BoardmanClark

School Law FYI

SEPTEMBER 2018

Collective Bargaining Refresher

Many of you may be negotiating 2018-2019 collective bargaining agreements or be in the process of preparing to negotiate your 2019-2020 collective bargaining agreements. Any duty to bargain for 2019-2020 will be dependent on the outcome of recertification elections which will be held between October 31 and November 20. While there have been no changes to the bargaining law since Act 10 was passed, a reminder of some of the basic principles might be helpful. This article will discuss the procedures and issues for those who are negotiating a successor collective bargaining agreement. If you are negotiating an initial collective bargaining agreement, there are additional considerations and issues which must be dealt with, and you may wish to consult legal counsel.

DUTY TO BARGAIN

The duty to bargain applies to and is restricted to the amount of total base wage increase of bargaining unit employees, as well as the distribution thereof. The parties will be negotiating a successor collective bargaining agreement to the most recent agreement and use that agreement for base wage increase calculations (or, if the board implemented, the most recent implemented proposal will be used to calculate any base wage increase) which will establish base wages for employees in the bargaining unit. The total base wages for each bargaining unit will be calculated using the "snap shot date" of January 1 of the year in which the collective bargaining agreement will be effective (e.g., January 1, 2018 for a 2018-2019 contract). The parties should use the same method of calculating base wages as they used previously. Unless approved by a referendum, the law prohibits an increase in the total base wages that exceeds 2.13% for collective bargaining agreements effective July 1, 2018 (the CPI cap for collective bargaining agreements has not been set for collective bargaining agreements that begin on July 1, 2019).

STATUTORY NOTICES REGARDING COLLECTIVE BARGAINING AGREEMENTS

The parties must notify the Wisconsin Employment Relations Commission (WERC) of the commencement of negotiations on a WERC form. Notice must also be given to the public and news media of the re-opening of collective bargaining that complies with the requirements of the Open Meetings Law. See Wis. Stat. §§ 19.86 and 19.84(1)(b).

Presentation of initial bargaining proposals, along with supporting rationale, must be presented at an open meeting which has been posted pursuant to Wis. Stat. § 111.70(4)(cm)2. Initial proposals must be in writing.

Consideration of a tentative agreement and final ratification of any agreement must be done at an open session which has been properly noticed. See Wis. Stats. § 19.85(3).

Other than the above requirements, the Open Meetings Law does not apply to a school board or a committee thereof which is formed for or meeting for the purposes of collective bargaining. *See* Wis. Stat. § 19.82(1). Negotiations shall be conducted in closed session if either party desires to do so. Despite the fact the Open Meetings Law does not apply, the Attorney General has recommended that negotiation sessions be noticed.

Ground rules may be established to govern the negotiation procedures, but are not necessary. Neither party may insist on ground rules as part of the negotiation process. .

DUTY TO BARGAIN IN GOOD FAITH

The duty to bargain in good faith requires both parties to approach bargaining with an open mind and to make a sincere effort to try and settle their differences and reach a mutually satisfactory agreement. Under Act 10, the duty to bargain only extends to bargaining about an increase in base wages and the distribution of that increase for a one-year period.

The board should not have a "take-it-or-leave-it" position on any issue related to base wage increases and distribution. It must approach bargaining with an open mind and be willing to listen and seriously discuss any proposal the union makes on base wage increases and distribution. You should have a reason based on provable facts for any position you take.

You should not engage in regressive bargaining. That is, you should not take back something you have offered without having a justification for the regression based on a change of facts since the time you made the offer. For example, if you initially offer a base wage increase based on a CPI increase the WERC has published, and you discover an error in your costing that makes the offer in excess of what the law allows, you may reduce your offer and explain why you are reducing it. In most instances, reducing your offer without a valid reason is interpreted as evidence of bad faith bargaining. Because Act 10 limits the subjects of bargaining to base wage increases and the distribution thereof, bargaining generally takes less time than it used to, but you still must be mindful of discussing and responding to proposals.

You must meet with reasonable frequency and for reasonable periods of time. What is reasonable depends on the circumstances, but generally you should promptly respond to a request to bargain and offer dates and times you are available. You must meet for a reasonable length of time, but you do not have to agree to marathon bargaining.

MECHANICS OF BARGAINING

Each party is free to designate almost anyone it wants as a bargaining representative. The board cannot object to a member of the union's negotiation committee and vice versa. However, the negotiators for each side must have meaningful authority to negotiate (although not necessarily authority to make a final decision on behalf of the party they represent).

Most negotiating committees decide to have one spokesperson at bargaining sessions and agree to have only that person speak at the bargaining table. If other members of the committee have questions or concerns about what has been said or may be said, the person should let the spokesperson know of the desire for a caucus (meeting separately and confidentially away from the other side to discuss strategy). Bargaining

committee members should be prepared to refer questions directed to them individually at the bargaining table back to the chief spokesperson rather than attempting to answer the question themselves at the bargaining table. The committee should work to present a unified front. Committee members should not challenge the chief negotiator's statements in front of the union. Either side can request a caucus at any time and you can have more than one caucus during a negotiation session. Do not be afraid to caucus as often as is necessary for the committee to do its most effective job of presenting a united front.

Discussions of the negotiating committee and the board regarding bargaining strategies is confidential and should not be discussed with anyone else, other than legal counsel for the board. This includes spouses and family members. Spouses and family members do not have a fiduciary duty to maintain confidentiality, so no information should be shared with them from any closed session, including negotiation strategy discussion.

One member of the board's negotiations committee should be responsible for taking very complete notes of all proposals, counter-proposals, and discussions regarding every proposal and issue. These bargaining notes are confidential, and generally should not be disclosed in response to an open records request. These notes may be the basis for resolving questions as to what the parties meant in negotiating the contract. However, do not record the negotiation session without the agreement of all parties.

You should get all proposals and counter-proposals in writing, at least at the stage at which they are tentatively agreed upon. If you orally agree to something, it is just as though you agreed to it in writing. In the course of negotiations you should only tentatively agree on a provision subject to agreement on an entire contract. In other words, don't agree to the percentage of increase in the base wages unless and until you also have an agreement on distribution. Make the union aware that any agreement reached by the two negotiating committees must be ratified by the full board.

If you are unable to reach agreement with the union negotiating committee, you may not bypass the union negotiators in an attempt to negotiate directly with employees. Also, you may not attempt to undermine the union by your communications with employees. However, you may provide your employees with information regarding what has gone on in negotiations, particularly the information that is given in response to employee questions. You may wish to consult with your attorney before making any such communications to employees.

If agreement is reached with respect to total base wage increase and the distribution thereof, the agreement should be reduced to writing and ratified by both parties and signed as a collective bargaining agreement.

SUPPLEMENTAL PAY

The union may attempt to bargain on a topic that exceeds the board's authority to bargain. A common topic is supplemental pay. If the union makes proposals that you believe are in excess of your authority to bargain, you can listen to the union (you do not have to cut them off when they make the proposal), but do not make a counter-proposal. Tell the union that you believe their proposal is in excess of what the board can bargain about and, therefore, you are not making a counter offer to the proposal.

Unless specifically addressing individual employee compensation, discussions concerning supplemental pay or alternative compensation models must be in open session and usually are conducted with a broad range of stakeholders, including certified bargaining representatives. To the extent supplemental pay or alternative compensation model implementation affects base wage bargaining, the discussion may occur in closed session negotiations with the union.

Supplemental pay and alternative compensation plans may not be negotiated or collectively bargained, nor may agreement on total base wages and the distribution thereof be conditioned upon a particular supplemental pay or alternative compensation plan being implemented. It is a statutorily prohibited practice for either party to do so.

IMPLEMENTATION

If agreement is not reached through collective bargaining, and if the board has satisfied its obligation to bargain in good faith, the board may implement its final offer with respect to base wages and the distribution thereof upon the declaration of impasse by the board. Impasse is a term of art in labor law and involves a specific process. If a board implements its final offer, it does not have a collective bargaining agreement for the affected year. School districts should get legal advice before implementing any change based on a claim of impasse. Parties may voluntarily seek mediation if they are at impasse, but mediation is not required for impasse determination or prior to implementation.

CONCLUSION

Even though Act 10 has simplified collective bargaining in many respects, there are still legal requirements you must comply with. By adhering to the basic legal principles of bargaining, you should avoid problems.

- Douglas E. Witte (608) 283-7529
- Michael J. Julka (608) 286-7238
- James K. Ruhly (608) 283-1738
- Eileen A. Brownlee (608) 822-3251
- JoAnn M. Hart (608) 286-7162
- Steven C. Zach (608) 283-1736
- Richard F. Verstegen (608) 286-7233
- M. Tess O'Brien-Heinzen (608) 283-1798
- Brian P. Goodman (608) 283-1722