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Township Law *E-Letter*

Ins and Outs of Collective Bargaining Part I

*Municipal employees are the first line of service to citizens. They put a “face” on local government. Managing employees—and their benefits—in a fair, uniform way is critical to not only their performance, but also to providing quality service. It is easy to lose sight of this focus with shrinking budgets and sky-rocketing benefits costs, particularly in the midst of collective bargaining. This **E-Letter** highlights the ins and outs of collective bargaining.*

Preparation for bargaining is a critically important foundational step to successful negotiations; in many cases, it will likely take more time than the negotiations themselves. While negotiating collective bargaining agreements (CBAs) can be smooth, your township should prepare itself for all the potential bumps in the road. In this E-letter and the next, we will discuss preparing for negotiations, mediation, fact finding, and Act 312 arbitration, with an eye toward containing legal fees and avoiding unfair labor practice charges against the township.

STEP ONE: UNDERSTANDING THE LEGAL FRAMEWORK OF BARGAINING

Public sector bargaining is primarily governed by Michigan’s Public Employment Relations Act (PERA) Act 312 of 1969 (“Act 312”), and the multitude of state laws amending or relating to PERA and Act 312. Act 336 of 1947 (MCL 423.201 et seq.)

Public Employment Relations Act (PERA)

PERA is Michigan’s principal state law in public sector labor law. PERA tracks many tenants of private-sector labor law (like the National Labor Relations Act), which means that it prohibits interference with or retaliation for engaging in activities such as union organizing or exercising rights under a collective bargaining agreement. Above all, PERA stands for the requirement for both parties to bargain in good-faith.

Act 312—Compulsory Arbitration of Labor Disputes in Police and Fire Departments

Act 312 relates specifically, and applies only, to police and fire service employees. Act 312 of 1969 (MCL 423.231 et seq.). Act 312 establishes compulsory, binding arbitration to resolve contract negotiations after impasse. However, Act 312 does not modify or replace the duty to bargain in good-faith or any other obligation under PERA. It merely adds a final binding procedural step to negotiations instead of permitting unilateral implementation of contract terms for this subset of public employees.

Act 54—Incentivizing More Efficient Bargaining with Expired Contracts

Act 54 amended PERA in 2011, prohibiting pay increases (including step increases) and retroactive pay after contract expiration. Act 54 of 2011 (MCL 423.215(b)). It also imposed an obligation on employees to pay insurance cost increases after contract expiration, until a successor agreement is reached. Act 54 was later amended to exempt police and fire bargaining units entitled to protection under Act 312.

PA 116—Streamlining Arbitration & Focusing on Ability to Pay

Also adopted in 2011, PA 116 streamlined the Act 312 arbitration process and instituted a statutory focus on the employer’s ability to pay when the arbitrator considers the parties’ positions. PA 116 of 2011 (MCL 423.239). Here, the last best offers submitted before the hearing need not necessarily be derived from where negotiations left off, but can start at the party’s initial economic proposal. During this process, both parties submit and agree on collective bargaining agreement comparables (both internal and external) that each party will use to support its economic proposal. Within the criteria, the ability to pay is the most significant factor to be considered.

PA 152—Limiting Publicly Funded Health Insurance Contribution

Public Act 152 of 2011 limits the expenditures on employer funded health care costs by either (1) the hard cap default; (2) permitting an 80/20 benefit cost share alternative; or (3) allowing an opt out alternative. Act 152 of 2011 (MCL 15.561 et seq.).

The hard cap default provides that a public employer may not spend more than a specific total amount on employee health care costs. For 2018, the overall cap is calculated by multiplying \$17,892.36 times the number of employees receiving family coverage plus \$13,720.07 times the number of married (or two-person) plans plus \$6,560.52 times single subscribers. Cap amounts are adjusted by health care CPI each January 1. Any cost over that total must be reimbursed by the employees. If the employer is paying the cost: it generally counts. The cap is not based on a per contract basis, but on an employer-wide basis. The township board determines which employees pay how much to make up the difference, but the amount may be subject to contract negotiations. Elected officials are included in the calculation and must pay at least 20%.

The *80/20 benefit cost share alternative* is set by a majority vote of the township board. The law does not mandate that everyone pay 20%—just that the total paid by the township does not exceed 80% of the cost.

The law also permits a township, by an annual 2/3 vote, to *opt out* of these limitations on health care expenditures.

Michigan’s Right to Work Law

Under Michigan’s Right to Work law, public employees may choose not to join a union or contribute to having a bargaining representative, but a bargaining representative still must represent all employees in the bargaining unit. MCL §423.14 and MCL §423.209. This law, too, has an exemption in how it applies to Act 312 police and fire units: it doesn’t.

STEP TWO: PREPARATION

Preparation is one of the most crucial factors to reaching a successful conclusion to negotiations. When preparing for negotiations, these six things tasks in mind: (1) know the audience; (2) research market data; (3) build the right negotiation team; (4) know the financials; (5) know the CBA; and (6) strategize with purpose.

1. Knowing and Understanding Your Audience Before Negotiations

It is important to establish a relationship with union leadership. Schedule regular meetings with union leadership to discuss issues and answer any unresolved questions. Understanding and listening to union concerns at these meetings enables the township to prepare for and research the issues that are most likely to be brought forward during negotiations. Thus, not only will a personal relationship with union leadership lead to a more civil and cooperative negotiation process, but it will also allow townships to be prepared to professionally respond to the issues that may be presented.

It is vital that townships understand that negotiations are a give and take process. As negotiations are not one-sided, there should be mutual gains (and losses for both sides). Township officials conducting negotiations should remain sensitive and open to what the union is asking for, just as the officials would expect the union to be respectful of the needs of the township. Having a good working relationship in advance of negotiations provides a conducive backdrop for this process.

2. Researching and Knowing the Market Data and Comparables

Townships will also find it helpful to analyze and prepare data and information sources for discussion prior to entering into negotiations. For example, start by conducting a review of other similarly situated townships’ compensation plans, personnel policies and collective bargaining agreements: how similar or dissimilar are the positions, nature of services, wages, insurance plans, and pension or retirement plans. Have there been recent modifications in other communities like the ones your township may pursue?

When a township is conducting these reviews, a comparable employer may be selected by several characteristics including: population, taxable value, department size, type of services offered, etc.

3. Building the Proper Negotiating Team

A township should establish “key players” to be present at negotiations. These key players will make up a township’s negotiation team, and should be capable of intelligently speaking to their areas of expertise in caucus. The following are examples of key players:

- Finance Expert – A key player capable of presenting data on the current finances.
- Subject Matter Expert – A key player capable of speaking to the operational side of the CBA. This should be someone in a supervisory role who knows the inner workings: what is needed to get the work done effectively and efficiently and how personalities within the bargaining unit may impact negotiations.
- Recorder/Secretary/Notetaker – A key player capable of keeping track of what has been tentatively agreed upon during negotiations, as well as when there are no changes to a specific article.
- Lead Negotiator – A key player capable of doing most of the speaking at the table.

4. Understanding your Township’s Financial Situation

Prior to negotiations, townships should also consider meeting with their Finance Director (if any!) to have a better understanding of the current financial outlook. For example, if the union is negotiating for a one percent salary increase, the township must first understand the impact of a one percent salary increase on the total compensation package. One percent may seem minimal, but even this increase may have substantial effects due to benefits such as health care coverage being included in compensation packages. Townships should run through multiple financial scenarios to gain a clear understanding of the financial impact of each scenario or percentage increase.

5. Knowing and Understanding your CBA Front to Back

The negotiating team must have a thorough understanding of the CBA itself. Read the CBA cover to cover; the lead negotiator should be especially well-versed in its content and interpretation. Make notes in the margins of the CBA and highlight specific areas where issues or questions have arisen in the current contract term.

Clarifying ambiguous language and making the CBA precise, easy to read and understandable is essential in heading off misunderstandings in the future. Because a CBA should be straightforward and easy for everyone to read, avoid legal terms such as: whereas, hereafter, herein, shall, etc. Additionally, all numbers should be written out in words and numbers such as “five (5).”

Finally, it is imperative to constantly assess whether any “past practices” have developed or been maintained that conflict with or create ambiguity within the CBA. If there are past practices that you wish to change, declare them to be at an end at the bargaining table. If the union does not issue a demand to bargain on those practices immediately after, the past practice may cease without ramifications from the labor law perspective once the new CBA is signed.

6. Strategizing

The negotiation team should meet to create and review their game plan, focusing on the roles of each key player, issues which might be faced during the process, personalities on both sides of the table and how they may react to certain issues, and ground rules—all before every sitting at the bargaining table with the union.

When strategizing, it is imperative that the bargaining team understand and work within their authority. Bargaining authority speaks to the parameters (provided by the township’s administration) within which the bargaining team has discretion (or a directive) to act.

Consider the priorities of the issues to be addressed and the language to be used for that purpose: what is highly important (an absolute gotta have!) as opposed to something that would be nice to have, but is not a deal breaker.

If the township will be negotiating multiple contracts at one time, strategize to resolve the easiest and fastest contract first to set expectations for the other contracts to follow. Typically this means negotiating the non-police and fire unit contracts first.

Establishing a relationship with union leaders and conducting regularly scheduled meetings before negotiations may provide leads on issues the union will likely advance in negotiations. After theorizing what issues will be advanced, townships should plan the order in which the issues will be discussed. Start with easy items first, such as language changes that everyone is likely able to agree upon—we call this low hanging fruit! By starting with easy issues, the township and union make progress in the negotiation and build trust. Issues to be discussed last, such as hard economic issues, may then be easier to negotiate.

CONCLUSION

A solid legal foundation is critical, but preparedness leads to productivity in most arenas, and collective bargaining is no different. In next month's e-letter, we will discuss tips and tricks for bargaining and discuss what happens if you cannot reach agreement at the table.

-- Helen "Lizzie" Mills

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