



Collective Bargaining for Elected Officials

An Overview

By Dan Rowan

Collective bargaining is a unique negotiation process used to establish the terms and conditions of employment for more than one-half of the public employees in Oregon. At one time or another, we have all been negotiators. Whether buying a car or deciding a child's bedtime, everyone has participated in the give and take that ends up with an agreement. Experience tells us a successful outcome often depends on a solid understanding of the process and the role of the participants. Elected officials who understand the basics of collective bargaining are better able to make responsible decisions that balance the interests of employees with the welfare of the electorate.

The Bargaining Process

Collective bargaining for public employees in Oregon follows the framework established by the Public Employee Collective Bargaining Act or PECBA (ORS 243.650–243.782) and the relevant Oregon Administrative Rules (OAR 115-010-0000–115-086-0020.) The Oregon Employment Relations Board is responsible for implementing PECBA and overseeing the resolution of public sector labor disputes.

PECBA gives employees the right to representation by a labor organization and the right to bargaining collectively through a chosen representative. A group of employees that bargains collectively is known as a bargaining unit. Once a bargaining unit has chosen a labor organization as its representative, the labor organization has the responsibility of negotiating the terms of employment for all employees in the bargaining unit. Strictly speaking, not all labor organizations are unions, but the terms “union” and “labor organization” are often used interchangeably.

Once a group of public employees chooses a labor organization, the law requires the public employer to meet and bargain in good faith over the terms and conditions of employment for the represented employees. The collective bargaining process typically begins prior to the expiration of an existing contract or when a labor organization is first certified. Once the employer receives a demand to bargain, the parties schedule an initial bargaining session. Often the parties begin by agreeing to ground rules that set the parameters for negotiations.

Negotiations typically span multiple bargaining sessions in which the two sides exchange proposals and counterproposals regarding the contents of the new contract. In addition to wages and benefits, contracts include provisions governing discipline, hours of work, and a variety of other subjects. Parties generally bargain over non-economic issues before reaching wages, health care, and other economic issues. Proposals usually consist of draft contract language and may cover a single issue or be “packaged” to address multiple subjects.

In most negotiations, the parties sign tentative agreements for each open issue. These agreements are “tentative” because the bargaining unit must ratify the new contract before it takes effect. Most public employers also require ratification of the tentative agreements by the governing body as a condition of negotiations. However, an employer's negotiating team must make this condition known to the union at the outset of bargaining. If either side fails to ratify, the parties return to the bargaining table.

In addition to giving public employees the right to organize and bargain, PECBA defines the rights of the parties when no agreement is reached during the normal course of bargaining. Once the parties have bargained for 150 days without reaching an agreement, either side can request mediation with the assistance of the state's Conciliation Services office. The parties must participate in mediation for a minimum of 15 days before either side can declare impasse. Mediation and a declaration of impasse are prerequisites to proceeding to the final stage of the dispute resolution process.

How labor negotiations proceed once the parties reach impasse depends on the type of employees represented. State law prohibits police officers, firefighters, deputy district attorneys, emergency telephone workers, parole and probation officers, corrections officers, and mass transit employees from striking. Instead of the right to strike, impasse for these employees is resolved through binding interest arbitration. The issue during interest arbitration is which of the parties' final bargaining positions, contained in each side's “last, best offer,” will become the new labor contract. Each side presents evidence at a hearing before a neutral arbitrator, who then chooses one of the two last, best offers based on statutory criteria.

All other public employees in Oregon have the right to strike in an attempt to break an impasse in collective bargaining. A declaration of impasse and a 30-day “cooling-off” period are prerequisites to a lawful strike or an employer’s implementation of the terms of employment contained in its final offer. A strike lasts until the parties reach agreement or until the striking employees make an unconditional offer to return to work.

Most negotiations end with an agreement before reaching impasse. However, understanding the impasse resolution process is vital to developing a strategy for negotiations. For example, an employer might take an aggressive position when dealing with a union which has employees that are unlikely to support a strike. In contrast, it would be unwise to propose reductions in pay or benefits when dealing with a strike-prohibited unit in which the employees are paid less than their comparators because the union likely would prevail at interest arbitration.

Planning for Collective Bargaining

As with so many other things, preparation is the key to successful collective bargaining. The first step is defining the role of elected officials and selecting a bargaining team. Public employers should address the role of elected officials and identify the bargaining team well before bargaining begins. Although the governing body has final decision-making authority in the collective bargaining process, it is very rare for a governing body to bargain directly with the union. Instead, the governing body delegates bargaining authority to a bargaining team.

In some cases, an elected official will participate as a member of the bargaining team. However, elected officials at the bargaining table often face a conflict between their role as final decision-maker and their obligations as a bargaining representative. For instance, an individual councilor on the bargaining team must bargain within the parameters set by the governing body even if the councilor does not personally believe they are in the best interest of the city. Furthermore, where agreement is subject to ratification by the governing body, it is a violation of the duty to bargain in good faith for the elected official on the bargaining team to fail to recommend ratification of the tentative agreement. Finally, when an elected official is at the bargaining table, the union’s negotiator will tend to focus their attention on the elected official, knowing that the official is part of the governing body that sets the parameters for the bargaining team.

Many local governments retain an outside negotiator to represent them during bargaining. Whether to use an outside agent depends on the goals and circumstances of the upcoming negotiations. An outside negotiator is advisable: when negotiations are likely to be contentious; when an employer is seeking substantial changes to contract language; when several problems have arisen under the prior contract; or during bargaining for a first contract. Conversely, an outside negotiator might not be necessary when relations between labor and management are strong and neither side anticipates proposing substantial changes to the status quo.

Delegating the lead negotiator role to an outside agent offers several advantages. Using a knowledgeable, experienced negotiator usually results in more favorable terms and clearer contract language. An outside negotiator is familiar with how other employers have addressed similar issues and can draw on language from other contracts, which often makes bargaining more efficient. Using an outside agent also helps preserve and protect relationships. Internally, the negotiator facilitates productive communication and consensus between the governing body and management. Externally, the negotiator acts as a buffer between the city’s leadership and the union and represented employees. Finally, the state’s Employment Relations Board (ERB) recently confirmed that negotiations in which the public employer is represented by a private negotiator may be closed to the public.

The members of an effective bargaining team all serve different functions. The lead negotiator is responsible for communicating with the union, both at the table and through informal conversations. The lead negotiator also decides the order in which issues are addressed and prioritizes different objectives. The bargaining team should include managers or supervisors who serve as subject-matter experts for different topics. At least one member of the team should have detailed knowledge of the job duties and terms of employment for the employees in the bargaining unit. Another should be familiar with the city’s human resource and payroll policies. Someone who can assess the financial impact of proposals and provide information about the employer’s budget is also essential. Finally, a note taker should record the minutes of negotiations to reflect the bargaining history for each proposal. Occasionally, individuals can serve multiple roles so long as all the roles are filled.

Once a governing body decides on the composition of its bargaining team, it should provide clear guidance regarding the team’s scope of authority and objectives. Delegation of authority to the bargaining team can vary from broad guidance (e.g. “negotiate a contract within the prescribed budget and in the best interests of the city”) to detailed instructions on specific issues (e.g. “switch employee health care to a high deductible plan with an HRA-VEBA contribution”). The bargaining team may meet with the governing body in executive session to provide updates on the status of negotiations and discuss strategy. The best results are achieved when the bargaining team has some freedom to bargain within the parameters set by the governing body without fear of being second-guessed. The bargaining team, in turn, must communicate with the governing body and take care not to exceed the authority granted. Effective communication is essential to avoid surprises and ensure that the governing body will ratify the contract when the parties reach a tentative agreement.

Once the bargaining team and governing body have defined the scope of authority and developed a general strategy, the bargaining team should begin developing specific proposals. Prior to bargaining over non-economic proposals, members of the bargaining team should solicit feedback from supervisors and managers. The team should address provisions of the ex-

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piring contract that led to grievances, resulted in unexpected costs, or impeded efficient operations.

To develop viable economic proposals, projecting the cost of proposals is essential. Although it can be difficult to calculate the exact cost of every proposal, reasonable projections ensure the bargaining team is staying within budget. For example, projecting the cost of a wage increase is relatively straightforward. Yet it is surprising how often employers neglect this important step until negotiations are well underway. The bargaining team also should have a sense of how the overall compensation of the bargaining unit compares to the compensation of employees at comparable cities. For strike-prohibited units, a formal compensation survey is often necessary to understand the potential outcome of interest arbitration.

As a general rule, the more information a bargaining team has and the better it communicates with the governing body, the better the outcome will be.

Current Trends

Recently, the Oregon Court of Appeals provided guidance on when an individual official's actions are attributable to the public employer under PECBA. In *AFSCME, Council 75, Local 2043 v. City of Lebanon*, the Oregon Court of Appeals reversed a decision by the ERB regarding a letter written by

a city councilor critical of the union. The ERB held that the letter interfered with employee rights protected under PEBCA and was therefore an unfair labor practice. The Oregon Court of Appeals disagreed, concluding that the councilor was not speaking as a designated representative of the city, nor was she acting as the apparent agent of the city. Thus, her expression of personal views was not an unfair labor practice. This case is currently pending review by the Oregon Supreme Court.

Other recent collective bargaining issues include when collective bargaining should be open to the public, the right of public employees to use an employer's email system for union purposes, and the right of parties to record bargaining sessions.

More information about the collective bargaining process and recent decisions of the Employment Relations Board are available on the board's website, www.oregon.gov/erb.

For more information on recent developments and trends in labor and employment law, visit www.bullardlaw.com/news/alerts.html.

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