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International Public Management Association for Human Resources *2009 Western Region Annual Conference*

“Legal Issues for Negotiators”

April 21, 2009

Presenters:

Richard Whitmore

Legal Issues for Negotiators

IMPA-HR Western Region Annual Conference – April 21, 2009

Presented by Richard Whitmore

Legal Issues for Negotiators

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AGENDA

- Legal Obligation to Meet and Confer
- Effects Bargaining
- Avoiding an Unfair Practice Charge
- Contracting Out Bargaining Unit Work
- Specific Contract Provisions
- Impasse Procedures
- Unilateral Implementation
- Concerted Activity

Legal Obligation to Bargain

- **What is good faith?**
 - Meet until reach agreement or meaningful end.
 - Explain interests and reasons for positions.
 - Fully consider proposals; make changes where appropriate.
 - Continue meeting for reasonable period of time.
 - Exchange info, opinions and proposals.

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**Fundamental Managerial
Policy Decision**

- Balancing Test
- Effects Bargaining

Effects Bargaining

- A fundamental management decision not within scope, *BUT*
 - The way the decision impacts terms and conditions of employment may be.
- An employer can require the union to articulate the impact upon requesting to meet.

**Legal Obligation to Meet
and Confer**

- Mandatory versus permissive subjects of bargaining.

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Effects Bargaining

- Still required to bargain to impasse.

Avoiding a UPC

Breach of Duty to Negotiate - Per Se:

- Unilateral action without bargaining decision or effects/ Refusal to bargain.
- Failure to Execute Agreed on Contract.
- Conditioning bargaining on waiver of rights, or insistence to impasse on non-mandatory subjects.

Avoiding a UPC

Bad Faith by Totality of Conduct:

- Surface bargaining.
- Representatives' lack of authority to negotiate.
- Take it or leave it proposals.
- Refusal to supply relevant information.
- Dilatory (delay) tactics.

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Avoiding a UPC

Bad Faith by Totality of Conduct:

- Bypassing the designated representative.
- Unreasonable changing of negotiators.
- Withdrawal of prior agreements.
- Violations of negotiated ground rules.
- Regressive proposals as negotiations continue.

Avoiding a UPC

To Avoid UPC or Defend if Necessary:

- Come to the table with authority to negotiate.
- Keep detailed minutes of negotiations.
- Make proposals in writing.
- Provide information upon request. Provide reasons for positions taken.
- Have discussion that demonstrates genuine consideration of union proposals.

Avoiding a UPC: Communicating Directly with Employees

- **Legal if:**
 - Factual
 - No threats
 - No promises
 - Do not circumvent bargaining table
 - Not in violation of ground rules

But..... Be Careful

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Ground Rules

- Negotiable Subject
- Release Time
 - Reasonable number, reasonable amount.
 - Contrast with right to determine size, composition of bargaining team.
- Communications Issues
- Final Date for New Proposals

**Contracting Out
Bargaining Unit Work**

- Decision to contract out due to labor costs: mandatory subject of bargaining.
- Decision to contract out unrelated to labor costs: likely outside scope.
- Effects of contracting out: mandatory no matter what motivates decision.
- Beware of contract language limiting agency ability to contract out.

Retirement Benefits

- Right to pension benefits vests upon employment.
- Employer cannot impair “contractual obligation” to employee.
- Language that created the benefit is key.
- Changes can be made:
 - Upon agreement.
 - Prior to retirement, *reasonable* modifications to maintain integrity of pension system.

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Retirement Benefits

- Types of Beneficiaries
 - Current retirees
 - Active employees
 - Future employees
- Unions cannot negotiate on behalf of retirees (permissive subject).

Retiree Health Benefits

- GASB Statement 45.
- Vest in the same manner as pension benefits.

Retiree Health Benefits

- Negotiating Changes
 - Second tier of benefits for future employees
 - Reductions for active employees
 - Comparable new advantages
 - Changes for current retirees
 - Medicare

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Fair Labor Standards Act (FLSA)

- Know FLSA status of employees in bargaining unit (non-exempt/ exempt).
- MOU provisions affected by FLSA.
 - Overtime pay
 - Comp Time Off (CTO)
 - Regular rate of pay
 - FLSA work period
 - Hours worked

Fair Labor Standards Act (FLSA)

- Other MOU provisions affected by FLSA:
 - Schedule/ work period - Standby pay
 - On-call pay - Mealtime comp
 - Employee's live at work

Management Rights Clause

- All inclusive
("All agency rights and functions, except those abridged by agreement, remain vested in agency.")

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Management Rights Clause

- AND list of specified rights, including:
 - Train, direct, assign employee's.
 - Discipline, Lay-off.
 - Determine efficiency, methods, means, and personnel for operations.
 - Determine content job descriptions.
 - Make and implement rules and standards.
 - Contract out and transfer work out of bargaining unit.

Waiver of Right to Bargain

- A "zipper clause" states that the written document contains the complete agreement negotiated by parties.
- Express waiver of right to bargain over matters covered by agreement.
- Agency waives ability to make ANY changes to matters within scope during term of MOU, even those not covered by contract.

Parity (Me too) Clause

- Should agency later negotiate higher increase with Union "B," then Union "A" will receive same increase.
 - Does not violate good faith obligation to Union "B."
- BUT,
- Creates animosity towards Union "B", and
 - Union "B" may say it has unreasonable burden.

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Severability Clause

- If provision becomes inoperable by law, then severed from agreement.
- Preserves remainder of the agreement.
- Agreement to negotiate replacement section – not of equal value.

Agency Shop

- Fee payer – not full member
- Religious exemption, pay fee instead to charity.
- Union must keep itemized financial records.

Leaves

- Holidays, paid time off, compensatory time off, vacation, sick leave
- Accrual and usage limits
- Legally required leaves (e.g. FMLA)

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Impasse Procedures

- Declaration of impasse
- Mediation
 - Typically non-binding, no public decision or recommendation
 - Good tool to reach agreement
 - Can use before impasse

Impasse Procedures

- Fact-finding
 - Three person panel.
 - Written findings of fact and recommendations.
- Interest Arbitration

Unilateral Implementation

- After met and conferred in good faith, and impasse procedures exhausted.
- Governing body MAY implement last, best and final offer.

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Unilateral Implementation

- Not required
- Use strategically – only when benefit to agency
- Weigh potential impact on labor relations

Concerted Activity

- Information distribution (flyers, leaflets)
- Picketing
 - First Amendment protection
 - Can restrict in residential areas
 - Picket line misconduct
 - Honoring picket lines

Concerted Activity

- Work Stoppages
 - Legal versus illegal strike
 - Expiration of Contract
 - Contingency Planning
 - Public Relations
 - Injunctions

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A. PREPARATION FOR NEGOTIATIONS**1. ORGANIZING FOR NEGOTIATIONS**

The success of governmental operations depends in large measure upon successful employee relations; and successful employee relations, in turn depends more and more upon successful negotiations. It follows that successful employee relations and successful negotiations requires the involvement of all agency officials, managers and supervisors.

Establishing a negotiations system as discussed in the first part of this workbook requires policy direction from the governing body, the chief administrative official, the agency's attorney, and the management official(s) responsible for the agency's personnel administration and employee relations. Someone with labor relations expertise is needed to advise these officials, and to handle the consultations with the agency's employee organizations regarding the rules.

Once the agency's labor relations system is in place, the organizational functions for negotiating labor agreements should include the following:

a. The Governing Body

Receives on-going information and advice from its staff relevant to formulating negotiating objectives and parameters, and fixes limits of authority of its negotiating representatives. Adopts MOUs and implementing ordinances and resolutions.

b. Chief Administrative Officer (CAO)

Assesses overall financial and operational impact of issues being negotiated and makes recommendations to governing body. Supervises agency's negotiating teams and often represents the agency before the media and community groups.

c. Human Resources Director and Staff

Directs and coordinates staff support activities for negotiations. Prepares negotiating data, including surveys and costing data. Coordinates input from departmental operating management. Handles communications with management and, as applicable, with unit employees.

Actively participates in all phases of negotiations and provides information to the Chief Negotiator concerning agency bargaining history and other administrative issues.

d. Chief Negotiator

Handles negotiations and communications designed to lead to agreement with unions within guidelines established by governing body. Advises the governing body, CAO, Personnel Director and other designated agency staff regarding the negotiations on a regular and on-going basis. Consults with agency staff on negotiation related issues (e.g., costing, negotiation data, internal and external communications, impasse/strike planning). Provides guidance and advice concerning negotiating positions, supervises negotiating team. Determines negotiating strategies. Drafts agreements. Provides management training and advice regarding negotiated agreements.

e. Legal Counsel

Provides advice to negotiating team, staff and governing body regarding the legal implications of negotiation issues, agreements, and procedural matters related to the negotiations.

f. Agency Operating Managers

Review personnel and departmental rules, MOUs, and established practices that are subject to negotiations that unduly restrict management operational discretion or otherwise impede efficient operations; review grievances under the current MOU or personnel rules to determine whether changes to such provisions are appropriate; consider recommendation of new employment related policies or procedures to enhance efficient operations. Communicate such recommendations and information to those responsible for developing negotiating proposals. Act as resource to negotiating team. Oversee effective administration of agreements.

2. SELECTING THE NEGOTIATING TEAM

Ideally, every agency negotiating team should include four areas of expertise: A person experienced in local agency labor relations and negotiations to serve as chief negotiator; someone fully familiar with agency finances and budgetary issues; a staff member knowledgeable about the agency's personnel administration; and one or more departmental representatives to provide operational expertise.

Beyond these areas of expertise, it is desirable that at least one member of the team has, in the normal course of their responsibilities, day-to-day contact with the CAO to ensure that the CAO is kept apprised of the status of negotiations on an on-going basis.

In addition to being knowledgeable, members of the negotiating team should be individuals that are tactful, insightful, flexible, are good listeners, and are perceived as credible and fair by employees and supervisors. Individuals that tend to "fly off the handle" easily, that are hostile and antagonistic to the process, that are preoccupied with being seen as the "good guy," that are "nit-pickers," that lack patience, a sense of humor, and/or human relations sensitivity, should not be designated as members of a negotiating team.

Some larger agencies have found it helpful to designate a management backup group for providing guidance to the negotiating team in caucuses. This can be a group of varying size consisting of a City Manager, Assistant City Manager, City Attorney, Controller and Department Heads that are not directly involved in the negotiations.

With the organizational framework in place, the negotiating process itself can be implemented.

B. NEGOTIATION PROCESS

1. GROUND RULES

The employer and union typically negotiate ground rules for the negotiation to address procedural matters. Refusing to bargain or renegeing on agreed-upon ground rules may constitute a violation of the duty to bargain.¹ A sample set of Ground Rules can be found in Appendix F.

2. NEGOTIATING NOTES

While the Chief Negotiator should take personal notes, he/she will be too busy negotiating to keep a reasonably complete record of the negotiations. It is important to keep such a record in the event of later disputes concerning what has and has not been agreed to, the intended meaning of provisions, questions of good faith negotiations, and the like. Thus, one member of the team should be assigned the responsibility of taking fairly complete notes, or a confidential secretary should be assigned that function.

3. COMMUNICATION WITH EMPLOYEES IN THE BARGAINING UNIT DURING BARGAINING

a. Agency Direct Communication with Employees

The Meyers-Milias-Brown Act (MMBA) prohibits an employer from using direct communications with employees to bypass the exclusive representative and undermine the representative's exclusive authority to represent unit members and negotiate with the employer.² However, not all communication with employees violates the Act.³ The Public Employment Relations Board (PERB) has adopted the NLRB standard for employer free speech, and, generally, does not find speech an unfair practice if the communication contains neither threat of reprisal or force, nor promise of benefit.⁴ However, negotiated ground rules may restrict such communications, regardless of the content.

During negotiations, an employer is obligated to present factually accurate information and may not engage in conduct to derogate the exclusive representative's authority.⁵ Ultimately, accurate communication to employees concerning negotiations, where there is no evidence of threat or coercion, or of intent to bypass or undermine the union is

lawful.⁶ PERB consistently has held that in order to show a violation of the MMBA based on employer speech, it must first be shown the conduct contains reprisals, discrimination, threats, interference or coercion.⁷ Employers must be aware that any communications that appear to be “negotiating” directly with represented employees, could be challenged.

To determine if an expression or communication contains such a threat or reprisal, force or promise of benefit, PERB will consider the statements for accuracy; the context in which the statements occurred; the impact that such communication had or is likely to have on the employee who may be more susceptible to intimidation or receptive to the coercive import of the employer’s message; and the effect on the authority of the exclusive representative. PERB will ultimately look to the totality of the circumstances.⁸ Similarly, in order to prove that an employer has unlawfully bypassed the exclusive representative by negotiating directly with unit employees, PERB has held that it must be demonstrated that the employer sought either to create a new policy of general application or to obtain a waiver or modification of existing policy applicable to such employees.⁹

By adopting the NLRA 8(c) free speech standard, PERB held that an employer has a protected right to communicate with employees on employment-related matters, so long as that communication does not run afoul of the NLRA 8(c) standard or constitute an intent or attempt to bypass the exclusive representative.¹⁰ In *Rio Hondo Community College District*, PERB found no violation where the employer wrote to all faculty members urging them to reconsider their efforts in a lawsuit which sought reclassification and compensation changes that would place part-time faculty members on an equal but pro rata footing with full-time faculty members.¹¹

In another communication examined by PERB, the employer urged the association membership ‘to get their leaders turned around and away from the course of an aggressive, antagonistic approach to labor relations. Where an employer made an accurate communication (e.g., a discussion of what had occurred in the collective bargaining) to employees during negotiations, PERB found no violation of EERA.¹²

Similarly, PERB found no violation when a district employer distributed flyers to bargaining unit members stating that “the District started this process based upon the principles of interest based bargaining,” and that its flyer constituted “the most accurate characterization of [the Association’s] actions.”¹³

b. Union Use of Agency Communication Systems to Communicate With Employees

The MMBA provides that agencies may adopt reasonable rules and regulations regarding an employee organization’s access to employee work locations and means of communication.¹⁴

Access rights not described by statute become available to a union in two (2) circumstances: (1) when the usual means of communication are ineffective or unreasonably difficult; or (2) an employer's prohibition on access is discriminatory on its face or as applied.¹⁵

Once an employer has opened a forum for non-business communication, it cannot prohibit employees from using the same forum for a similar level of communication regarding union activities.¹⁶

Further, while labor organizations generally have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, such access rights are subject to reasonable regulation. Thus, as long as an agency's policies and practices are not discriminatory on their face or as applied, the agency can properly limit use of its website and prohibit the organization from availing itself of communication through that forum.

c. Union Use of Agency E-mail During Negotiations

Neither the PERB nor the courts have required a public employer to open up its electronic mail system to labor organizations if the employer reserves its computer system for business purposes only. In other words, *if an employer desires to exclude an employee organization (or any other group or individual) from using its computer system, it may do so by reserving the system for business purposes only.*¹⁷

In contrast, if a public agency permits its computer system to be used for non-business reasons, e.g., social, recreational uses, a labor organization is entitled to an equal right to such use. An employer's failure to grant a union the right to use the agency's e-mail or computer system, when it grants access for other non-business purposes would likely constitute unlawful discrimination and a denial of rights guaranteed to employees and employee organizations.¹⁸

For example, the PERB has held that it was a violation of the Dills Act for the State of California to allow minimal personal communication by e-mail while it prohibited such communication by the labor organization.¹⁹ However, the NLRB has ruled that employers have the right to prohibit union-related e-mail, so long as employers have a policy barring employees from sending e-mail for "non-job-related solicitations" for outside organizations.²⁰ In the decision, the NLRB distinguished between e-mail for personal communications and organizational-related communications.²¹

However, while an agency may not discriminate against employee organizations in the use of e-mail or computer resources, there is nothing in the law that holds that simply because some e-mail use is provided for non-business reasons, a union is then entitled to unfettered use of those resources. Ultimately, even if an employer permits non-business use of its e-mail system, it retains the ability to place reasonable time, place and manner restrictions over how its system will be used.

For example, an employer may limit access to non-work time or incidental use. It may also prohibit the transmittal of voluminous e-mail or burdensome attachments. In the Dills Act case noted above, although the PERB found that the State's refusal to allow the California State Employees Association access to its e-mail system (when it allowed access for other minimal personal communication) was unwarranted, the State's action prohibiting voluminous e-mail from the labor organization was found to be *lawful*, because there was no evidence that the State had ever permitted others to conduct, for personal reasons, the frequent and heavy levels of communication that the union sought to disseminate.

4. TYPES OF BARGAINING

There are now generally two forms of bargaining used by employers and labor organizations. The first is the traditional form of bargaining contemplated by the private sector model. This, of course, involves the well known exchange of proposals between the agency and the union, and the resulting withdrawal and modification of issues over time by both sides until a comprehensive agreement is reached.

Interest-based bargaining (sometimes referred to as collaborative, principal or Win-Win bargaining) is being utilized more frequently in labor negotiations. This form of bargaining attempts to remove the inherently adversarial nature between management and labor, and focuses on each side acknowledging the other's interest in a particular issue.

a. Checklist: Traditional Negotiations Process

The following checklist describes in detail the traditional bargaining process:

Preparation for Negotiations

- Hold in-service training sessions for supervisors and managers.
 - Agency philosophy regarding labor relations.
 - Explanation of MMBA, the agency's employer-employee organization relations system, and relevant personnel ordinances and rules.
 - Role of the managers and supervisors in process.
 - Specify procedures for management input.
 - Specify procedures for keeping management informed as to progress of negotiations.
- If one or more new members of governing body, individual meeting(s) or closed session to brief such new member(s).
 - Establish agency approach to labor relations.
 - Explanation of MMBA, the agency's employer-employee organization relations system, and relevant personnel ordinances and rules.

- Background on unions, union officers and history of negotiations.
 - How the process works; role of governing board members; closed sessions; what to expect.
- ❑ Developing negotiating data.
- Gather salary and other benefit survey data.
 - Other “comparable” public agencies.
 - Private in area.
 - Multi-year agreements in effect.
 - Recent settlements.
 - Consumer Price Index (CPI).
 - Compile current payroll costs for unit.
 - Unit “profile,” including:
 - Number and job classes of employees.
 - Distribution on salary schedule.
 - Insurance costs (medical, dental, vision, etc.).
 - Total base wages.
 - Total wage related by item (e.g., retirement, overtime, “incentive” pay, etc.).
 - 1% factor.
 - Total non-wage related by item (e.g., insurance, flat dollar premium pay).
 - Cost of salary range movements in forthcoming year.
 - Average unit wage.
 - Paid leave time usage.
 - Turnover.
- ❑ Review with operating management last memorandum of understanding and ordinances/rules/established practices subject to meeting and conferring.
- What provisions adversely affect efficiency.
 - What provisions result in excessive grievances.
 - Problems caused by ambiguous provisions.
 - Provisions restricting management’s right to act.
 - What problems arose which could have been resolved through appropriate contract language.

- Unforeseen costs.
- Excessive costs.
- Establish coordination channels with other public employers in area.
 - Review each other's negotiations, MOUs, and "brainstorm" new ideas.
- Anticipate union demands.
 - Union demands from prior negotiations (which were not adopted).
 - Terms and conditions of other units in the agency.
 - Same demands by same union in another jurisdiction.
 - Resolution passed at union convention.
 - Speeches by union officials.
 - List of grievances/complaints filed.
 - New enabling legislation regarding increased benefits that may be offered.

Analyze/Cost the Union Package

- Cost impact of compensation and benefit items.
- Meet with affected department management to assess operations impact(s) of working condition items.
 - Is there a real (bona fide) problem?
 - Is it a continuing problem?
 - Is it general in nature or specific and limited?
 - Will the proposal change the problem?
 - Is the proposal the same size as the problem?
 - Is the proposal free from unacceptable operating effects or unanticipated costs, now or in the future, and does it infringe on management's rights?
 - Is the cost reasonable in relation to the problem?

Analyze Union Negotiating Team

- Learn as much as possible about the union's chief negotiator.
 - Check with other management negotiators who have dealt with him/her.
 - Does the negotiator live up to his/her commitments?
 - What approach does he/she take in the negotiating process?
 - Will he/she control the committee or will they control the negotiation?
 - Quick settlement or will he/she wait until there is no other alternative?

- Learn as much as possible about the other team members.
 - Job.
 - Employment history with agency.
 - History of union involvement.
 - Personality (Emotional? Militant? Reasonable?)
 - Which item(s) in union package of personal interest?
 - Any “special axe(s) to grind”?
 - How much influence? With leadership? With rank and file?

Establish Roles of Negotiating Team Members

- Note taking responsibilities.
- Observe union team.
- Participation in at-the-table negotiations.
- Communicating with Chief Negotiator.

Establish Negotiating Goals and Authority

- Under guidance and direction of CAO, thoroughly prepare for extended closed session with the Governing Body to establish its role, general negotiating goals and review upper limits of overall authority.
- Explain process to Governing Board; the “whys” and “hows” of their policy direction and their role under it.
- Provide governing body members with all relevant information.
 - Analysis of union package, including cost and other impacts.
 - Survey data.
 - CPI data.
 - Other settlements.
 - Budget data.
 - Proposed goals (i.e., management’s proposed issues).
 - Proposed goals of union, if known.
 - Proposed upper authority for total compensation package.
 - Proposed positions on key non-economic policy issues.

Establish Communication Procedures to be Followed During Negotiations

- With Governing Body.
- With CAO and key managers.
- With agency management and supervisors.
- Question of factual negotiation bulletins to employees.

Initial Meeting

- Create constructive, friendly, professional atmosphere.
 - Introductions.
 - Basis for rapport between chief negotiators.
- Discuss negotiating procedures (ground rules).
 - Meeting schedules, location.
 - No “docking” of pay for reasonable number of employees during normal working hours (“release” time).
 - Exchange of proposals?
 - In writing?
 - Tentative agreement procedure.
 - In writing?
 - In contract language form?
 - Union negotiating team authority?
 - Confidentiality until agreement or impasse?
 - Union communications to unit employees?
 - Union communications to governing body, media?
 - Union team recommendation. Ratification procedure.
 - Submission of MOU to Governing Body.
 - Consider setting cut-off date (e.g., for proposals)

Successor Meetings

- Review union items.
 - Ask who, what, where, when, why and how questions to determine for each proposal...
 - Justification.
 - Importance to union team.

- By questioning, begin process of eroding employee expectations.
- ❑ Submit affirmative management proposals.
 - Be prepared to assume good faith obligation to explain and justify.
 - Keep union team focused on management's affirmative proposals.
- ❑ Management counter proposals.
 - Seek to negotiate from own proposals.
 - Initially resolve easier items.
 - Set positive tone.
 - But consider holding back in order to have enough to bargain with later on.
- ❑ Tradeoffs.
 - Know your priorities.
 - Determine union's priorities.
 - Determine areas of possible compromise.
 - Maximize "ante" to get as much as possible from agency concessions (make union feel they won major victory).
- ❑ Tactics. Depend on such factors as...
 - Personalities of negotiating teams.
 - Relationship between chief negotiators.
 - Agency's employee relations atmosphere.
 - Politics and political relationship between Governing Body and Union.
 - Significance of issue.
 - Parties' previous dealings.
 - Respective negotiating objectives.
 - Parties' perception of detriment of no agreement compared to detriment of making concessions.
 - Relative power factors.
- ❑ Negotiating approaches.
 - Have a high aspiration level.
 - Demonstrate good faith by:
 - Justifying positions.
 - Treating union representatives with respect.

- Be flexible to meet changing circumstances and positions.
 - Be alert to union team comments, facial expressions, “body language.”
 - Distinguish between union’s majority interests and vocal minority positions.
 - Negotiate significant money issues as a package.
 - Tie together as many unresolved issues as possible at the time major issues fall into place.
 - Clearly restate tentative agreements and reduce them to writing in clear language.
 - Maintain on-going communications with CAO and Governing Board to assure their positions are being correctly reflected.
- Avoid...
- Pushing technicalities and legalities.
 - Rejecting union proposals on ground of illegality.
 - Being pressured into making a proposal or responding to one on the spur of the moment.
 - Representing facts of which you are not sure.
 - Making commitments you may not keep.
 - Describing a proposal as the last, best offer unless you mean it.

Checklist: Negotiations Notes (Traditional Bargaining)

- Indicate the date, time, and location of the session.
- Identify the persons attending, and their arrival and departure times.
- Record discussions by topic, proposal and/or the contract section, and identify:
 - Who raised the issue?
 - The position/rationale stated.
 - Who responded and the content of the response.
- The outcome of the discussion:
 - No resolution/resolution.
 - If more information to be obtained, by whom/by when.
 - Tentative agreement - summarize, or recap, the understanding.
- Attach all proposals and supporting documents to notes of the relevant session.
- Review the notes after the session, and consider having transcribed or typed up.

- Have team members review the notes to ensure that they agree with their content.
- Retain all notes and other documents in a confidential location.
- Retain notes after agreement is reached.

b. Interest-Based Bargaining

One of the recent trends in negotiations is the use of what is commonly referred to as “interest-based bargaining.” Interest-based bargaining is known by a variety of names. Among the more common names are: integrative bargaining, principled bargaining, collaborative bargaining, best practices bargaining, mutual gain, and win-win bargaining.

Interest-based bargaining has three essential components: 1) problem solving orientation; 2) an “interest” versus a “position” approach; and 3) a modified structure/format to bargaining “at the table.”

While some advocates of the interest-based bargaining approach extol the process as fundamentally different from the traditional bargaining approach, many experts view the collective bargaining process more broadly. These experts see a difference in cultures and disagreements as an inherent part of the labor-management relationship. They view the collective bargaining process as a recognition of this (inherent) conflict and see negotiations as implicitly an adversarial process.

Interest-based bargaining seeks to channel whatever conflict exists in the labor-management relationship into the most productive direction possible. It seeks to build trust through openness and cooperation while eliminating suspicion, secrecy and competition.

As set forth in the Tables below, advocates of interest-based bargaining claim that this process differs from traditional “positional” bargaining in the following ways:

- Separates the People from the Problem
- Focuses on Interests, Not Positions
- Invents Options for Mutual Gain
- Insists on Using Objective Criteria

Positional v. Interest-Based Bargaining

POSITIONAL BARGAINING		INTEREST-BASED BARGAINING
SOFT	HARD	
Participants are friends	Participants are adversaries	Participants are problem-solvers
The goal is agreement	The goal is victory	The goal is a wise outcome reached efficiently and
Make concessions to cultivate relationship	Demand concessions as a condition of the relationship	Separate the people from the problem
Be soft on the people and the problem	Be hard on the problem and the people	Be soft on the people, hard on the problem
Trust others	Distrust others	Proceed independent of trust
Change your position easily	Dig in to your position	Focus on interests, not positions
Make offers	Make threats	Explore interests
Disclose your bottom line	Mislead as to your bottom line	Avoid having a bottom line
Accept one-sided losses to reach agreement	Demand one-sided gains as the price of agreement	Invent options for mutual gain
Search for the single answer: the one <i>they</i> will accept	Search for the single answer: the one <i>you</i> will accept	Develop multiple options to choose from; decide later
Insist on agreement	Insist on your position	Insist on using objective criteria
Try to avoid a contest of will	Try to win a contest of will	Try to reach a result based on standards independent of will
Yield to pressure	Apply pressure	Reason and be open to reasons; yield to principle, not pressure

Adapted from Getting to Yes, Negotiating Agreement Without Giving In, Fisher and Ury, Penguin Books, 1981.

TRADITIONAL	INTEREST-BASED
▪ Issues	▪ Issues
▪ Positions	▪ Interests
▪ Arguments	▪ Options
▪ Power/Compromise	▪ Standards
▪ Settle/Win-Lose	▪ Settle/Mutual Gain

While a thorough examination of the philosophy and components of interest-based bargaining are beyond the parameters of this workbook, a brief explanation is needed to understand the value of this process.²²

Interest-based bargaining contains terms that are not generally used in traditional bargaining. Accordingly, it is appropriate to review the definitions of the more commonly used terms.

<i>Issue:</i>	Means a topic or subject of negotiations
<i>Interest:</i>	One party's concern, motivation, fear or aspiration about an issue
<i>Position:</i>	One party's (predetermined) solution to an issue
<i>Options:</i>	Solutions that can satisfy an interest
<i>Standards:</i>	Objective characteristic or factors to compare and rank options
<i>Consensus:</i>	Decision reached by the group when it finally agrees upon a single alternative and each group member can honestly say: <ul style="list-style-type: none">• I believe that you understand my point of view;• I believe that I understand your point of view;• Whether or not I prefer this decision, I support it because it was arrived at openly and fairly, and it is the best solution for us at this time.

i. Features of Interest-Based Bargaining

One way to understand the process is to think of interest-based bargaining as containing the following features:

- Principles
- Assumptions
- Steps
- Techniques

1. Principles

There are four primary Principles:

- Focus on Issues Not Personalities
- Focus on Interests Not Positions
- Create Options to Satisfy Both Mutual and Separate Interests
- Rank and Evaluate Options with Standards, Not Power

2. Assumptions

There are also four Assumptions:

- Bargaining Enhances Relationships

- Both Parties Can Win
- Open and Honest Discussion Expands Mutual Interests and Options
- Standards Can Replace Power Regarding Bargaining Outcome

3. Steps

The Steps used in interest-based bargaining can be summarized as follows:

Preparation

- Preparation of information, data collecting, etc., is similar to traditional bargaining; unlike traditional bargaining however, parameters are not generally obtained prior to the start of bargaining.
- In contrast to traditional bargaining, in interest-based bargaining all group members participate in discussions; to assist the group in its discussions of issues a facilitator is selected; the parties can either select a person to act as facilitator or more commonly, appoint someone from the group to act as a facilitator on a rotating basis.
- Record keeping - is done by a designated record-keeper for the group. Most often charts are used to record the discussions of the parties.

Opening Statements

- Opening statements represent each party's goals and aspirations for the negotiating process; usually the stated goals are broad based; the parties generally reaffirm their commitment to work cooperatively toward a more effective working relationship and to use the interest-based bargaining approach as the means to achieve that relationship.
- Ground rules are used and typically include the ones used in traditional bargaining as well as those which indicate a more interest-based or collaborative approach (e.g., joint information gathering).

Identify Issues

- Clarifying and understanding the issue(s) and the problems which created the need to present the issues are essential.

Identify Interests

- Clarifying and understanding each party's interests is essential. Parties should not proceed to the next step in the process unless they thoroughly understand each other's issues and interests on a particular matter.

Create Options

Create Standards

- Use objective criteria whenever possible to focus on the option(s) which have the greatest potential for resolving a particular problem.

- Typical standards include legality, operational efficiency, safety, consistent with the marketplace, and mutual gain
- Rank and Evaluate Options with Standards
- Achieve Agreement

4. Techniques

The Techniques used in interest-based bargaining include:

- Active listening
- Brainstorming
- Consensus Seeking
- Idea Charting/Group Memory

Brainstorming is a technique for group generation of ideas. It is an informal but structured process used to generate as many ideas as possible solutions to a problem.

Brainstorming involves several steps:

- Define the problem or questions, making sure that every group member has a clear and accurate perception;
- Write the problem or question on a flip chart so that all group members can see it.
- Ask group members to present their ideas for solving the problem or answering the questions without evaluating responses.
- Record each idea on chart paper exactly as it is offered.

5. RULES OF BRAINSTORMING

- Make No Criticism
 - Judging is Forbidden
 - Focus on Likes
- Be Free-Wheeling
 - Use Imagination
 - Take Risks
- Go for Quantity
 - More Ideas the Better
 - More Variety the Better
- Combine—Expand—Hitch-Hike Ideas

- Build on Others' Ideas

a. Advantages of the Interest-Based Bargaining Approach

Interest-based bargaining has a number of advantages, including:

- Compels a Problem Solving Orientation. There is a reduction in posturing and a “buy-in” into problem solving as part of the relationship.
- Total Table Participation. Brings all issues, concerns to the table (allows the parties to discover the “true” issues). Bargaining team members are empowered.
- Brainstorming develops options which may not have been realized.
- Particularly useful in resolving non-economic issues.
- Increased potential for improvement in overall relationship (e.g., information sharing, problem sharing, honest and full communications).

b. Challenges with Interest-Based Bargaining.

Although interest-based bargaining has tremendous potential, in practice it also has tremendous challenges. Among these challenges are the following:

i. Structural Issues

One of the primary problems facing advocates of the process is constituent involvement.

Too often there is a failure to educate and train constituents (i.e., bargaining groups “too far ahead” on issues) and/or a failure to communicate with constituents (“in the dark”). To be successful, interest-based bargaining requires the parties to determine and check their constituents’ interests and to keep them informed of progress so that there can be a “buy in” into the process when problems arise.

Another problem often encountered is that there is a dependence on the relationship between key players. When these “players” leave the agency or are otherwise no longer involved, the investment and understanding of the process by others are often lacking.

A third problem is commitment to the process. Key leaders on both management and labor must view the process as important and worthy of support. Management must recognize the legitimacy of the union as (an equal) partner in the relationship. Management must also recognize that if it attempts to use interest-based bargaining in isolation, and then revert back to the “old style” when not negotiating, the union may not continue to see the value of continuing this type of relationship.

Typical stress points occur when: turnover occurs among key leaders; one side plays by the rules, the other side does not (e.g., end-runs, publicity, picketing); and continued use of parameters.

ii. Unrealistic Expectations

The reason for entering into interest-based bargaining invariably results from a situation in which the existing system is not effectively resolving the problems between the parties. Interest-based bargaining is designed to examine issues in a more non-adversarial, more interest-based approach, while seeking to resolve problems and strengthen the relationship between the parties. Unfortunately, both sides may enter into interest-based bargaining for the wrong reasons or with unrealistic expectations.

Management sometimes enters into interest-based bargaining because of: pressure from the union or the governing body; to obtain “labor peace”; it’s the latest fad; and/or it’s a way to get the union to make concessions (e.g., agree to no raise). The union, for its part sometimes enters into the process to obtain: power sharing and/or a resolution of all of its perceived problems in the workplace.

The key to success is creating realistic expectations. Initially, by understanding that interest-based bargaining is not a “cure all”; it requires a long term commitment, a recognition that mistakes and problems will occur, and the willingness to regularly check the progress of the process.

1. Conditions for Success

- Commitment
- Management Must Recognize Legitimacy of the Union
- Long Term Orientation
- Careful Consideration of Proper Linkage Between Traditional Bargaining and Problem Solving
- Establish Realistic Expectations
- Labor-Management Cooperation Programs Should Avoid Entanglement in Internal Politics
- Ownership May be Lost If Too Much Weight Placed on Role of Neutrals
- Crucial Information Must be Available to Both Parties
- Both Sides Must Articulate Objectives
- Both Sides Must Listen to One Another
- Constituent Communication is Essential
- Relative Equality of Power between Union & Management
- Trust

C. AGREEMENT AND IMPASSE

1. DRAFTING THE AGREEMENT

Being the one to draft agreement language affords both an advantage and imposes a disadvantage. The advantage is the element of control to ensure that the language correctly reflects the agreements reached. The disadvantage is that in the event the language is not completely clear, any later disputes concerning the intended meaning or effect of the language will tend to be interpreted against the drafter of the language by a court or an arbitrator.

On balance, it is suggested that the agency representatives draft the language, relying on any union proposed language to an optimum extent consistent with the agency's interest.

When reducing items of agreement into contract language, it is important to keep in mind the approaches relied on by arbitrators and judges in resolving disputes involving contract interpretation. In that regard, refer to "Criteria Used In Interpreting Agreement Language" below.

a. Criteria Used in Interpreting Agreement Language

The following material on standards used by arbitrators in disputes over interpretation of agreement language is adapted loosely from a section of the book HOW ARBITRATION WORKS by Elkouri and Elkouri, Bureau of National Affairs, Inc., Washington, D.C. (6th edition 2003). The material is based on a survey of a number of cases and must be used as a guide, not an authoritative statement of how a particular arbitrator will judge a particular case.

i. Intent of the Parties

The basic consideration for the arbitrator is what the parties intended the language in question to mean. The other criteria listed below provide "handles" which help the arbitrator determine such intent.

ii. Clarity of the Language

Language which the arbitrator finds to be "clear and unequivocal" will generally be taken at face value; that is, as sufficient indication of what the parties wanted the language to mean. For example, the use of the term "shall" or "will" means an act must be taken; whereas "may" is not considered mandatory.

iii. Specific Versus General Language

Where agreement language is specific in some respects, it will normally be held to control another more general clause.

Example: One article of an agreement specifies that management shall "continue to make reasonable provisions for the safety and health of its employees." Another clause

states that “wearing apparel and other equipment shall be provided by management in accordance with practices now prevailing...or as such practices may be improved from time-to-time by management.” How would you expect an arbitrator to rule on a case asking that rain clothes be provided to certain employees who have not had such clothes to this point?

iv. Agreement Construed as a Whole

Arbitrators normally will hold that all parts of the contract have some meaning, or the parties would not have included them in the agreement.

Example: A clause on distribution of overtime states that “Overtime will be distributed equitably among employees qualified to do the work.” It also specifies that “The distribution of overtime will not be used to either reward or punish employees.” The agreement’s “management’s rights” clause reserves to management the right to “assign work” and “maintain efficiency.” Could management use its management’s rights clause to justify denying an employee who is consistently tardy or absent a Saturday overtime assignment if other employees cannot begin their own work until the person taking that overtime assignment arrives? Would an arbitrator be less likely to accept an argument that “qualifications” for the assignment include such things as reliability, dependability, etc., if the management’s rights clause were not in agreement?

v. Bargaining History of the Language

Arbitrators generally construe ambiguous language against the party who proposed or drafted it.

vi. Interpretation in Light of the Law

Arbitrators will seek an interpretation that validates an agreement over one that invalidates it.

vii. Use of Dictionary Definition

Arbitrators will use the usual and ordinary definitions of words from a reliable dictionary when there is no mutual understanding between the parties as to a different meaning, such as if the word or phrase is specifically defined in the agreement.

viii. Assumption Against Harsh, Absurd or Nonsensical Results

Arbitrators generally will assume that the parties did not intend their language to have harsh, absurd or nonsensical consequences unless other evidence clearly points in this direction.

2. UTILIZING IMPASSE PROCEDURES

Impasse is the point in negotiations at which one or both parties determine that no further progress can be made toward reaching an agreement. It is defined as the point at which the parties have exhausted the prospects of concluding an agreement and further

discussions would be fruitless.²³ Declaration of impasse precedes implementation of impasse resolution procedures or unilateral action by the employer.

As discussed in the first part of this workbook, mediation, and, to a lesser extent, fact-finding, are impasse procedures used by public agencies.

a. Mediation

The mediator acts as an impartial “go-between” for the parties. The mediator should act strictly behind the scenes, attempting to convince one and/or both of the parties to compromise and agree. A mediator may be helpful if emotions and tensions make fruitful direct negotiations futile, or if one party or the other is convinced that it cannot achieve closure to an agreement in return for the only further concession that party is prepared to make without the pressures of mediation.

However, one should not come to rely on mediation to bring closure to every negotiation because of the danger that the union will assume that it can only get everything that is to be had by going to mediation every time.

b. Fact finding

The parties present their position to the fact-finder at a formal hearing. They present relevant data to support their position. The fact-finder then evaluates all of the evidence within the jurisdictional and procedural guidelines imposed on him or her. After evaluating the evidence, the fact-finder writes a report setting forth the facts as he or she views them, and makes a non-binding recommendation for settlement. The report is served privately on both parties. If the parties do not resolve the impasse within a specified period of time, the fact-finder makes the report public by presenting it to the legislative body.

More often than not, it is not to the advantage of the agency to move the impasse to fact-finding for the following reasons:

- **Lack of Predictability**

Fact-finding is risky in that it can result in an unfavorable recommendation. Even though the recommendation is not binding, if the agency rejects the recommendation, it may face unfavorable publicity and strong public pressure.

- **Time and Expense**

Fact-finding is likely to be expensive, due to the fact-finder’s fees, and legal fees and other expenses. It can also take several months. This can generate problems, particularly with respect to budget deadlines.

- **Effect on Negotiating Process**

Can weaken the negotiating process by replacing reliance on the give-and-take of negotiating with reliance on the opinion of an outside “expert.”

On the other hand, factors that might make fact-finding appropriate on occasion:

- **Public Opinion as Leverage in Agency’s Favor**

Obviously, fact-finding is more desirable if the agency is likely to benefit from publicity about the dispute. This may be because the union is particularly susceptible to public pressure, or because the agency’s position, in comparison, is likely to be viewed as reasonable by its constituents.

- **As a Face-Saving Measure**

Fact-finding may also be helpful if the parties need to back down gracefully from a very strong position. In this way, the fact-finder takes some of the heat, so to speak, off the parties.

- **The Likelihood of a Favorable Recommendation**

Fact-finding will be desirable if it is likely that the agency will benefit from a favorable recommendation. For example, if the agency’s position on a cost-of-living increase is reasonable in relation to settlements with other units in the agency and as compared to what other agencies are settling for, and the union’s position is unreasonable by comparison, the agency may want to take the risk that a fact-finder will agree.

c. Negotiations in an Interest Arbitration Environment

Charter cities and counties with binding arbitration of negotiating impasses should take some special steps to prepare for negotiations. Additionally, local government employers with law enforcement or firefighting employees have the possibility of facing arbitration of economic issues unresolved in negotiations (See earlier discussion on legal challenges to Code of Civil Procedure § 1299 et seq.).

i. Research Issues to be Negotiated

Conduct careful advance preparation on economic *and* non-economic issues. The line between economic and non-economic issues is blurry, so it is essential to conduct thorough planning regarding all issues in the event that they are resolved by an arbitrator. Your advocate cannot effectively represent your agency at the interest arbitration if your agency does not have this supporting survey information. Even if your agency does not go to interest arbitration, this information will assist your agency to make better-informed proposals and counter proposals. It is therefore best to go through this process before negotiations even begin.

Preparation should include:

- ❑ Collect evidence and arrange for expert witnesses prior to negotiations. For example, if your agency does not have a list of comparable agencies, it might be necessary to retain a professional survey consultant to determine a favorable list that will be accepted as legitimate by an arbitrator. The expertise that a professional survey consultant brings adds some expense to the negotiations, but will give your agency a head start, in the event of interest arbitration, as to: the appropriateness of the selected agencies; the method of surveying the agencies; and the manner in which the wages and other economics were calculated. Assessment of what the most representative “market” consists of is often a subject for expert testimony, study and analysis. Typically, the factors given the most weight are:
 - Job duties and nature of the employment;
 - Geographical spread of the “relevant labor market”;
 - Size of the employer (typically, the similarity of job duties of public employees working for different employers turns in part on the size of the employer);
 - Similarity in working conditions; and
 - Consideration of total compensation package (wages, benefits, retirement pickup, etc.)
- ❑ Research the wages and benefits of comparable employees in the comparable agencies. Examine any list of lists that the parties have historically used as well as any new list that your agency or an outside expert developed.
- ❑ Determine changes in the Consumer Price Index for your area. This information is available on the internet from the Department of Labor’s Bureau of Labor Statistics website.
- ❑ Ensure that all key decision makers in the agency are kept apprised of developments and are involved in policy decisions and the development of negotiation proposals.
- ❑ Develop sound economic proposals. The agency’s economic proposals should be consistent with the following three factors:
 - The agency’s economic proposals must be genuine, good faith proposals;
 - The agency’s economic proposals must be reasonable and supported by defensible and sound evidence, such as comparability surveys, changes in agency revenue, change in the Consumer Price Index and prevailing industry practice; and
 - The agency’s economic proposals should require the union to make takeaway concessions. The current contract is not the floor.

ii. Develop Negotiations Strategy

An employer facing the possibility of interest arbitration should consider serious, defensible management proposals as part of an overall strategy. Prioritizing these management proposals may help identify which will be presented to an arbitrator and which can be dropped or packaged with other items before arbitration.

In strategizing about management proposals, the contours of the last offer should be at least roughly anticipated before your agency puts the initial offer on the table. Your agency should also have a tentative plan for justifying your initial and final positions. Attempt to think about all of the issues from the union's perspective both to improve your agency's proposals and also to head-off incorrect union arguments.

Your agency should also have a strategic plan regarding how and when to make movement in negotiations. This includes having a plan for reaching last, best positions at the most opportune time. Remember, on economic issues there should be no commitment to individual agreements until all economic issues are resolved.

iii. Negotiations in an Interest Arbitration Environment

It is important to have a disciplined approach to negotiations when there could be an impasse that results in interest arbitration. Public agencies should consider taking the following steps during negotiations:

1. Ground Rules

If there is a possibility of interest arbitration, management may want to discuss as part of ground rules what happens in the event of such arbitration. For example, do tentative agreements unravel and proceed to arbitration or are they deemed resolved and not a disputed that goes to arbitration? What about dropped proposals? Can they resurface in arbitration? All of these are issues that management should consider before formal negotiations begin.

2. Take Good Notes

Take good notes. That sounds so simple, but it often does not happen, with potentially dire consequences in an arbitration. Accurate and thorough notes can help a public agency prove its case and defend itself in several ways.

In our experience, unions will sometimes have a plan to take negotiations to interest arbitration. In those circumstances, they carefully posture the negotiations in an attempt to be able to "blame" the impasse on the public agency. Questions can also arise during the arbitration hearing about whether a particular proposal was dropped, whether there was an understanding as to what certain contract language meant, and a myriad of other questions that can only be introduced at the arbitration through witness testimony. We have seen in these circumstances that sometimes union negotiators will be able to testify in remarkable detail to the manner in which each party presented evidence, made representations, made proposals or withdrew proposals, while management negotiators

have little or no recollection. Taking good notes will preserve a record that negotiators can use to refresh their recollection if they need to testify.

It will also be a daily reminder that everything that happens at the negotiating table could be replayed in an interest arbitration, making it necessary to remain focused on the agency's goals.

3. Costing

Carefully cost all proposals (agency and union). It is imperative for the public agency to be able to show the exorbitant cost of all union proposals and the relatively reasonable cost of all agency proposals. A component of costing is determining the amount of a 1% increase in current top-step base wage. This 1% of base wage number is used in interest arbitration to help gauge the cost and therefore, the reasonableness, of economic proposals. Focusing on this issue during negotiations will help preserve this issue for arbitration.

4. Comparable Jurisdictions

Reach agreement on comparable jurisdictions. This could be easy if the parties have historically used a particular list of agencies and there is no reason to make a change. If they have not, your agency should be ahead of the Union because your agency will have researched and developed its own list, or retained a professional survey consultant to determine an appropriate "universe" for comparison in negotiations and arbitration. It is always better to have an understanding with the Union about what jurisdictions are comparable. If there is a difference of views, the facts should be shared in negotiations so that the matter can be fully presented in arbitration.

5. Maintain a Balance of Issues on the Table

Strive for agreement but maintain an appropriate number of important issues on the table pending arbitration, consistent with what the Union is maintaining. While it is important to develop management economic proposals during the planning phase, it is equally important not to prematurely withdraw them during negotiations.

3. UNILATERAL IMPLEMENTATION

If negotiations in a non-interest arbitration environment are unsuccessful in arriving at an agreement, and if any impasse procedures that are utilized do not resolve the impasse, then the governing body may choose to exercise its legal option to unilaterally implement changes in compensation or other employment terms.

Unilateral implementation action may be taken only after good faith negotiations have reached a bona fide impasse and required impasse procedures have been fully utilized in good faith.²⁴ The negotiating obligation is revived by the issuance of fact-finding recommendations, and impasse is deemed broken if the union then makes a significant shift in its negotiating posture, thereby precluding the agency from unilateral implementation unless and until impasse is again reached in the post fact-finding

negotiations.²⁵ Post-impasse changes in position by either the employer or the union will break the impasse.

Then, and only then, can the agency take unilateral action. What changes in employment terms can the Governing Body then unilaterally implement? Only those offered to the union negotiating representatives and rejected by them. If the agency chooses to take unilateral action, it must only implement its last, best and final offer, and only a pre-impasse proposal rejected by the union. It may not, for example, implement recommendations of a fact-finding panel even though these may be more favorable to the union.²⁶

It is particularly important that any unilateral implementation action be carefully structured to comply with these legal restrictions because the chances of legal challenges by unions to such action are normally very high. (Refer to the following checklist.)

Checklist: Unilateral Implementation by Agency

- Agency engaged in good faith negotiations to impasse.
- Agency participated in good faith in any impasse procedure required by local ordinance or resolution.
- If impasse procedure included fact-finding, agency offered to participate in renewed negotiations based on fact-finding recommendations; and if such post fact-finding negotiations occurred, that agency representatives participated in good faith to renewed impasse.
- If impasse broken by union request to negotiate accompanied by substantive change in union position(s), agency representatives resumed good faith negotiations to renewed impasse.
- Agency complied with all elements of the impasse and implementation procedures required by its own ordinance or resolution.
- Union put on notice that governing body will consider the impasse at a specified public meeting.
- Union given an opportunity to address issue at meeting.
- Governing body may deliberate the matter in closed session, and announce its closed session action at that meeting; or take action at a subsequent public meeting; or announce that it intends to take no action on the impasse. Refer to Brown Act requirements.
- Governing body may consider only the disputed issues submitted to it.
- Governing body may only unilaterally implement an offer made by agency representatives to union negotiators and rejected by union.
- This should include offer as a whole - not some parts only, or offer with some modifications. It is especially risky to include regressive proposals or positions.

- ❑ Generally this should be the agency’s last, best offer made to union.
- ❑ Since the union has right under the MMBA to negotiate increased compensation for each budget year, unilateral implementation action can only be for the remainder of the current fiscal year.

4. CONCERTED ACTIVITY

Protected concerted activity occurs when two or more employees act together to protest or complain about terms and conditions of employment, such as wages and benefits. The MMBA protects an individual employee’s right to engage in, or not to engage in, protected, concerted activities.

Certain forms of concerted activity can impact the workplace, agency services, labor relations and the negotiations process. These types of activity include information distribution (i.e. flyers), picketing and work stoppages, or “strikes.”

a. Types of Concerted Activity

i. Information Distribution

During the negotiation process, employee associations will often distribute flyers or leaflets. See Section above regarding *Union Use of Agency Communication Systems* for information regarding Union use of agency mailboxes, email and internet for distribution purposes. Leafleting is protected conduct under the First Amendment of the U.S. Constitution.²⁷ PERB has also held that leafleting is protected under EERA if the leaflet is the product of an employee organization, and the content is not malicious or defamatory.²⁸

ii. Picketing

Peaceful, informational picketing at an employer’s facility for the purpose of informing the public is a lawful, First Amendment-protected activity.²⁹ An agency must have a compelling governmental interest to override this free speech right (i.e. disruption of governmental operations).³⁰ Generally, an agency cannot seek to enjoin peaceful picketing or leafleting in furtherance of a labor dispute.³¹ A court can, however, place reasonable restrictions on disorderly conduct, unlawful blocking of access or egress to premises where a labor dispute exists, or other unlawful activities involving a labor dispute.³² And, courts can restrict picketing in a residential area if it invades the tranquility of one’s home.³³

In deciding the legality of picket line conduct, PERB will review whether the conduct reasonably tends to coerce or intimidate non-striking employees in the exercise of their rights not to participate in a strike.³⁴ Threats of physical violence and bodily injury are unlawful, but name calling and abusive language and vulgar epithets are not enough to constitute a violation. Furthermore, short delays in getting to the work site that are not accompanied by violence are not unlawful intimidation or coercion.³⁵

1. Sympathy Strikes/ Honoring Picket Lines

A sympathy strike is the concerted refusal to cross the lawful picket line of another union. The right to engage in a sympathy strike may be waived only by a clear and unmistakable waiver.³⁶ PERB has held that a general “no strike” clause in an MOU does not prohibit sympathy strikes.³⁷

iii. Work Stoppages – Right to Strike

If the union in good faith participates in negotiations to impasse, and participates in good faith in any required impasse procedures, it may then engage in a strike to the extent such a strike does not pose a “substantial and imminent threat to public health or safety.”³⁸ However, a strike prior to the completion of impasse procedures is a violation of the duty to bargain in good faith, and is an unfair practice that PERB can enjoin.³⁹ Only firefighters are prohibited by statute from striking or from recognizing a picket line of a labor organization.⁴⁰ By judicial decision, police officers are prohibited from striking as well due to the threat to public safety.⁴¹

1. Types of Work Stoppages

Below is a list of various types of work stoppages. Note that all illegal or prohibited types of strikes are subject to injunction.

Economic Strike: a strike to gain concessions at the bargaining table

Illegal Strike: a strike that poses a substantial and imminent threat to health and public safety (i.e. firefighters’ strike); a strike that violates a “no strike” clause; a strike prior to completion of impasse procedures.

Intermittent Strike: a series of intermittent strikes (i.e. one-day long). A series of one-day strikes within two months following completion of impasse procedures was unprotected and an unlawful partial strike.⁴² But an employer cannot respond with a lockout or discharge of economic strikers.

Legal Strike: a strike not prohibited by common or statutory law. A legal strike may still be subject to discipline if the strike is not protected under labor statutes.

Partial Strike: where employees attempt to work and strike at the same time; strikes of short duration are presumptively protected.

Protected Strike: a strike protected by labor statutes (e.g. unfair practice strike).

Slowdown: employees accept compensation while slowing down their production. This is unprotected activity for which employees may be disciplined.

Sit-in Strike: employees stop work, but remain on the employer’s premises in order to prevent work. This is unprotected activity for which employees may be disciplined.

Sympathy Strike: A strike in sympathy with other striking employees or bargaining unit. The legality of such a strike depends on whether a “no strike” clause is in effect.

Unfair Practice Strike: a strike to protest employer unfair practices. If precipitated by employer unfair labor practices, such a strike is generally permitted, absent any substantial and imminent threat to health and public safety.

Wildcat Strike: a strike by employees that has not been approved by the exclusive collective bargaining agent or the union.

While many of the above-listed types of strikes are illegal, the alleged illegality of a strike is not a valid defense to a public employer’s refusal to meet and confer.⁴³

2. Effect of Expiration of Collective Bargaining Agreement

The good faith obligation requires that the employer maintain the status quo as to wages, benefits and working conditions during negotiations on a new agreement, after expiration of the predecessor agreement. The status quo includes what was in the expired contract.⁴⁴ After the expiration of the contract the employer may not make a change in terms and conditions of employment, but an arbitration provision will not be extended to require arbitration of post-expiration disputes, unless drafted to require express extension of that provision.⁴⁵

Many collective bargaining agreements will include a “no strike” clause. Generally, a “no strike” clause will expire with the contract. Also, an organizational security clause will expire with the contract, unless the agency shop agreement is contained outside of the MOU, or unless agency shop was obtained by election under Government Code § 3502.5(b).

APPENDIX A

LABOR RELATIONS TERMINOLOGY

Agency Shop:

An agreement under which all employees covered by a bargaining agreement are required, as a condition of employment, to either become union members or pay service fees to the union. Employees who object on religious grounds to supporting unions must pay an amount equal to union dues to a non-labor, non-religious charity.

Arbitration:

A method of resolving disputes between an employer and employee organization by submitting the dispute to a neutral third-party, whose decision may be binding or merely advisory. “Grievance” or “rights” arbitration is typically the final step in resolving disputes over interpretation or application of an existing agreement. “Interest” arbitration is a procedure for resolving impasse in negotiations concerning terms for a new agreement.

Authorization Card:

A form signed by an employee authorizing a union to represent him or her in relations with an employer.

Bargaining Unit:

A group of employees who share a community of interest and form an appropriate grouping to be represented by a union for the purpose of collective bargaining. All employees holding positions included in the bargaining unit are covered by the agreement between the employer and employee organization, whether or not they are dues-paying union members.

Binding interest arbitration:

An impasse procedure in which unresolved issues are submitted to an arbitration panel that has the power to decide which party’s proposal will be implemented.

Business agent:

A full-time employee of a labor union who represents the union in negotiations and perform tasks (such as grievance processing) necessary to the enforcement of the agreement. Also called “field representative”, “labor representative”, or “union representative.”

Caucus:

A recess during negotiations when either the union’s or employer’s bargaining committee needs to discuss an issue in private.

Certification:

Formal recognition of a union as the exclusive representative of a bargaining unit, typically following a representation election by employees in the bargaining unit.

Certified Employee Organization (or Representative):

A union that has been certified as the exclusive representative of employees in a bargaining unit.

Checkoff:

An arrangement whereby union dues, assessments, and other fees automatically are deducted from employee paychecks by the employer and forwarded to the employee organization.

Confidential Employee:

An employee who is privy to information that affects employee relations. The MMBA permits employers to adopt rules for designating confidential employees, and for excluding them from representing any employee organization that represents other employees in the agency.

Contract:

See Memorandum of Understanding.

Contract Bar:

A rule prohibiting a rival employee organization from attempting to decertify the exclusive representative during the life of a bargaining agreement between the employer and employee organization.

Contracting Out:

Employment of outside contractors to perform work formerly performed by the employer's employees.

Decertification:

Withdrawal of recognition of a union as the exclusive representative of a bargaining unit, usually following an election by the employees in the unit.

Duty of Fair Representation:

The responsibility of the exclusive representative to fairly represent all members of the bargaining unit, including those who are not members of the union.

Exclusive Representative:

A union that has been recognized as having exclusive authority to negotiate wages, hours, and working conditions on behalf of an employee bargaining unit.

Factfinding:

A method of impasse resolution that involves investigation of a labor-management dispute by a neutral third party. The factfinder reports the results to the parties, usually including recommendations for settlement.

Fair Share Fee (also known as “Service Fee”):

In agency shop units, an assessment paid by non-members of the union for representation services.

Favored-Nations Clause:

A provision in a contract that gives the union the chance to share in the terms of a more favorable contract if another union within the jurisdiction later negotiates a better deal with management.

Good Faith:

The mutual obligation of the employer and the employee organization to negotiate over mandatory subjects of bargaining. In practical terms, this means approaching bargaining with an open mind, following procedures that will enhance the prospects of settlement, being willing to meet as often as necessary, providing the union with information it needs to bargain meaningfully, discussing the demands of employees freely and justifying negative responses to these demands, and considering compromise proposals.

Grievance:

A complaint that the bargaining agreement (or other policies and procedures of the agency) has been violated.

Impasse:

The point in negotiations at which one or both parties determine that no further progress can be made toward reaching an agreement. Declaration of impasse usually precedes implementation of impasse resolution procedures or unilateral action by the employer. The only impasse resolution procedure authorized under MMBA is mediation, but agencies may adopt other procedures such as arbitration or factfinding.

Job Action:

Concerted activity by employees, designed to influence bargaining. These include actions such as work stoppages or slowdowns, sickouts, and protest demonstrations.

Labor-Management Advisory Committee:

Groups with representatives from both labor and management that meet between negotiations to work out troublesome, unresolved issues. These committees do not negotiate.

Last, Best, and Final Offer:

The final proposal. Submitting the last, best and final offer signals a serious intent to settle by notifying the other side that you have reached your bottom line.

Lockout:

An employer's refusal to allow employees to work or be paid in order to gain bargaining concessions from an employee organization.

Maintenance of Membership:

A union security provision within a contract, stating that once employees join the union, they must maintain their membership for the duration of the contract. There typically is a window in the term of the contract during which employees may withdraw from the union.

Mediation:

A method of resolving impasse in which a neutral third-party, or mediator, assists the parties in reaching agreement. The mediator's role is to act as a go-between and help the parties discover areas of agreement.

Meet and Confer:

Refers to the process where the parties bargain on negotiable subjects and attempt to reach agreement.

Meet and Consult:

The process where the parties meet to discuss labor relations rules.

Memorandum of Understanding (MOU):

An agreement between management and labor concerning wages, hours, and conditions of employment for a stated period of time that is reached as a result of collective bargaining. Also called a contract or a collective bargaining agreement.

Negotiation:

The process by which union and management representatives strive to reach agreement on subjects within the scope of representation. The process involves the exchange of information, the presentation of proposals and counterproposals, and the expression of opinions concerning bargaining positions.

Organizational Security:

A provision in a contract that protects the employee organization by assuring it income through membership dues or agency fees. See Agency Shop, Checkoff, and Maintenance of membership.

Past Practice:

An unwritten but long-standing practice or procedure that has become the customary and expected practice. In absence of contract language on a subject, past practice may be binding.

Ratification:

Formal approval of a tentative agreement by submitting it to the rank-and-file union membership for a vote.

Reopener clause:

A provision of a collective bargaining agreement that states the time and circumstances under which parties can reopen negotiations on some part of the contract before it expires and negotiations begin on a full successor agreement.

TA:

Short for “tentative agreement,” the process of signing-off on portions of the contract as negotiations progress. TAs often are conditioned on reaching agreement on the whole contract.

Unfair Labor Practice:

An allegation that management or the union has violated the controlling statute (MMBA, EERA, etc.). In the context of negotiations, this involves practices such as refusing to meet at reasonable times, refusing to provide information, or “surface” bargaining in which one participant does not intend to reach agreement. Unfair practices also include interfering with employees’ rights to organize, or retaliating against employees for engaging in protective activity, such as filing grievances.

Zipper clause:

A provision in a collective bargaining agreement which specifically states that that written agreement is the complete agreement of the parties, and anything not contained therein is not agreed to unless put into writing and signed by both parties. Depending on how it is drafted, it can impact the employer’s flexibility to make changes to items within the scope set forth outside the MOU (practices, policies, etc.).

APPENDIX B

SAMPLE CITY RIGHTS CLAUSE

It is understood and agreed that the City retains all of its powers and authority to manage municipal services and the work force performing those services.

It is agreed that during the term hereof, the City shall not be required to meet and confer on matters which are solely a function of management, including the right to:

- Determine and modify the organization of City government and its constituent work units.
- Determine the nature, standards, levels, and mode of delivery of services to be offered to the public.
- Determine the methods, means, and the number and kinds of personnel by which services are to be provided.
- Determine whether goods or services shall be made or provided by the City, or shall be purchased, or contracted for.
- Direct employees, including scheduling and assigning work, work hours, and overtime.
- Establish employee performance standards and to require compliance therewith.
- Discharge, suspend, demote, reduce in pay, reprimand, withhold salary increases and benefits, or otherwise discipline employees, subject to the requirements of applicable law.
- Relieve employees from duty because of lack of work or lack of funds or for other legitimate reasons.
- Implement rules, regulations, and directives consistent with law and the specific provisions of this MOU.
- Take all necessary actions to protect the public and carry out its mission in emergencies.
- Determine the content of job classifications.
- Contract out and transfer work out of the bargaining unit.

Decisions under this Article shall not be subject to the grievance procedure herein.

APPENDIX C

SAMPLE UNION SECURITY CLAUSES

Preliminary Comments

Beyond membership dues/initiation fee/assessment payroll deductions (“checkoff”), the parties may under the MMBA negotiate “maintenance of membership” and “agency shop” provisions. Agency shop arrangements can also be voted in by employees in accordance with the procedures discussed below.

Maintenance of Membership: Requires specified unit employees who voluntarily joined or will join the Union to retain such membership for such term of the MOU (subject to negotiated specified open [resignation] periods).

Agency Shop: Requires specified unit employees who chose not to join the Union to pay the Union a service fee (“fair share fee”) to compensate the Union for its representational services, such as collective bargaining, contract administration, and grievance adjustment.

A service fee should not exceed the standard initiation fee, periodic dues and general assessments of such organization for the duration of the agreement. Such a “union security” provision is a major bargaining goal for most unions in their negotiations with the employer.

California Government Code section 3502.5 authorizes an agency shop arrangement without a negotiated agreement upon a signed petition by a minority of 30% of the employees in the bargaining unit. After the submission of the petition, an election will be held, and if the majority of employees voting vote in favor of the agency shop, it will be implemented. The amendment also provides that the petition can be filed only after 30 days of negotiations.

California Government Code section 3502.5(d) provides that a negotiated agency shop provision can be rescinded during the term of the MOU only by a majority vote of all unit employees, in accordance with statutory requirements. An elected agency shop provision may be rescinded in accordance with the same procedures.

Under U.S. Supreme Court decisions, such service fees may only be the service fee payer’s proportionate share of Union expenditures “necessarily or reasonably incurred” in connection with the Union carrying out its obligations of fair representation as the exclusive representative of all unit employees, and may not be expended for partisan political or ideological purposes. (*See Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* (1984) 466 U.S. 435, 104 S.Ct. Rptr. 1883).

Further, the U.S. Supreme Court has imposed on unions the obligations of providing financial information and an administrative appeals mechanism to facilitate making available to non-members a meaningful and prompt opportunity to challenge the propriety of the union's use of such service fee funds. (*See Chicago Teachers Union Local 1 v. Hudson* (1986) 475 U.S. 292, 106 S.Ct. Rptr. 1066).

In *Mitchell v. Los Angeles School District* (9th Cir. 1992) 963 F.2d 258 *cert. denied* (1992) 113 S.Ct. 375, the court rejected the argument that affirmative consent to deduction of full agency fees from non-union employees was required. Non-union members' rights are adequately protected when they are given the opportunity to object and pay a fair share fee to support the union's representation costs.

There are many variations possible in negotiating a more or less encompassing agency shop provision, e.g., applies only to future unit employees ("modified agency shop"), requires majority approval by unit employees of the agency shop provision in a vote separate from the MOU ratification vote as a condition of implementing it, allowing for rescission elections during the term of the MOU, an employee's failure to pay is not a condition of employment and therefore not grounds for termination, employees authorized to pay directly to the Union rather than through contractually required payroll deductions, and others.

Moreover, employers who negotiate such Union security provisions will want to consider proposals that require the Union to reimburse them for the administrative cost incident to effectuating and disbursing such funds to the Union. One approach is to negotiate this by specifying a certain amount per deduction or per payroll period.

Under law, the Union and the employer are potentially liable to employees that are required to pay a service fee which violates employees' rights. It is thus essential that negotiated agency shop provisions clearly impose specific obligations and responsibilities on the Union and contain comprehensive indemnification language to protect the employer to the maximum extent possible.

General: Union security, particularly agency shop provisions, are a highly sought after goal of most unions, and thus employers have typically sought significant "quid pro quos" in return. When agency shop provisions are negotiated into agreements, management invariably seeks protection from litigation and its resulting costs, and most often obtains desired negotiating provisions as "tradeoffs" for its agreement. Under Government Code Section 3502.5 there is less incentive for a labor organization to agree to a negotiated agreement, when it can obtain its desired goal without trading off anything of significance. Instead, it could demand negotiations, negotiate for 30 days, then submit its petition. Although Section 3502.5(b) does contain indemnification and hold harmless language for agency fee arrangements, its failure to mention an employee organization's obligation to defend any action against an employer raises concerns about the adequacy of the protection for employers. Clearly it is in the best interest of both the Union and the employer to come to agreement on agency shop.

Both parties have an interest in language regarding the “nuts and bolts” of how agency shop works. Employers should also seek clearer and more comprehensive hold harmless and indemnification language. The following sample MOU counterproposals contain language addressing the respective rights and obligations of management and the Union under “Maintenance of Membership” and “Agency Shop” arrangements.

“Maintenance of Membership” Counterproposal

All regular full-time (non-managerial, supervisory, confidential)¹ employees who chose to belong to or become members of the Union, shall be required² to maintain their membership in the Union in good standing during the term of this MOU, subject however, to the right to resign from membership effective during any of the following resignation periods:

- (a) The first thirty-day period after this MOU is ratified and adopted by the Union and the City.
- (b) The first thirty-day period after an employee initially falls within the coverage of this Section.
- (c) The first thirty-day period of the second and third contract years of this MOU.

Any unit employee may exercise his rights to resign by notice in writing to the Union and to the City prior to or during the said resignation periods.

“Agency Shop” Counterproposal

- 1) All regular full-time non-probationary unit (non-managerial, supervisory, confidential)³ unit employees who on the effective date of this MOU are members of the Union in good standing and all such employees who thereafter voluntarily become members of the Union shall (as a condition of employment)⁴ pay a representation service fee that represent each such employee’s proportionate share of the Union’s cost of meeting and conferring and administering the MOU beginning ninety days after the MOU is ratified and adopted by the Union and the City, or after an employee attains such status, or after the Union has provided the employee(s) and the City with the legally requisite expenditure information (paragraph 3 below), whichever is latest. Such representation service fee shall in no event exceed the regular, periodic membership dues paid by unit employees.

¹ If these are included in the unit.

² It is suggested that, at least initially, the counter not include this provision.

³ If these are included in the unit.

⁴ It is suggested that, at least initially, the counter not include this provision.

- 2) The representation service fee arrangement provided by this Section may be rescinded by majority vote of all unit employees determined in a secret ballot election in which all regular full-time (non-managerial, supervisory, confidential)⁵ unit employees are eligible to vote provided that (a) a request for such vote is supported by a petition containing the signatures of at least thirty percent of the employees in the unit, and (b) the vote may be taken at any time during the term of the MOU, but in no event shall there be more than one vote taken during any one contract year. The sufficiency of petitions shall be determined, and the election conducted by the State Mediation and Conciliation Service or any other entity or individual(s) agreed to by the Union and the City.
- 3) A unit employee who is subject to the payment of a representation service fee hereunder shall have the right to object to any part of that fee payable by him or her which is claimed to represent the employee's additional pro rata share of expenditures by the Union that is in aid of activities or causes of a partisan political or ideological nature, or that is applied towards the cost of benefits available only to members of the Union, or that is utilized for expenditures that are not necessarily or reasonably incurred for the purpose of performing the duties incident to meeting and conferring or administering the MOU.

Prior to a unit employee having any obligation to pay a representation service fee hereunder, the Union must have given sufficient financial information to such unit employees to allow them to gauge the propriety of the Union's representation service fee. This information must be updated by the Union and provided to unit employees and the City at least annually. The financial information must be itemized and adequately describe all categories of expenses, and the information must be verified as complete and accurate by a qualified independent auditor. The information must cover local expenditures as well as uses made by county, state, national and international organizations with which the local Union is directly or indirectly affiliated and to whom the local Union transmits a portion of its dues and/or representation service fee funds.

The Union shall make available, at its expense, an expeditious administrative appeals procedure to unit employees who object to the payment of any portion of the representation service fee. Such procedure shall provide for a prompt decision to be made by an impartial decision-maker jointly selected by the Union and the objecting employee(s). A copy of such procedure shall be made available by the Union to Non-Union member unit employees and the City.

- 4) Any employee who is a member of a religious body whose traditional tenets or teaching include objections to joining or financially supporting employee organizations shall not be required to financially support the Union. Such employee, in lieu of a representation service fee, shall instruct the City in writing, with a copy to the Union, to deduct and pay a sum equal to the representation service fee to a non-religious, non-labor charitable organization selected by such

⁵ If these are included in the unit.

employee, or, in the absence of such selection, as agreed upon by the Union and the City.

- 5) When an authorized agent of the City is served with written notice by a concerned unit employee or employees, or by the Union that a dispute exists between such unit employee or employees and the Union involving claimed violation of employee rights with respect to (1) representation service fee expenditures or obligations by the Union, or (2) employee exemption pursuant to paragraph 4, the City shall thereafter deposit such disputed dues or fees in an interest bearing escrow or comparable account pending final resolution of the dispute, and shall so advise in writing the employee or employees and the Union. The City shall not be obligated to take any other or further action pending final resolution of the dispute. Final resolution as used in this subdivision shall mean resolution of the dispute by way of legally binding settlement agreement between the employee(s) and the Union, or non-appealable final judgment of an administrative agency and/or court of competent jurisdiction. The sole obligation of the City with respect to such disputes is as set forth in this paragraph. The City shall not be made a party to administrative or court proceedings except to the limited extent where such administrative body and/or court determine such to be necessary for the purpose of enforcing its order or judgment. In such event, the City shall be entitled to payment of its attorney fees and costs by the Union.
- 6) The Union agrees to hold harmless, indemnify and defend the City and its officers, employees and agents against any and all claims, proceedings and liability arising, directly or indirectly, out of any actions taken or not taken by or on behalf of the City under this Section.
- 7) This Article shall not be included in the MOU, and shall not be binding in any manner, unless a majority of (non-managerial, supervisory, confidential) unit employees vote in favor if its inclusion in a secret ballot election conducted by the State Mediation and Conciliation Service separate from the Union's MOU ratification election.

APPENDIX D

SAMPLE GROUND RULES AGREEMENT

The <EMPLOYEE ORGANIZATION> and <EMPLOYER> agree on the following ground rules for meeting and conferring until settlement is reached to modify the current collective bargaining agreement or until one of the parties [or PERB] determines that an impasse exists.

1. Meetings shall occur at mutually acceptable dates, time and locations. Any changes shall be discussed at least 24 hours in advance.
2. Release time shall be one hour before the scheduled meeting time and end one hour after each session is completed.
3. The <EMPLOYEE ORGANIZATION> and <EMPLOYER> shall designate a chief spokesperson.
4. The chief spokesperson of either party may call a caucus at any time. The party hosting the meeting shall leave the room or furnish a private room where either party may request to caucus. The party requesting the caucus should give an estimate of the time needed.
5. Only the chief spokesperson or his or her designee shall transmit or receive documents between the two parties. Enough copies of each document shall be provided for each member of the other party, unless otherwise agreed.
6. All proposals and counter proposals shall be in writing.
7. Any written or verbal press releases or statements to the press or public regarding the substance of negotiations shall be done through mutually agreed-to releases or statements.
8. As agreements are reached they shall be put in written form, dated and timed, and labeled as Tentative Agreements, and two copies of each shall be signed by the chief spokesperson for each party.
9. Agreements on specific items of negotiation shall not be binding on either party until the entire package of Tentative Agreements is ratified /approved by both parties.
10. When the complete package of Tentative Agreements is accepted, the negotiating teams of both parties shall promote the ratification/ approval of the package by their respective sides.

FOR THE EMPLOYEE ORGANIZATION

FOR THE EMPLOYER

ENDNOTES

- ¹ *California Dept. of Personnel Admin.* (1993) PERB Dec. No. 995-S; *Compton Community College District* (1989) PERB Dec. No. 728; *Stockton Unified School District* (1989) PERB Dec. No. 143.
- ² See *Muroc Unified School District* (1978) PERB Decision No. 80.
- ³ See *Marin Community College District* (1995) PERB Decision No. 1092.
- ⁴ *Rio Hondo Community College District* (1980) PERB Decision No. 128, cited in State Bar of California, *California Public Sector Labor Relations* (2007) §10.05(7)(a).
- ⁵ *Temple City Unified School District* (1990) PERB Decision No. 841; *Oak Park Unified School District* (1998) PERB Decision No. 1286; *Clovis Unified School District* (2002) PERB Decision No. 1504.
- ⁶ See *Alhambra City and High School Districts* (1986) PERB Decision No. 560.
- ⁷ See *San Francisco Unified School District* (1983) PERB Decision No. 317; *Clovis Unified School District* (1978) PERB Decision No. 61; and *Regents of University of California* (1983) PERB Decision No. 366-H.
- ⁸ See *Alhambra City and High School Districts* (1986) PERB Decision No. 560; *Muroc Unified School District* (1978) PERB Decision No. 80; *Los Angeles Unified School District* (1988) PERB Decision No. 659.; and *Rio Hondo Community College District* (1980) PERB Decision No. 128.
- ⁹ *Marin Community College District* (1995) PERB Decision No. 1092.
- ¹⁰ See *Rio Hondo Community College District* (1980) PERB Decision No. 128. NLRA is codified at 29 U.S.C, sections 151-168. Section 8(c) states: The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.
- ¹¹ *Rio Honda Community College District* (1980) PERB Decision No. 128.
- ¹² *Muroc Unified School District* (1978) PERB Decision No. 80.
- ¹³ *Oak Park Unified School District* (1998) PERB Decision No. 1286.
- ¹⁴ Gov. Code § 3507(a).
- ¹⁵ See *State of California (Department of Personnel Administration et al.)* (1998) PERB Dec. No. 1279-S.
- ¹⁶ See *State of California (Department of Personnel Administration et al.)* (1998) PERB Dec. No. 1279-S.
- ¹⁷ See *In re Adtranz*, (2000) 331 NLRB No. 40, 2000 WL 739735, vacated in part, 253 F. 3d 19 (D.C. Cir. 2001) (the part of the case dealing with the employer's right to restrict use of e-mail was affirmed.)
- ¹⁸ See *State of California (Department of Personnel Administration et al.)* (1998) PERB Dec. No. 1279-S.
- ¹⁹ See *State of California (Department of Personnel Administration et al.)* (1998) PERB Dec. No. 1279-S.
- ²⁰ *The Guard Publishing Company* (2007) 352 NLRB No. 70.
- ²¹ *The Guard Publishing Company* (2007) 352 NLRB No. 70.
- ²² A more thorough examination of the interest-based bargaining process can be found in Fisher and Ury, *Getting to Yes, Negotiating Agreement Without Giving In* (1981).

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- 23 *Modesto City Schools* (1983) PERB Dec. No. 291.
- 24 *Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191.
- 25 *PERB v. Modesto City School Dist.* (1981) 136 Cal.App.3d 881.
- 26 *PERB v. Modesto City School Dist.* (1982) 136 Cal.App.3d 881.
- 27 *Thornhill v. Alabama* (1940) 310 U.S. 88, 102; *Thomas v. Collins* (1944) 323 U.S. 516, 532; *United Farm Workers of America v. Superior Court* (1975) 14 Cal. 3d 902, 912; *Pittsburg Unified School District v. California School Employees Ass'n* (1985) 166 Cal.App.3d 875, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.14.
- 28 *Mt. San Antonio Community College District* (1982) PERB Dec. No. 224, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.14.
- 29 *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-103; *Thomas v. Collins* (1944) 323 U.S. 516, 532; *United Farm Workers of America v. Superior Court* (1975) 14 Cal. 3d 902, 912; *In re Berry* (1968) 68 Cal.2d 137, 152-155; *McKay v. Retail Auto. S.L. Union no. 1067*(1940) 16 Cal.2d 311, 319, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.11.
- 30 *Bakery & Pastry Drivers etc. v. Wohl* (1942) 315 U.S. 769, 773; *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766, 770; *Trustees of Cal. State Colleges v. Local 1352, San Francisco State College Federation of Teachers* (1970) 13 Cal.App.3d 863, 868, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.11.
- 31 Code Civ. Pro. § 527.3(b).
- 32 Code Civ. Pro. § 527.5.
- 33 *Annenberg v. Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App. 3d 637, 642 cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.11.
- 34 *Fresno Unified School District* (1982) PERB Dec. No. 208, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.11.
- 35 *Fresno Unified School District* (1982) PERB Dec. No. 208, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.11.
- 36 *Children's Hospital of Oakland v. California Nurses Association* (9th Cir. 2002) 283 F.3d 1188, 1192, cited in State Bar of California, *California Public Sector Labor Relations* (2007) ¶ 25.15.
- 37 *Oxnard Harbor District* (2004) PERB Dec. No. 1580-M; but see *Regents of the University of California* (2004) PERB Dec. No. 1638-H.
- 38 *County Sanitation District No. 2 v. Los Angeles County Employee Association* (1985) 38 Cal.3d 564.
- 39 *County Sanitation District No. 2 v. Los Angeles County Employee Association* (1985) 38 Cal.3d 564.
- 40 Labor Code §§1961, 1962.
- 41 *City of Santa Ana v. Santa Ana Police Benevolent Assn.* (1989) 207 Cal.App.3d. 1568.
- 42 *Fremont Unified School Dist* (1990) PERB Dec. No. I054B.
- 43 *IBEW v. City of Gridley* (1983) 34 Cal.3d 191, 196-206; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905.
- 44 *San Joaquin County Employees Ass'n v. City of Stockton* (1984) 161 Cal.App.3d 813.
- 45 *Litton Financial Printing Div. v. NLRB* (1991) 501 U.S. 190.