Bargaining to Impasse (including how and why to avoid it)

Lance Andree
Rachel Miller
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Statutory and regulatory framework

• Chapter 41.56 RCW – Classified Employees
• Chapter 41.59 RCW – Certificated Employees
• Distinctions between Classified and Certificated
  ▪ Expiration of Contract: One year continuation of terms and conditions of classified CBA following expiration
  ▪ "No right to strike" explicit in classified statute, implied in certificated statute
  ▪ Mediation process for resolving impasse for classified
  ▪ Mediation and non-binding Fact-Finding process for resolving impasse for certs

Duty to Bargain in Good Faith

• Meet at reasonable times and places to negotiate
• Wages, hours and working conditions
• Subjective and objective factors indicating open mind and willingness/effort to reach agreement
• Does not require one party to agree or make concessions
### Mandatory, Permissive and Illegal Subjects

<table>
<thead>
<tr>
<th>Mandatory Subjects</th>
<th>Permissive Subjects</th>
<th>Illegal Subjects</th>
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<tbody>
<tr>
<td>Wages and working conditions</td>
<td>Everything else</td>
<td>Matters the law specifically prohibits or controls</td>
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- **“Decision” vs. “Effects” or “Impacts”** bargaining

### Mandatory v. Permissive

**Significance of the Difference**

- A party may not condition agreement (go to impasse) on a permissive/non-mandatory subject
- Not a ULP for employer to act unilaterally with respect to a matter that is not a mandatory subject of bargaining
- At the table, PERC policy to encourage discussion diminishes significance of distinction

### Examples of Mandatory Subjects

- Salaries
- Overtime compensation
- Leave policies
- Health Benefits
- Discipline / Just Cause
- Grievance procedures
- Work rules
Examples of Permissive Subjects

- School / District Budget
- Staffing levels
- Educational program
- Pre-employment qualifications practice
- Waiver of a mandatory subject of bargaining
- NOTE: may need to bargain “impacts” of any of the above decisions

Quiz – Mandatory or Permissive?

Refer to the quiz handout in your materials. Try to predict if PERC has found each subject to be “mandatory” or “permissive” based on the legal principles and examples provided above.

Expiration of CBA

- Still no unilateral changes w/o bargaining
- “Dynamic status quo” may require some enhancements pending bargaining
- For classified CBAs, terms and conditions remain in effect following expiration – for up to one year.
- Specific items can be excluded by agreement
- Thereafter, employer may implement after impasse
- No one year minimum waiting period for certificated CBAs
Statutory Procedures for Impasse Resolution: PERC

- Classified: RCW 41.56 – any matter “may” be submitted to mediation if parties cannot agree
- Certificated: RCW 41.59.120
  - Mediation
  - Fact-finding if mediation unsuccessful
    - Rules at WAC 391-55 – 10 days of mediation before requesting fact-finding
- Relationship of resolution procedures to “impasse” definition

Impasse

- The point at which the parties remain deadlocked after reasonably thorough, good faith bargaining
- Bargaining to impasse allows employer to make unilateral change, implementing last offer
- Cannot reach impasse if violating duty to bargain in good faith
- Determination of impasse is a matter of judgment; PERC will look at variety of circumstances. See Skagit County, Decision 8746-A (PECB, 2006) (“There is no fixed definition of an impasse or a deadlock which can be applied mechanically to all factual situations.”)

Impasse – How do you know?

PERC looks to the following non-exclusive factors to determine whether a party has properly declared an impasse:
- The bargaining history;
- The parties’ good faith in the negotiations;
- The length of the negotiations;
- The importance of the issue(s) on which the parties disagree; and
- The contemporaneous understanding of the parties of the state of negotiations (this factor is of “central importance”)

Skagit County, Decision 8746-A (PECB, 2006) (citing Taft Broadcasting Co., 163 NLRB 475, 478 [1967])
Implementation – So now what?

• An employer may lawfully implement its last offer on a mandatory subject after a lawful impasse, so long as it remains willing to bargain all other mandatory subjects of bargaining, and, if requested by the union, return to bargaining about the implemented subject.

- Vancouver School District, Decision 11791 (PECB, 2013)

Case Study: Vancouver Sch. Dist.

• Negotiations for expiring classified CBA
• After impasse, employer implemented its contract including layoff and recall provision
• District tells Union that per District’s last offer, parties have agreement expiring 8/31/13
• District refuses to bargain further

Impasse Example: Can’t I just Implement?

• Union files ULP. Examiner concludes parties at impasse, lawfully implemented layoff and recall provision
• After Examiner’s decision, Union requests bargaining
• District says it has no obligation to bargain during life of contract
• Union files second ULP regarding District refusal to bargain
### Case Study: Vancouver Sch. Dist.

- **Commission decision:**
  - Lawfully implemented language becomes status quo (contrary to Union assertion)
  - Didn’t get to implement a new duration
  - District had duty to bargain:
    - Bargaining over implemented language not foreclosed until 2013 (duration of implemented offer)
    - Unlike a negotiated CBA, implemented final offer did not suspend duty to bargain on closed topics: obligation to continue bargaining if impasse is broken
    - Because Union's proposal showed movement on issue, negotiations could have been fruitful

### Impasse Example: Vancouver Sch. Dist.

- **Lessons learned from Vancouver decision:**
  - Duty to bargain can continue post-impasse, implementation . . . and after favorable decision from Examiner!
  - Commission will scrutinize declarations of impasse
  - "Impasse only temporarily suspends the duty to bargain." After impasse/implementation, anything creating a new possibility of fruitful discussion breaks an impasse.
  - Must remain ready to bargain!
  - Implementation after impasse ≠ agreement

### What if we have a deadline?

- **Communicate early and often**
  - In writing
  - Not just what but when the decision needs to be made and why
  - Without presenting change as a fait accompli ("done deal")
- **Document efforts to meet and agree**
- **Engage in good faith / open minded negotiations**
- **Continue to bargain impacts upon request after any unilateral decision made**
- **Statutory Deadlines**
### How NOT to bargain to impasse

- Practice “active listening”
  - Let them know they have been heard
  - That you understand what they feel strongly about why they feel strongly about it.
  - Don’t underestimate the power of “why”
- Do not expect or demand trust; earn it
- Long-term changes comes from relationships not short-term bargaining

### Turn the Other Cheek

- Prior to and during bargaining, always turn the other cheek
- Do not hold grudges
- Do not expect the Association to change their behavior
- Communications from the bargaining table are overrated at best and troublesome at worst
- Implement a deliberate strategy to organize and unify the leadership team

### Earning Trust

- Get ahead of the curve in information sharing with the Association
- Do not try to “buy” good will
- Use one-sided principles
- Do not go around the Association leadership directory to their members
The Golden Rule of Negotiations

All contracts settle sometime.

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