LBAEE
July 2021 News

Nuts & Bolts: When Bargaining Reaches an Impasse

This year – and late spring in particular – has seen a record wave of labor negotiations for public employees across the state. Many employee organizations whose labor contracts, or Memorandums of Understanding (MOUs), expired last year either extended for a year or worked under an expired MOU. Others saw their current MOU expire June 30 this year and have been negotiating for a new contract effective July 1, 2021. Even for those whose MOUs were effective during 2020-2021, the COVID-19 pandemic still ushered in a host of operational changes, most of which affect terms and conditions of employment and are therefore mandatory subjects of bargaining. On top of this, the Federal American Rescue Plan Act has provided much-needed financial support for local public agencies, accelerating discussions over wage increases and essential worker bonuses. Finally, as operational needs evolve, many agencies have proposed updated job classifications and personnel rules, and both are bargainable and subject to impasse.

Although most negotiations result in mutual agreement – after all, a primary goal of public employee organizations is to negotiate and enforce a strong labor agreement – inevitably some do end up at impasse. This month, we discuss how your employee organization can effectively navigate a bargaining impasse. Navigating this process can be tricky and there are timelines to follow and pitfalls to avoid. But here are some general considerations.

What is an Impasse? State bargaining law – the Meyers-Milias-Brown Act (MMBA) – does not define "impasse." However, Public Employment Relations Board (PERB) decisions say that impasse occurs when both sides exhaust proposals on negotiable subjects to the point where further discussion or movement towards possible agreement would be futile. *County of Trinity* (2016) PERB Dec. No. 2480-M, at p. 4.

Who Declares Impasse? Either side can declare impasse. Who declares it often depends on who the moving party is in the negotiations; in other words, who has more to gain by ending negotiations? If negotiations concern increases to pay and benefits, the employee organization often has more to gain and is therefore more likely to declare impasse.

If the agency is bargaining over employee concessions or is determined to implement changes to terms and conditions of employment, then the agency has more to gain and is more likely to declare impasse. In this circumstance, the employee organization will often seek to avoid going to impasse and to continue bargaining for as long as possible.

When is Impasse Declared? Knowing when to declare impasse requires case-by-case strategic planning that is not susceptible to a generic formula. But the key is determining your BATNA – or Best Alternative To a Negotiated Agreement. For example, if a potential new agreement offers better terms than the existing agreement, and the new and better terms will not apply retroactively, then negotiating while maintaining status quo terms will be the agency's BATNA. This makes it unlikely the agency will want to rush to declare impasse. However, if a potential new agreement is full of employee concessions, then negotiating while maintaining status quo terms will be the employee organization's BATNA. This makes it unlikely that the employee organization will rush to declare impasse. If the future is uncertain and difficult to forecast with any accuracy, it may be that both the agency and the employee organization feel that their BATNA is to continue negotiating, making it less likely that either side will declare impasse.

Keep in mind that the law requires the agency to maintain current terms and conditions of employment while bargaining. The agency cannot implement terms unilaterally until after the bargaining process is completed. *See, e.g.*, *County of Sonoma* (2010), PERB Dec. No. 2100-M; *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d.191. This includes exhausting any impasse procedures, such as fact finding. *See also* Gov't Code § 3505 (defining meet and confer process to "include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.")

Also keep in mind that a party may commit an unfair labor practice by prematurely declaring impasse and refusing to bargain. *See, e.g.*, *Kings In-Home Support Services Public Authority* (2009), PERB Dec. No. 2009-M at p. 10 (public agency committed unfair labor practice by prematurely declaring impasse and refusing to bargain when at least one additional bargaining session was necessary for the union to consider and respond to the agency's final offer).

How is Impasse Declared? The declaration can be verbal or written, but it is more often done in writing. Under the MMBA, a factfinding petition must be filed within a prescribed window period, and this may depend on when a written notice of impasse is issued. For example, where the labor dispute was not submitted to mediation, an employee organization must request that the dispute be submitted to a factfinding panel not later

than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Gov't Code § 3505.4(a). Keep in mind that if the employee organization does *not* submit the dispute to factfinding, the agency's elected officials can then vote to implement the terms of its last best final offer once the timelines for the employee organization to file for factfinding have expired. So be careful declaring impasse. It has significant consequences.

Why Declare Impasse? For public agencies, the answer is simple – they are done bargaining and want to implement the terms of their last best final offer and cannot do so until impasse is declared, and the impasse process is exhausted. For agencies, declaring impasse is one step – and a big one – towards ultimately imposing new terms.

For employee organizations, the answer is more complex. Originally, when the factfinding law took effect in 2012, factfinding was seen as more of a defensive tool to delay concessions that many agencies were then proposing in the wake of the Great Recession. In the years since, some employee organizations have begun to see the impasse process, and factfinding specifically, as a means of improving management's offer for pay and benefit increases – for example, when the agency's proposed increases are not high enough. In this context, factfinding often does not result in a drastic improvement in the agency's financial position. But it can be seen as a way of escalating the dispute to the agencies elected officials and circumventing the management bargaining team. The key to whether this strategy could be effective is whether the agency's elected officials – the ultimate decision-makers – are likely to be influenced by the factfinding panel's recommendations. If so, the employee organization declaring impasse and pursuing factfinding could be worthwhile. But using impasse to get management to sweeten their offer is not something that should be routinely considered. It can sour the bargaining relationship without materially improving the agency's final financial package. It is best to view impasse as a measure of last resort, after all other alternatives have failed.

What Happens Once Impasse is Declared? Many public agencies also have impasse procedures in their local rules. For example, one common provision is to provide for an impasse meeting with the City Manager or General Manager. Another common provision is to allow for mediation of the labor dispute at the request of either party, or more commonly only upon mutual agreement. An employee organization should know if there are local rules governing impasse before declaring impasse. A local impasse rule that is unreasonable may be subject to challenge through an unfair practice claim with PERB.

What Happens at an Impasse Meeting? The employee organization should consider requesting an impasse meeting with the agency regardless of whether the local rules *require* an impasse meeting. If by the time of the impasse meeting, either the agency or

the employee organization has authority to resolve the impasse, the impasse meeting could result in a negotiated compromise. But even if a negotiated agreement is not possible, conducting an impasse meeting can still be beneficial. For example, the parties can discuss post-impasse procedures, logistics, or narrow down the issues that are still in dispute, making factfinding more efficient. Since both sides share equally in the cost of the factfinding chairperson, conducting an efficient factfinding hearing can be cost-effective for both the employee organization and the agency. Even if both sides remain far apart on economics, the parties may be able to reach an agreement on other disputed issues – for example, proposals concerning work rules, MOU language revisions, or no-cost or low-cost improvements to working conditions. In these uncertain financial times, negotiating solutions to these issues can make it more likely that the parties reach a comprehensive agreement. At the very least, it can streamline factfinding and allow more time to focus on the items that matter most to the employee organization.

What Happens in Mediation? If the agency's local rules allow for mediation, it is usually a good idea for the employee organization to request it. In fact, if both parties agree, the dispute can be submitted to mediation even in the absence of any local rules. Gov't Code § 3505.2. The State Mediation and Conciliation Service provides a state appointed mediator free of charge. These mediators have experience mediating public sector impasses. A mediator can help the parties communicate more effectively or to consider ideas or concepts that could result in agreement without locking either side into a specific bargaining position. At the initial mediation session, the mediator typically begins with both sides together in one room, and then splits up the parties into separate rooms. The mediator will go back and forth between the rooms to get a sense of the issues and the parties' interests and objectives. The mediator may question how much either side can move on the disputed issues and if doing so could result in an agreement. The employee organization should consider communicating any recommended or proposed solution to the entire membership. Keep in mind; the mediation process is designed to *facilitate* agreement, not to decide which party "wins." If the agency agrees to modify its position in mediation, that often means mediation was successful! As with the impasse meeting, mediation does not have to result in a total agreement to be worthwhile – simply narrowing down the disputed issues can make mediation worth the effort.

What Happens in Factfinding? In 2011, Governor Brown signed AB 646 into law, which adds factfinding to the MMBA as a potential tool for employee organizations to use to resolve labor disputes. The law took effect on January 1, 2012. The tool has been effective, depending on the circumstances in which it is used. You can find the law, Gov't Code §§ 3505.4, 3505.5, and 3505.7 on PERB's website www.perb.ca.gov.

Only the employee organization can file for factfinding, and the procedural right of the employee organization to request factfinding cannot be expressly or voluntarily waived. Gov't Code § 3505.4(e). Filing must be done during a window period. If no mediator is appointed, the employee organization must file within 30 days of the written declaration of impasse. If a mediator is appointed, the window is between 30 and 45 days from the date the mediator is appointed. The State Mediation and Conciliation Service typically sends a letter confirming the date of appointment.

Filing for factfinding is done through PERB's e-File system. Within 5 days, each party will select a person to serve as its panel member (at their own cost). Within 5 days after selecting the panel members, PERB will select a chairperson of the panel. Within 5 days after PERB selects a chairperson, the parties may mutually agree on a person to serve as chairperson in lieu of the person selected by the PERB. There is no charge to file, but the chairperson's fee is split equally between the parties. The labor dispute is then submitted to this three-person panel for an advisory recommendation.

Other than the initial filing, which is a jurisdictional prerequisite, timelines may be extended based on mutual agreement between the parties. Absent mutual agreement, within 10 days of the appointment of the panel, the panel shall conduct a hearing. At the hearing, both the agency and the employee organization will have the opportunity to present their case for a fair labor contract. The panel will hear the parties' positions on the disputed issues, receive any written materials, and allow for the questioning or subpoenaing of witnesses. The chairperson may try to mediate the dispute, especially if the parties have not already conducted mediation.

The MMBA sets forth specific criteria for the panel to consider:

- State and federal laws that are applicable to the employer.
- Local rules, regulations, or ordinances.
- Stipulations of the parties.
- The interests and welfare of the public and financial ability of the public agency.
- Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- The consumer price index for goods and services, known as the cost of living.
- The employees' overall compensation, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

- Any other facts, not confined to those specified above, which are typically or traditionally considered in making the findings and recommendations.

Gov't Code § 3505.4(d). The panel will adjourn after both sides have presented their case.

If the dispute is not settled within 30 days after the appointment of the factfinding panel, or upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms for settlement, which shall be advisory only – meaning the public agency is not obligated to comply with the panel's decision. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The agency shall make these findings and recommendations publicly available within 10 days after their receipt. Gov't Code § 3505.5(a). In practice, the panel recommendation is often designed to identify a package that stands the best chance for both sides to vote to potentially accept as an agreement.

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of the settlement have been submitted to the parties, the agency may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. Gov't Code § 3505.7. The unilateral implementation of an agency's last, best, and final offer shall not deprive an employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law. At the public hearing, the agency's elected officials may decide to accept the panel's recommendation, which cannot be worse than the final offer.

Factfinding is Not Limited to MOU Bargaining. Factfinding is also available for "single-issue" bargaining disputes and is not limited to MOU negotiations. *See City and County of San Francisco* (2015), PERB Order No. Ad-429-M. The dispute, in that case, was over the City and County's desire to implement a 30-minute unpaid meal period and a corresponding lengthening of the current eight-hour shift to eight and one-half hours for transportation employees on the graveyard shift. The only issue for PERB was whether it should reexamine its position on the scope of MMBA factfinding because, according to the City and County, PERB's "boundless application of fact finding is legally incorrect and leads to untenable practical consequences." *Id.* at p. 2. The City and County had argued that the statutory language and legislative history indicate that MMBA factfinding "is calibrated for disputes of significant dimensions, such as may arise in contract negotiations, and that the extensive, time-consuming and expensive process is a disproportionate remedy for the myriad of minor bargaining disputes that regularly arise

outside of contract negotiations." *Id.* In response, PERB said that "none of the City and County's arguments persuade us to abandon our previous determination that both the plain language of the statute and its legislative history intended to make MMBA factfinding available for *any* differences over *any* matter within the scope of representation." *Id.* (emphasis in original).

Conclusion:

Deciding whether to go through impasse takes a lot of strategy and is difficult to navigate, so it is best to have professional staff help. A negotiated solution is typically preferable to an impasse or a protracted labor dispute. Nevertheless, the tools available to the employee organization described above do provide some leverage in helping to secure a negotiated agreement. How to use these tools during any given negotiation requires both planning and organization. There are timelines that must be followed and potential pitfalls to avoid, so do not wait to contact staff for assistance.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

5.0% - CPI for All Urban Consumers (CPI-U) Nationally

4.7% - CPI-U for the West Region

3.9% - CPI-U for the Los Angeles Area

3.8% - CPI-U for San Francisco Bay Area (from April)

5.9% - CPI-U for the Riverside Area

5.3% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I recently noticed some differences between our Higher Classification Pay policies in our MOU compared to our Personnel Rules. The latter has more restrictions. For example, it requires that the employee

"work at least forty (40) consecutive hours once per calendar year in said position in order to qualify for the higher classification pay." The MOU does not include this restriction. Which one of these can we go by?

Answer: Your MOU supersedes any conflicting employer policies and practices unless the MOU explicitly says otherwise. In some cases, the MOU may simply identify the benefit and then refer to the Personnel Rules or Policy for more specifics. If that is the case, or if the MOU is generally vague about specifics, any requirements you find in the Personnel Rules may also apply. If it is possible to follow both the MOU and the Personnel Rules at the same time without conflicting, that is likely how it will be interpreted. Keep in mind the Personnel Rules or Policy applies to all employees, not just those in your bargaining unit.

However, if your Association has negotiated better terms for its members than what the Personnel Rules or Policy provide, and the Rules or Policy is in direct conflict with the MOU, then your MOU will govern.

Question: Can the Agency require that we provide our vaccination cards?

Answer: Yes, but subject to two important caveats. First, the Agency must keep any medical information confidential and in separate files. Under State law – the Confidentiality in Medical Information Act (CMIA) – an employer may not disclose your medical information absent your written consent unless a limited exception applies. They must also instruct employees who handle confidential medical information about any procedures that are in place to help ensure confidentiality. The CMIA also restricts an employer from disclosing your medical information to third parties.

Second, requiring an employee to share their vaccination card or status may be a change in terms and conditions of employment, particularly if failure to do so will result in discipline. If that is the case, the Agency must give the employee organization notice and an opportunity to bargain over the impact of this new requirement, if requested. The employee organization can then negotiate over impacts, such as what happens to someone who refuses, and what the agency plans to do with the information. It can also ask what the business purpose is for the new requirement and any specifics about who sees the cards, if copies will be made, how will they be stored, for how long, and who has access to the cards.

As COVID-19 workplace restrictions ease for those who are fully vaccinated, employers will have legitimate business reasons to ask about an employee's vaccination status. The California Department of Fair Employment and Housing (DFEH) has updated its COVID-

19 FAQs. This includes clarifying that an employer *may* require employees to provide proof of vaccination.

Question: At our open Division meeting with all staff, management asked employees to respond to several questions, such as "what makes you happy nowadays," "what keeps you awake at night," "anything you want to share with teammates," and "any challenges you want to share with Management?" Are these questions allowed in an open forum in the workplace? I do not feel comfortable sharing this with my employer. Management is not my therapist.

Answer: These are concerning questions to be asked in the workplace, especially in a group setting. If your coworkers have similar concerns, the employee organization should address this right away on behalf of the entire work unit.

The context in which the questions are asked is important. Your employer cannot require that you answer personal questions like these in the context of a group meeting intended as a bonding exercise or an icebreaker.

You are right; Management is not your therapist. If they do not require anyone to share, and it is an open voluntary discussion, feel free not to share. You can simply listen to others and if asked directly, say something like "I would have to think more about it," "I'm not comfortable sharing," or "I just want to listen right now if that's ok."

If management says your response is mandatory, do your best to provide a response and then reach out to your professional staff right away, who can notify HR that requiring responses to these personal questions is not appropriate in this context (for example, it could be seen as soliciting information about an employee's medical condition without a legitimate business purpose).

Question: I had a dental appointment for a deep clean and they gave me a note for the whole day off because they said it was going to be painful. I told my supervisor the appointment was for extracting a wisdom tooth because I feel it is personal and I should not have to tell them anything specific. Even though I told them the truth about where I was going, and had a doctor's note, they are now trying to fire me because I did not tell them the truth about the reason for the appointment. Can they do this?

Answer: An African proverb says, "one falsehood spoils a thousand truths." Although you had a right to use your sick time for the dental appointment, your employer *can* discipline you for dishonesty. You did not have an obligation to tell your supervisor the exact procedure you were having done – for example, you could have requested the day off and provided the note stating

you had a dentist appointment and that should have sufficed – in your case, you volunteered it was to have your "wisdom tooth extracted," and that was dishonest.

But check your discipline procedure in your MOU or Personnel Rules. If you are a permanent public employee with due process protections, you are entitled to written notice of the charges, the materials upon which it is based, an opportunity to respond during a "Skelly" hearing before the discipline is imposed, and a post-deprivation evidentiary hearing before a reasonably impartial third party. The MOU, Personnel Rules, or Discipline Policy should set forth the specific process you are entitled to.

During this process, you will have an opportunity to plead your case and explain your position. Based on the facts you identified in your question, termination does seem a bit harsh. If you have a good work record and no prior discipline, reducing your termination to a suspension might be possible, especially if the agency follows the concept of progressive discipline. It might also be possible to negotiate a separation agreement that includes a neutral employment reference and an agreement that your employer will not contest any application you might later file for unemployment benefits. Contact professional staff, who can guide and support you through this process.

Question: I am a salaried, exempt employee. My hours are 8-5, but I frequently work past 5, as necessary. As an exempt employee, I do not get overtime for working over 40 hours/week. I recently took a long lunch, 1.5 hours. My supervisor asked me to "make up" the extra half-hour. Is my supervisor allowed to ask this of me? Since I do not get compensated for the extra time that I frequently work, I feel that this is unfair.

Answer: Yes, your supervisor can ask you to make up for lost work, though you are right that this does not seem like a fair law. As an exempt employee, your employer can even require that you work more than 40-hours per week without overtime pay, based on operational needs. In contrast, a non-exempt employee would be entitled to overtime pay. Absent anything in your MOU or personnel rules that state otherwise, your supervisor can ask you to cover the extra half-hour. But, as an exempt employee, your employer cannot dock your pay for taking a long lunch.

You can also contact your professional staff, who can help you identify other solutions. For example, your employer may have a core work hours policy that allows or requires exempt employees to use accrued leave to cover any absence during the workday, even partial day absences. It might be possible to use leave to cover the extra half-hour, rather

than stay late. Your employer might also have a flex-time policy that allows exempt employees to come in late or leave early during regular business hours in the same workweek that an exempt employee worked extra hours.