or discontinue operations in whole or in part, provided, however, the Sheriff negotiates over impacts of any direct layoff of officers resulting from action specified in agreement, prior to layoff

Recent Case Law: Division of Labor Relations

- Some of these 37 clauses contain limited bargaining obligations, while others did not
- Examples of those that did not include:
 - The determination of the level of services to be provided
 - The training of officers, including, but not limited to in-service and physical fitness training
 - The hiring, appointment or promotion of officers, including the determination of qualifications and requirements for the position or rank

Recent Case Law: Division of Labor Relations

- Following the introductory paragraph and the 37 specific items, the parties included the following language:

“and the Sheriff will have the right to invoke these rights and make such changes in these items as the Sheriff in his sole discretion may deem appropriate without negotiation with the Union; except to the extent expressly abridged by a specific provision of this Agreement.”

Recent Case Law: Division of Labor Relations

- The dispute in this case concerned the Employer's unilateral implementation of a promotional testing procedure
 - This implementation occurred after the Employer had met with the Union and discussed input on a new testing process
 - The Employer and the Union set up a management and labor committee to investigate the issue
 - After more than two years, the Sheriff instituted its new policy
 - The Union then filed a charge of prohibited practice

Recent Case Law: Division of Labor Relations

- As we have seen, the Division found that promotion procedures are mandatory subjects of bargaining
- Despite this, the Division found that the Sheriff did not violate the law
 - The Sheriff successfully raised the defense of contract waiver, arguing that the parties' collective bargaining agreement gave them the right to implement the new policy

Recent Case Law: Division of Labor Relations

- The Division found that the Sheriff's Management Rights clause was specific as to the parties' bargaining obligations
- Even though the language was unambiguous, the Division looked at the bargaining history and determined that it was clear that the Union had specifically waived its right to bargain about promotions
 - The bargaining history showed that employer received this language in exchange for a nearly 20% pay raise to bargaining unit members

Existing Work Rules: Is Bargaining Required?

- “A public employer may alter procedural mechanisms for enforcing existing work rules without bargaining, provided [it] does not change underlying conditions of employment.”

City of Worcester, MUP-05-4409 (2007)

Existing Work Rules: Is Bargaining Required?

- Example: Sick Leave Monitoring (Town of Wilmington, MUP-4688 (1983))
 - In an effort to better track sick leave, Fire Chief developed a written form to be completed by all fire fighters absent for one day or more upon their return to work.
 - Form contained questions pertaining to the reason for absence, details of any medical treatment received, and the ability of the absent fire fighter to perform regular duties.
 - Previously, employees using sick leave were required to call in to report absences. By contract, Town could require employees to provide physician's certification stating necessity for absence.

Existing Work Rules: Is Bargaining Required?

- Division of Labor Relations held that the Town's unilateral institution of reporting form was not a violation of the law, because it did not change any underlying conditions of employment.
 - No change to criteria for granting sick leave
 - No change to practice regarding submission of doctor's certification
 - Form did not require any information Town could not have required under the previously-existing work rules.
 - Simply provided Town a more efficient method of enforcing work rules and tracking sick leave.

What Is Impasse?

- The Division of Labor Relations generally finds that parties have reached impasse only when the parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked.
- This requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise.

Impasse: Factors to Consider

- The good faith of the parties in negotiations
- The length of the negotiations
- The importance of the issues as to which there is a disagreement
- The contemporaneous understanding of the parties as to the state of negotiations

Impasse: DLR Examples

- Where one party indicates a desire to continue bargaining, Division finds the parties have not exhausted all possibilities of compromise, and have not reached impasse.

Comm. of Mass., Comm'r of Admin. & Finance, SUP-4075 (1999)

- Where parties have bargained for over two years, and have exchanged and rejected each others' final offers, Division declares impasse despite union's assertion that it was "prepared to engage in further negotiations."

City of Worcester, MUP-05-4542 (2007)

Mediation

- When and how can mediation be helpful?
- How is a mediator appointed?
- Can you choose what mediator to use?
- Do you have to agree with the mediator's recommendations?
- How does mediation differ from arbitration?
- What is interest arbitration?
- Can a Town ever get a fair break in arbitration?

Role of the Mediator

- After a reasonable period of negotiation, the parties acting individually or jointly may petition the DLR for the determination of an impasse and the initiation of mediation
- Upon receipt of this petition, the DLR will commence investigation to determine if impasse exists
- If impasse found, the DLR will appoint a mediator to assist the parties in reaching agreement (parties can also mutually agree on mediator)
- Mediator's role is to assist the parties with productive dialogue on their disputes

Techniques Used By Mediators

- Separate parties – fosters openness, allows mediator to see areas of possible settlement
- Encourage constructive communications
- Keep parties focused on settlement alternatives
- Offers information and suggestions

Anticipate Techniques to Bring Pressure to Bear

- Ballot Box Pressure or Threatened Pressure
- Publicity/Media Campaigns
- Work Stoppages including
 - Blue Flu
 - Sick Outs
 - Work to Rule
 - Picketing
- Increased “Noise”
 - More grievances
 - Possible charges of prohibited practice

It's Never Over

- After agreement is reached, the final MOA is subject to ratification and funding.
- Funding the agreement versus funding in each year of the agreement – legal and practical issues
- What if it is not ratified?
- False assumption: Whew, a 3 year deal! We're all done for 3 years.
 - Need for training of supervisors in contract implementation and administration
 - Impact bargaining issues
 - Need for preparation throughout the term of the contract

Conclusion: Be Prepared

- Know the difference between mandatory and permissive subjects of bargaining.
- Be careful not to waive your right to refuse to bargain over permissive subjects.
- Identify existing workplace rules and procedures that can be improved/enforced more efficiently, often with minimal bargaining.
- Develop a coherent strategy.
- Select the right team, led or at least assisted by qualified labor counsel.

Conclusion

- Provide for training for the Board and the team
- Negotiating in good faith doesn't mean "giving in"
- Be careful not to waive your management rights
- Review and strengthen your CBAs
 - Management rights clauses
 - Termination clauses/"Evergreen" issues
 - Zipper clauses
 - Grievance and arbitration procedures
- Preparation for next series of negotiations

An Ounce of Prevention is Worth a Pound of Cure

- Preventive maintenance is always easier than damage control.

Questions?



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