Township Law *E-Letter*

Ins and Outs of Collective Bargaining Part II

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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 Steps 3 and 4 of the collective bargaining process.*

In last month's e-letter, we tacked the preparatory steps township bargaining teams should consider and undertake before collective bargaining actually begins (Steps 1 and 2). This month, we discuss some basic rules of that bargaining process.

STEP THREE: BARGAINING

Townships should keep in mind four rules through the bargaining process.

Rule #1 – Bargain in Good Faith

This does not mean that the township must agree to union proposals, nor does it mean that the union must agree to an employer proposal. Good-faith bargaining prohibits bargaining tactics that are proof that the township or union does not intend to negotiate a contract with one another. Examples of bad-faith bargaining include: surface bargaining, refusing to meet, delaying meetings, failing to provide information, regressive bargaining, direct dealing, discouraging membership support for the union, or failing to give the chief negotiator sufficient authority to make agreements. Any of these violations could prompt an unfair labor practice charge ("ULP"), which is litigated while the parties are still in the throes of negotiations.

Rule #2 – Bargain Mandatory Subjects

Mandatory subjects of bargaining include pay rates, hours of work, and other terms and conditions of employment. The following are examples of mandatory subjects of bargaining:

- arbitration
- overtime premiums
- bargaining unit work
- pay for time spent on union business
- bereavement leave
- pay for training
- salaries
- bonuses
- pension for current employees
- clothing and tool allowances
- premium pay for Sundays & holidays
- cost-of-living adjustments
- dental and vision plans
- promotions
- discharge and discipline
- red-circle pay
- rest and lunch periods
- work schedules
- equity pay adjustments
- grievance procedures
- sickness and accident plans
- holiday pay
- testing of employees
- hours of work
- transfers
- incentive pay
- tuition reimbursement
- jury duty pay

- union shop or other union security
- layoffs and recalls clauses
- legal services plans
- vacation pay
- life insurance
- wages
- management's rights clauses
- workload
- medical insurance
- dues check-off clauses

Rule #3 – Remember the Process (AKA: The Art of Negotiating the Agreement)

Negotiating a CBA is like playing a game of chess: it requires strategy, finesse, or even sacrifice(!) during the process. Consider these helpful tips and strategies when negotiating collective bargaining agreements.

A. Presenting Proposals

The first bargaining session is typically dedicated to introductions and discussing ground rules. Ground rules are beneficial if parties wish to entertain a rigid format that surround negotiation process such as: setting negotiation dates; who can talk at the table; how proposals will be submitted; which issues will be negotiated first; how sidebars and caucuses will be conducted; if members will be paid during negotiations (if not already addressed in the CBA); how and when requests for data or information will be presented to opposing parties; how tentative agreements will be processed; and whether bargaining sessions can be recorded or if both parties will rely on written notes. However, depending on the parties, the number one and only ground rule should be that both parties should be respectful, candid, and trustworthy.

After introduction and ground rules (if not before), the township should determine if it wants the union to provide the initial proposal or whether the township would like to tip its hand by providing the initial proposal. We recommend that the union provide the initial proposal so the township bargaining team can see the tone and style that the union will use when negotiating. Allowing the union to provide the initial proposal also prevents the township from starting a proverbial war with a long list of hard-hitting proposals only to shortly realize that the union wants to be reasonable and moderate. (The employer seeking serious concessions may also initiate and present the first proposal, of course, in the spirit of candor.)

Some negotiations can be accomplished piece-meal. To start off on the right foot and ease into the process, townships may start with easy non-economic proposals that consist of potential language changes to existing articles, thus leaving the economic proposals that may be difficult to accept to the end of negotiations. Likewise, if parties push too hard in the beginning or become impatient, it will prolong the entire process. Occasionally, that is where package bargaining can come in handy.

Using package proposals and trading off on certain proposals can be a beneficial strategy in reaching an agreement, especially when a party is unwilling to move on a certain issue. Always remember that negotiating requires a quid pro quo (this for that) process. Therefore, you may need to organize your proposals into various packages when offering them to the opposing party. The township may be willing to accept a union proposal if, in return, the union accepts the townships position on a certain proposal. This style of bargaining can lend to a feeling that there is a trade-off taking place: each side gets something without totally surrendering.

B. Format of Proposals

All proposals should be neatly prepared (preferably typed) and written in clear and concise language in order to avoid ambiguities and misunderstandings. Language is no good if parties do not understand it now – or, worse, later! One tip to assist with tracking proposals and making changes to language is to use Microsoft Word's "track change" format when making changes. This will assist parties in viewing the existing language as compared to the new proposed language change (bolded) or old language that is deleted (a line striking through the language).

Additionally, all proposals should be numbered and include a heading at the top that indicates who is making the proposal, as well as the date and time the proposal is presented. This will help in tracking and organizing your proposals and assist in defending your township should the opposing party lodge a ULP. The notetaker should always keep a clean copy of all proposals so they can be copied later. Likewise, in the age of electronics, an electronic copy should be provided to the opposing party after the negotiation session.

C. Discussing Proposals and Issues at the Table

It is vital that both sides understand clearly what is being proposed and the reason for the change.

When the township presents its proposal to the union, the lead negotiator should give a brief explanation of the proposal and the reason for the change. After describing the township's proposal and the proposed changes, the next step is to explain, justify, and persuade the union of the reason and need for the change. During this process, the negotiator must be honest, trustworthy, and credible and have a good understanding of the CBA. Speak clearly, confidently and concisely. Communicate with and use supportive data or examples to justify the position.

At this point, only the lead negotiator should speak about the proposal unless otherwise pre-arranged or the lead negotiator signals that a team member can speak at the table. If a team member interrupts by making a statement, it could cause harm or inject confusion into the process—or worse, undermine the credibility of the lead negotiator.

After presenting your proposal, the township's lead negotiator should encourage and answer any questions from the opposing party. The questions and responses will assist the parties in ensuring that the other party understands your intent and position.

When receiving a proposal from the union, it is imperative that the township's bargaining team understand the "intent" of the language. If the intent is unknown or unclear, simply ask the union for the reason for the proposal. It is also vital to listen first to understand and avoid interrupting, making negative facial expressions, or blurting out an inappropriate response. In the end, no good will come from such responses and it can cause the other party to retreat, become upset or unwilling to compromise.

They always say honesty and kindness attracts. It is no different when negotiating. In other words, do not intentionally mislead or lie to the union, nor withhold information you possess that the union may be entitled to see. When a response is due, it is imperative that your answer is firm. Do not waffle or say "maybe" when the answer is "no." It is important to be kind and truthful even if the opposing party does not like the answer. It is not the content of the message that typically disrupts the communication: it is the manner in which it is communicated that causes the upheaval.

D. Putting an Agreement Together is About Timing Movement

Understanding when you can bend on issues or will stand firm is important to what happens in negotiations are stalling. Upon reaching impasse and going to mediation, fact finding (for non-312 units) or 312 arbitration (for police and fire bargaining units) is the next step—both options are a one way track to forced resolution in most cases. In the end, progress toward a mutually acceptable agreement is usually (although not always) better for both parties as compared to a neutral third party deciding the fate of your CBA (for 312 units) or implementation (for non-312 units).

Always remember your township's pre-negotiations goals. When bargaining, you may not, and should not expect to, get everything that was proposed. Each issue must ultimately be disposed of by either agreeing, accepting a variation of the proposal, or by its withdrawal. Thus, if you think the time is right or if you see that the union is willing to make a move, then the township may want to proceed with offering a gesture in making a deal. Once this process of agreeing has started, it is important to press forward and start disposing of issue after issue. In doing so, it is vital that you strategize and be patient during the process. Overstepping can cause either party to withdraw, or worse yet, for one side or the other to accept a proposal that should not have been accepted in the first place.

However, it is always important to remember that there is no legal requirement to agree and accept the union's proposal. In the public sector, mediation, fact finding and implementation, or 312 arbitration may ultimately be the end of the road when negotiating. (That's why Rule #4 is so important: you're required to engage in good-faith, but there is no mandate to agree with the other side!) We'll discuss mediation and the rest after we talk about the ideal situation: ratification.

E. Closing the Deal: Ratification

Both the township and the union must remember that both bargaining teams will need to convince their board or members to agree to a newly formed tentative agreement. Generally, if the township's bargaining team has done its homework in preparing for negotiations and acted within the scope of its bargaining authority, then it should not be a challenge to ratify with the full township board. However, the union could have an uphill battle when trying to convince its members to ratify. After a tentative agreement is reached, it is important that both parties discuss the ratification process. This may entail the township assisting the union in providing a final copy of the tentative agreement or urging that the union move quickly in voting on the tentative agreement.

F. What If You Don't Get a Deal? Mediation and Beyond

If negotiations stall, the next step in the bargaining process under state law is mediation. The mediation process comes with a lot of advantages for townships. Mediation is a nonbinding process to resolve impasse. The neutral outside mediator, typically appointed by MERC, offers a new perspective and knowledge of the labor market to the bargaining teams. Mediation allows creativity in crafting resolutions to overcoming the impasse at no cost. If unsuccessful, even on only one issue, the parties generally move to the next step in the bargaining process, fact finding or arbitration, depending on the type of bargaining unit.

As discussed above, PERA applies to all public-sector collective bargaining units while Act 312 Compulsory Arbitration applies only to police and fire collective bargaining units. There are thus two potential bargaining paths: [1] police and fire, and [2] all others.

1. Fact Finding & Unilateral Implementation

Fact finding and unilateral implementation is a process that townships can use to force contract terms of a final 'agreement' for non-police and firefighter bargaining units. Here, a neutral third party called the fact finder will conduct a hearing to receive evidence and argument on each party's position on the remaining open issue(s). Post hearing briefs are usually filed to further explain which position should be recommended by the fact finder.

The fact finder will then issue a report and recommendation. The recommendation is non-binding, but it is a public document parties, which can be persuasively used. The parties are then required to meet and bargain at least once in the 60 days after the issuance of the report. For non-police and fire personnel, fact finding is the last attempt to come to a mutual resolution.

These non-police and fire personnel are subject to unilateral implementation if the parties still cannot reach a deal at this point: it is the ultimate tool to end an impasse. Unilateral implementation imposes terms combined with previously agreed upon terms. These imposed terms are in effect until the bargaining unit is successful in making a material change on the issue that lead to the impasse. Both parties should consider the challenges presented by implementing terms of a contract after an impasse: it can negatively affect morale, performance, and employee relations, but it certainly does bring finality to what can otherwise be seemingly endless negotiations.

2. Act 312 Arbitration

For police and fire personnel, arbitration is the process utilized when the bargaining parties reach an impasse. Arbitration is a binding quasi-litigation process through which a neutral arbitrator dictates the terms of the CBA based upon a hearing on the parties "last best offers." These offers are submitted in advance of the arbitration hearing and may not necessary derive from where negotiations failed. This is an opportunity for the parties to retain some ownership of the opportunity to resolve their impasse without it being forced upon them through the arbitration process. The entire process, from the first prehearing conference after an arbitrator is selected to submission of post-hearing briefs by the parties, must take place within 180 days

STEP FOUR: EXPIRED CONTRACTS

Section 15b. of PERA controls what happens after a CBA has expired—which is derived from Act 54. Good-faith bargaining toward a successor contract is still required and certainly Act 54's requirements can incentivize personnel within a bargaining unit to get to the table and move forward. Maintain the status quo under the contract even during expiration, with the exception of the arbitration of grievances if you provide proper notice to the union. (There are a few other items that can be changed in contract expiration, but we do not recommend taking any action there without consulting with your labor counsel!)

CONCLUSION

While negotiating can be smooth in the right circumstances, the township should prepare itself for a long-drawn out and grueling process so that the bargaining team is not caught unaware and unprepared when the union comes to play hard ball. Knowledge of the process—and commitment to it—will go a long way!

-- Helen "Lizzie" Mills

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