



Fagen Friedman & Fulfroft LLP

Big Picture, Big Issues

"Global Negotiation Topics"

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BIG PICTURE, BIG ISSUES: GLOBAL NEGOTIATION TOPICS

I. THE EXPANDED SCOPE OF BARGAINING

As set forth in the Educational Employment Relations Act ("EERA") and as interpreted by the Public Employment Relations Board ("PERB") a public school employer's obligation to bargain with its employees' exclusive representative is broad. Accordingly, the bargaining implications of nearly all decisions should be *considered* prior to making and implementing those decisions. The obligation to bargain extends to both the decision and the effects of the decision.

A. General Rule: Public school employers must bargain subjects related to "wages, hours of employment, and other terms and conditions of employment." (Gov. Code § 3543.2(a)(1).)

1. Terms and conditions of employment include, but are not necessarily limited to:

- (a) Health and welfare benefits
- (b) Leaves
- (c) Transfer and reassignment policies
- (d) Safety conditions
- (e) Class size
- (f) Evaluation procedures
- (g) Organizational security
- (h) Grievance procedures
- (i) Layoff of probationary certificated K-12 employees

(Gov. Code § 3543.2.)

2. Anaheim Test: If a bargaining subject is not one of the above enumerated items, it may still be negotiable if:

- (a) It is logically and reasonably related to wages, hours, or an enumerated term and condition of employment;
- (b) The subject is of such concern to management and employees that a conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and
- (c) The employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's missions.

- B. Notice: Public school employers have an obligation to provide unions with reasonable advance notice of their intent to make any change to matters relating to wages, hours, and other terms and conditions of employment. (Gov. Code § 3543.2(a)(2).)
- C. Demand to Bargain: Public school employers have a duty to bargain in good faith when the union presents a valid demand to negotiate concerning wages, hours, and other terms and conditions of employment. (*Sylvan Union Elementary School District* (1992) PERB Dec. No. 919.)
- D. Completion of Bargaining: Unless the union waives its right to bargain a particular subject, public school employers must reach agreement with the union or fulfill its bargaining obligation through exhaustion of the impasse process, prior to making a change relating to wages, hours, or terms and conditions of employment or it will violate its duty to bargain in good faith. (*NLRB v. Katz* (1962) 369 U.S. 736.)
1. For example, PERB has found the following to be unilateral changes:
 - (a) Change in an established policy regarding employee work schedule;
 - (b) Change in the hours allotted to an employee; and
 - (c) Change in the workweek of an employee. (*San Jacinto Unified School District* (1994) PERB Dec. No. 1078.)
- E. Non-Negotiable Subjects: Matters that are not within the scope of representation are reserved to the employer. However, the matters may be subject to "meet and confer" and/or the employer may be required to negotiate the "effects" of the decision. Additionally, an employer may, at its discretion, meet and confer with the exclusive representative on any matter outside the scope of representation. (Gov. Code § 3543.2(a)(4).)
- F. Effects Bargaining: Before a public school employer implements a non-negotiable decision, it must first give notice, and, upon request, bargain the reasonably foreseeable effects of the decision. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313; *Trustees of California State University* (2012) PERB Decision No. 2287-H.)
1. A union's duty to request effects bargaining arises when an employer provides notice and an opportunity to bargain. PERB set forth a four part rule regarding a demand to bargain effects:

- (a) An employer must provide reasonable notice to a union and an opportunity to bargain before it implements a non-negotiable decision if that decision has foreseeable effects on negotiable subjects.
 - (b) A union must make a demand to bargain the effects of the decision after receiving advance notice of the employer's decision.
 - (c) A union's failure to demand to bargain may waive its right to bargain the reasonably foreseeable effects.
 - (d) Failure to provide reasonable notice and an opportunity to bargain reasonably foreseeable effects on negotiable subjects constitutes a refusal to bargain. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M.)
2. **Practical Pointer:** A public school employer is generally permitted to make unilateral changes to non-negotiable subjects. However, caution should be taken to ensure that the union's opportunity to bargain foreseeable effects is not ignored even if such effects are not readily apparent to the employer.
- G. **Waiver:** An exclusive representative may waive its right to negotiate about a matter within the scope of representation during the life of an agreement. The only requirement is that such a contractual waiver be "clear and unmistakable." Such a waiver may authorize the employer to make unilateral changes in that mandatory subject. (*Redwoods Community College District* (1996) PERB Dec. No. 1141.)
- H. **Conversation Starter: Does a school district have a duty to bargain the effects of the decision to...**
- 1. Install security cameras on a school campus?
 - (a) School districts have a duty to bargain the effects of its non-negotiable decision to install security cameras. PERB has recognized that the installation of security cameras has reasonably foreseeable negotiable effects on employee performance evaluation and potential discipline. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313.)
 - 2. Create and/or eliminate bargaining unit positions?
 - (a) **General Rule:** Under the EERA, school districts are not required to negotiate the decision to abolish positions or create a new positions because management has an overriding interest in

determining the functions necessary to accomplish its mission. (*Alum Rock Union Elementary School District* (1983) PERB Dec. No. 322.)

- Exception – Transfer of Duties: PERB has held that if the creation or elimination of a position results in a transfer of duties to another classification, then both the decision to transfer the duties and its effects are negotiable. (*Desert Sands Unified School District* (2001) PERB Dec. No. 1468; *Desert Sands Unified School District* (2010) PERB Dec. No. 2092.)

(b) **Other Related Negotiable Subjects:**

- (i) Wages and Job Title are Negotiable: Although the creation of a new classification is not negotiable, the wages and job title for a newly created position are negotiable. (*San Lorenzo Unified School District* (1982) PERB Dec. No. 274.)
- (ii) Impacts and Effects: School districts have a duty to bargain the effects of its non-negotiable decision to abolish position and create positions. This applies whether the position is vacant or filled. (*Lake Elsinore School District* (1987) PERB Dec. No. 646.)

3. Install global positioning systems ("GPS") in employer-owned vehicles?

- (a) The decision to install GPS into employer-owned vehicles for non-evaluative or non-disciplinary reasons is non-negotiable. The possibility that certain technologies might be used to detect misconduct does not make the decision to install the technology a mandatory subject of bargaining. (*State of California (Department of Motor Vehicles)* (2003) PERB Dec. No. 1558-S.)
- (b) However, if the school district's decision to install GPS devices incidentally impacts employee evaluation or discipline or other negotiable subjects, the school district must negotiate the effects of the decision.

4. Implement a new report card program?

- (a) The decision to implement a new report card program is non-negotiable managerial decision that is essential to achieve the school district's educational mission. Thus, the school district is not required to negotiate the decision to implement the program.

- (b) However, the school district may be required to negotiate the effects of the new report card on working conditions.

I. Unfair Practices/Unilateral Changes:

- 1. A public school employer violates its duty to bargain if it institutes changes relating to wages, hours, or terms and conditions of employment without first providing the union notice and an opportunity to bargain – such action is commonly referred to a "unilateral change." (*NLRB v. Katz* (1962) 369 U.S. 736, 738.)
- 2. PERB is granted broad power to "fashion a remedy which will best effectuate the purposes of [EERA]." (*Solana County Community College District* (1982) PERB Dec. No. 219.) PERB generally seeks to make employees whole for the employer's unfair practice and return to status quo. This may include, a cease and desist order, reinstatement of employees, back pay, other monetary damages, and, on rare occasions, attorneys' fees.

J. ***Conversation Starter: What do you think?***

- 1. What is a managerial decision that your school district made that had unforeseen effects on wages, hours, or other terms of employment?
- 2. What types of decisions have your unions requested to bargain the effects?
 - (a) Did their request identify reasonably foreseeable effects?
- 3. Does your CBA have any express waiver language?

II. **UNION CONCERTED ACTIVITY**

A. Concerted Activity: Employees acting together to pressure an employer to grant a bargaining concession or take a certain action. When negotiations are not going well, unions and employees often utilize concerted activity to gain leverage or apply pressure to the negotiations. However, not all concerted activity is protected.

B. Examples of Protected Concerted Activity:

- 1. Engaging in peaceful, non-disruptive informational picketing on matters of public concern. (*San Marcos Unified School District* (2003) PERB Dec. No 1508.)
- 2. Passing out organizational literature in non-work areas on employees' own time. (*Long Beach Unified School District* (1980) PERB Dec. No. 130.)

3. Refusing to perform discretionary duties as part of a work slowdown; i.e. Work to Rule. (*Palos Verdes Peninsula Unified School District* (1982) PERB Dec. No. 195.)
4. Engaging in lawful work stoppage/strike after impasse. (*Compton Unified School District* (1987) PERB Dec. No. IR-50; but see, *San Marcos Unified School District* (2003) PERB Dec. No. 1508.)
5. Engaging in a "sympathy strike" – a work stoppage by one bargaining unit to support a job action by another bargaining unit – unless specifically prohibited by CBA. (*Oxnard Harbor District* (2004) PERB Dec. No. 1580-M.)
6. Wearing bargaining-related buttons and clothing during instructional time, except where "special circumstances" show that the buttons or clothing cause undue distraction, disruption, or safety hazards. (*East Whittier School District* (2005) PERB Dec. No. 1727.)

C. Examples of Unprotected Concerted Activity:

- (a) Disrupting school district and/or school operations when engaging in concerted activities. (*Compton Unified School District* (1987) PERB Dec. No. IR-50; *San Marcos Unified School District* (2003) PERB Dec. No. 1508.)
- (b) Coercing or intimidating non-striking employees who want to cross the line. (*Fresno Unified School District* (1982) PERB Dec. No. 208.)
- (c) Refusing to perform non-discretionary duties as part of a work slowdown. (*Palos Verdes Peninsula Unified School District* (1982) PERB Dec. No. 195.)
- (d) Surprise strikes, in which little or no notice is given to the employer before the work stoppage. (*San Ramon Valley Unified School District* (1984) PERB Dec. No. IR-46.)
- (e) Striking or engaging in strike preparation activities prior to the completion of the impasse process, when doing so demonstrates an absence of good faith in participating in the impasse process or has a coercive effect on an employer's bargaining positions. (*South Bay Union School District* (1990) PERB Dec. No. 815.)

2. ***Conversation Starter: Is this protected activity?***

- Employees picketing outside of the school immediately before and after school?
- Employees wearing neon shirts that say "Fair Pay Now" in bold letters?
- Employees creating a group on a social networking website discussing negotiations?
- An employee placing a large sign supporting the union on the roof of his car in the staff parking lot on school grounds in plain view of students while in class? What if the same message is on the same car but on a bumper sticker, not the sign?
- An employee sending an email to all other union members completely misrepresenting the employer's position at the bargaining table?

III. DISTRICT RESPONSES TO CONCERTED ACTIVITIES

A. General Rule: When analyzing a school district's response to employee concerted activities, PERB generally balances the rights of employees to engage in such activities that are protected by law, against the employer's interest to ensure there is minimal disruption to the delivery of educational services as a result of labor disputes. (*San Ramon Valley Unified School District* (1984) PERB Dec. No. IR-46.)

1. Examples of Appropriate Employer Responses

- (a) Take appropriate disciplinary action when concerted activity is *not* protected. (*Palos Verdes Peninsula Unified School District* (1982) PERB Dec. No. 195.)
- (b) Promulgate and enforce rules prohibiting union solicitation during working hours. (*Long Beach Unified School District* (1987) PERB Dec. No. 608.)
- (c) Refute any untruths or inaccuracies in organization material. (*Charter Oak Unified School District* (1991) PERB Dec. No. 873.)

- (d) Establish reasonable restrictions regarding access to employee work areas, bulletin boards, mailboxes, and other means of communications. (Gov. Code § 3543.1(b).)
- (e) Notify employees of contractual obligations and potential for discipline. For example, the employer might notify employees that use of sick leave to engage in concerted activities is prohibited and could result in disciplinary action for abuse of leave.
- (f) If the employer is faced with employees engaging in wide-spread, unlawful concerted activity, it may seek an injunction, or file an unfair practice charge with PERB.

2. Examples of Inappropriate Employer Responses

- (a) Discipline or other "adverse action" against employees because they have engaged in protected activities. (*Palos Verdes Peninsula Unified School District* (1982) PERB Dec. No. 195.)
- (b) Threaten or intimidate employees for exercising their rights under the EERA. (Gov. Code § 3543.5(a).)
- (c) Prohibit employees from passing out organization literature in non-work areas on their own time. (*Long Beach Unified School District* (1980) PERB Dec. No. 130.)
- (d) Prohibit employees from wearing union buttons or clothing absent a showing that doing so would be disruptive or threaten safety or discipline. (*East Whittier School District* (2004) PERB Dec. No. 1727.)
- (e) Question or interrogate employees about their views, activities, or sympathies toward employee organizations. (*Clovis Unified School District* (1984) PERB Dec. No. 389.)
- (f) Interfering with union activities during "non-work" time.

3. ***Practical Pointer:*** In many cases, unit members may seek information from their site administrators concerning negotiations and lawful conduct during concerted activity. When facing the potential for, or experiencing, significant concerted activity, supervisory and management employees should be prepared with a consistent message and information to provide to individual employees.

IV. EMPLOYER COMMUNICATIONS REGARDING BARGAINING

- A. Exclusive Representation: Once an exclusive representative has been selected, the employer's duty to bargain includes the obligation to refrain from bargaining directly with the represented employees. Bargaining directly with represented employees, "bypassing" the exclusive representative, is commonly referred to as direct dealing.
- B. Employers should be mindful in their communications to avoid bypassing the exclusive representative, else they risk an unfair practice charge brought by the union alleging direct dealing.
- C. To avoid a direct-dealing claim, an employer must not communicate proposals to employees before first submitting them to the exclusive representative "at the table" or through other official processes.
 - 1. Examples of Employer Communication that Bypasses Exclusive Representative
 - (a) Bargaining directly with employees or inviting/encouraging employees to abandon their representative to achieve better terms directly from employer. (*United Technologies Corporation* (1985) 274 NLRB 1069, 1074.)
 - (b) Engaging in a campaign to disparage the exclusive representative's negotiators so as to drive a wedge between union leaders and the bargaining unit employees. (*Safeway Trails, Inc.* (1977) 233 NLRB 1078, 1081-82.)
 - (c) Engaging in a communications campaign to sway the views of the employees while maintaining an inflexible position at the bargaining table. (*California State University* (1989) PERB Dec. No. 777-H.)
 - (d) Communicating new proposals directly to employees (or the public) before first submitting them to the exclusive representative through the usual negotiations process.
- D. **Practical Pointer**: To avoid a "direct-dealing" allegation and violation, Board members and administrators should stick to objective facts and refrain from disparaging the union and its leadership, attempting to drive a wedge between the union and its members, or making threats or promises to employees.
 - 1. Examples of Appropriate Employer Communication
 - (a) Communicating employer positions at formal negotiation sessions.

- (b) Accurately reporting the status of negotiations and the nature of the proposals previously exchanged with the exclusive representative.
 - (i) This is commonly done by a "Negotiations Update" or similar publication that describes the status of the negotiations and the substance of each party's proposals.

E. ***Practical Pointer: Best Practices for Employer Communications During Negotiations.***

1. Bring all proposals to the bargaining table first.
2. Do not engage in outside communication with union members or the public about future proposals.
3. Disseminate only factually accurate information. Review all "Negotiations Updates" for accuracy.
4. Do not attempt to sway union members or stir up division through otherwise lawful communications, even when the union seems to be doing just that.

F. ***Conversation Starter: What are your experiences?***

1. How has your school district disseminated information about its position on negotiable issues?
2. How has your school district responded to inaccurate or disparaging union communications?

V. **RESERVE BALANCES**

A. Generally: Senate Bill 858 was signed by the Governor in June 2014. It includes a provision which caps school district reserves when, in the preceding year, the state makes a deposit into the Public School System Stabilization Account. When triggered by this deposit, the caps prohibit school districts from adopting a budget that contains total assigned and unassigned reserves of more than twice the applicable state minimums for unassigned reserves.

1. Small School Districts: Assigned and unassigned reserves are capped at eight percent of expenditures.
2. Mid-Size School Districts: Assigned and unassigned reserves are capped at six percent of expenditures.

3. Large School Districts: Assigned and unassigned reserves are capped at three percent of expenditures.
- B. Exemptions from Caps: School districts may apply to their county offices of education ("COE") for exemptions from these caps if they face extraordinary fiscal circumstances.
 - C. Disclosure Requirement: Any school district that exceeds the state reserve guidelines, must provide justification for maintaining the higher reserves.
 - D. ***Practical Pointer***: Remember, these caps are only in effect if, during the preceding fiscal year, the state made a deposit into the Public School System Stabilization Account. Additionally, these caps do not apply to COEs, charter schools, or community colleges.
 - E. How Can School Districts Cope with the Lower Caps?
 1. Request an exemption from COE.
 2. Shift money into other accounts to avoid the caps. Some school districts are designating excess reserves as "committed" funds by identifying the dollar amount required for a future specific project. The governing board has flexibility to change the designation of the "committed" funds at a later date.
 3. Spend down reserves to the levels allowed by the caps.
 - F. ***Conversation Starter: What is your experience?***
 1. How has your school district been impacted by the lower caps on reserve balances?

VI. LOCAL CONTROL AND ACCOUNTABILITY PLAN ("LCAP")

- A. Duty to Consult: School districts have a duty to consult with the union and other stakeholders in the preparation of the LCAP. The duty to consult includes determination of curriculum content, the selection of instructional materials, and the use of instructional technology.
 1. Definition of Consultation: The exchange of information, opinions, informal proposals, and recommendations according to orderly procedures in a conscientious effort to incorporate such recommendations into the resulting policy or plan.

B. Impact on Negotiations:

1. No Duty to Negotiate the LCAP. Although LEAs must "consult" with the unions on the LCAP, they are not statutorily obligated to negotiate LCAP implementation decisions, unless the decisions themselves are separately subject to negotiation (e.g., pay increases). "Establishing educational policies, goals and objectives," "determining curriculum," and "establishing budgetary priorities and allocations" are all fundamental management prerogatives not within the mandatory scope of bargaining. In some cases, a local collective bargaining agreements enumerate these management prerogatives in a "Management Rights" clause.
2. ***Practical Pointer:*** Non-negotiable decisions, like LCAP implementation decisions, may, however, have "effects" that are negotiable. School districts should consider how LCAP implementation decisions may affect the terms and conditions of employment for bargaining unit members.
3. LCAP actions are commonly subject to "effects" bargaining
 - (a) Work Day/Work Year
 - (b) Class Size
 - (c) Compensation
 - (d) Evaluation
 - (e) Professional Development
 - (f) Promotions
 - (g) Transfers
 - (h) District Office Administration
4. The Careful Approach on LCAP, Scope, and Effects.
 - (a) Provide reasonable notice to exclusive representatives on school district LCAP plan and processes.
 - (b) When you have a draft LCAP based on your "consult" process, send a copy of the plan to the presidents of your exclusive representatives. Provide updates to the unions as the school district proceeds.

- (c) If union makes a demand to bargain, ask the union to identify the matters which they believe are within the scope of bargaining that they propose to bargain.
- (d) Go to the table and listen. PERB has held that when a school district is presented with a non-negotiable proposal, the school district must state its objections to the proposal. However, practically speaking, objections are not the best place to start.
- (e) After engaging the unions in a conversation about 'why' and 'what,' identify the interests of the school district. Use the input received from the consultation groups, including the unions, to identify the school district's interests.
- (f) ***Practical Pointer:*** Be aware, both the classified union and teacher's union will likely have issues with your LCAP decisions.

C. ***Conversation Starter: What is your experience?***

1. How has your school district responded to a demand to bargain before adoption of the LCAP?
2. How does your school district negotiate with its LCAP in mind?

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