



Understanding Management's Role in Collective Bargaining: Key Principles and Strategies for Success

**Second Annual Human Resources Convention
Sponsored by
Maine Municipal Association**

**Thomas College
Waterville, Maine
June 7, 2016**

**Linda D. McGill, Esq.
Bernstein Shur
100 Middle Street
Portland, ME 04101
(207) 774-1200**

Understanding Management's Role in the Collective Bargaining Process: Key Principles and Strategies for Success at the Table

Linda D. McGill, Esq.
Bernstein Shur

Overview

Many of Maine's municipalities have at least one group of unionized employees; some municipalities have multiple bargaining units and more than one labor union. Negotiating labor contracts, administering those contracts, processing grievances and dealing with other aspects of labor relations are a fact of professional life for Town Managers, Police and Fire Chiefs, Department Heads, Select Board and Council members and other management representatives of municipal government. In the chronically tight economic climate – with both real fiscal constraints and increased scrutiny of any expenditure of tax dollars – routine labor relations activities have become more risky, challenging and complicated. It is important for municipal officials to have a solid grounding in the process, law and strategies that govern their dealings with the unions that represent their employees, so that managers know both their legal obligations and their affirmative rights to manage unionized employees effectively during these demanding times. A few basic principles are the key to navigating the collective bargaining relationship successfully in the context of municipal government.

Principle #1: Understand the Competing Business Interests of the Municipality and the Union.

There is an inevitable and legitimate tension between municipal managers and the union(s) representing municipal employees in negotiating a collective bargaining agreement and conducting other labor relations. The tension is rooted in the competing and sometimes clashing “Business Interests” of the Town or City and the Union.

- Municipal Management's Business Interest: to develop, maintain and improve the capacity to perform the responsibilities and functions of municipal government, including the ability to deliver services to the public efficiently and economically.
- Union's Business Interest: to press for gains in wages, hours and working conditions, including individual rights and protections, for bargaining unit employees so that unit employees are satisfied and paying customers.
- Recognizing the competing Business Interest of each side at the bargaining table – and the inherent tensions between those interests – makes the collective bargaining process more efficient, less emotional and less frustrating for both parties.

Principle #2: Understand the Legal Framework of Collective Bargaining.

Labor negotiations may seem to be simply a matter of intuition, common sense or will power. However, collective bargaining in municipal government is covered and controlled by the Municipal Employees Labor Relations Law, 26 M.R.S.A. § 961 et seq., as interpreted and applied by the Maine Labor Relations Board and the Maine courts. Understanding the legal framework that governs bargaining and other labor relations activities allows Municipal Managers to avoid committing illegal practices. More importantly, a sound grasp of the law allows representatives to press and protect their “business interests” vigorously, consistent with their rights and obligations under the law. Key legal concepts include:

➤ Good Faith Bargaining Obligation

- Good Faith Bargaining is a foundational legal obligation of both Municipal Manager(s) and the Union in negotiations.
- Definition of Good Faith Bargaining: Participating in negotiations with the sincere desire to reach agreement.
- Good Faith Bargaining is based on the total circumstances.
- Good Faith Bargaining does not require either party to agree to any proposal.

➤ “Status Quo” Obligation

- Key legal obligation of Municipal Management.
- Definition of Status Quo Obligation: Duty to maintain and not to make a unilateral change in existing (status quo) wages, hours and working conditions of bargaining unit employees unless the change is (a) permitted under an existing collective bargaining agreement; (b) negotiated in advance with the Union; or (c) made after *bona fide* impasse (see below).
- Status Quo Obligation prohibits any unilateral change by the employer - positive or negative.
- Status quo may be altered in a *bona fide* emergency. But *bona fide* emergency as defined by law rarely occurs and is almost always temporary.

- Impasse
 - Definition of Impasse: Legal status that exists when the parties have exhausted good faith negotiations and have failed to reach agreement to a contract.
 - In order to reach legal Impasse, all dispute resolution processes provided and mandated by law must be exhausted: mediation, fact-finding and interest arbitration.
 - Interest arbitration may result in a binding decision by the arbitrator(s) on any issues except “salaries, pensions or insurance”.
 - If a *bona fide* Impasse exists, the municipality may implement unilaterally its last best offer made in negotiations on issues that have not been determined by binding decision at interest arbitration.

Principle #3: Develop a Strategy for Each Set of Negotiations.

Each round of labor negotiations is different, regardless of how long the Union has been around or how many years the bargaining agreement has been in place. Negotiations are affected by current and recent local, state and national economic conditions; the Town or City’s fiscal situation; the Union’s status with bargaining unit members; the Union’s larger agenda; the philosophy or approach of incumbent elected officials and managers; the contents of the existing labor agreement and how this fits with current conditions in operations; the history of the relationship between the parties; the composition of the bargaining teams or personalities of the bargaining agents; and the like. Each set of negotiations is an opportunity for the Town or City – not just the Union – to assess its business interests, the needs of its managers and its employees, current fiscal conditions, the leverage for improving or changing the current agreement; and the like. To set the strategy and take a proactive approach to negotiations, it is useful to:

- Develop Management’s Agenda and Theme (budget constraints, flexibility, re-structuring, down-sizing, hold the Line, address inequities, etc.)
- Set Priorities: Wish List to Bottom Line.
- Anticipate the Union’s Agenda and Theme.
- Anticipate the Dynamics at the Table.
- Anticipate the Dynamics Under the Table.
- Consider Management’s Bargaining Approach: transparent; interest based; react/respond; scorched earth.

- Plan on Longer, Harder Negotiations if Agenda and Priorities Include a Change in Principles, Priorities or Pocketbook.

Principle #4: Gather Data and Do the Research.

Salaries and benefits of unionized employees may be the largest expense item in the municipal budget and may be a lightning rod for comment, criticism and scrutiny from many quarters besides the employees and the Union, e.g. the Budget Committee, citizens, legislators. Be prepared to support management positions with hard data developed well in advance of the first session. This requires the following steps:

- Prepare Basic Cost Data: % of pay roll, overtime costs, benefit costs including history of increases; CPI.
- Get Comparative Cost Data: wage data from surrounding geographic areas, comparable union contracts, comparisons of insurance benefits and other economic benefits (including leave accruals) with those offered by other employers.
- Know the Current Contract Language.
- Know the History of Administering the Contract during the Current Term: grievances, dissatisfactions, trouble spots, smooth sailing.

Principle #5: Regard All Items as “Economic”.

The traditional distinction between “Economic and “Non-Economic” items is false. All items in the labor contract affect the Town’s business interests and its ability to deliver services.

- Per cent on the Payroll = Fixed cost, able to be calculated.
- Decrease in Management Rights or Flexibility = Unaffordable.
- Strong Management Rights Language, Flexibility of Operations, Clear Contract Language = Priceless.

Principle # 6: Know Current Trends; Make Projections Over the Contract Term.

The current period of budget constraints, pressure to down-size or streamline functions and legislative activism is not likely to end soon; it is the “new normal”. Settling a three year contract is typically most efficient for management. But predicting whether an agreement reached in 2016 will stand the test of 2019 and beyond requires both a grasp of today’s trends and reliance on an unusually cloudy crystal ball. Some current trends in Maine public sector labor relations include:

- Significant differences between contracts settled in the years after the Great Recession and 2016 forward.
- Wage re-openers during contract term, contingent on economic indicators.
- Health insurance premium sharing generally increasing, but not as rapidly as in recent years.
- Job security clauses proposed by unions, resisted by management (minimum staffing, no lay-offs during contract term, etc.); few if any new sub-contracting restrictions are agreed to.
- Contracting out remains contentious issue.
- Fair share clauses: Constitutional for the time being, but few new ones being negotiated.
- Law enforcement units more difficult to settle than other units.
- Grievances are not increasing, but remain more difficult to settle when they involve discipline of an individual or major potential costs.
- More challenges to disciplinary actions.
- More dual forum claims – e.g., grievance under the CBA, claim with Maine Human Rights Commission.
- Many Prohibited Practice Charges threatened, but few are filed.
- More input and scrutiny of wage increases and other contract terms by public.

Practical Checklist for Negotiations

- ✓ **Know the terms on which contracts in surrounding towns and counties have settled, especially those involving the same union or comparable employees.**
- ✓ **Avoid giving “language” concessions, for example on contracting out or other management rights, in exchange for wage freeze or low wages; these will be more expensive and limiting in the future than a % on the pay scale, and there is no legal requirement to trade away anything even though the wage position is difficult.**
- ✓ **Consider mediation to try to resolve difficult negotiations or grievances. If you prefer a mediator (or don’t want a particular one), communicate to MLRB or use another ADR service to provide different choices.**
- ✓ **If a union requests “impact” or mid-term bargaining during the term of the contract, get legal advice before refusing or agreeing to bargain.**
- ✓ **Be prepared to educate employees and the union about the consequences of failure to reach agreement (for example, less money available later).**
- ✓ **Manage grievances carefully, complying with time limits and using “no precedent” resolutions when appropriate.**
- ✓ **Identify strong management cases for arbitration and be willing to arbitrate if necessary.**
- ✓ **Get legal review of any termination or serious discipline, both of labor contract issues and external law issues (discrimination claims, for example).**
- ✓ **Avoid making negative changes for non-union employees before negotiating the same changes with union employees.**