



AN OVERVIEW OF THE BOARD'S COLLECTIVE NEGOTIATIONS OBLIGATION

Although the primary purpose of boards of education is to determine the educational policies and direction of their local schools districts, every local board of education in New Jersey is also considered to be a public employer that is subject to the state laws governing public employer-employee relations. Therefore, among the many statutory responsibilities involved in the governance of their local educational systems, school boards in New Jersey must comply with the provisions of the law that sets forth the obligations of public employers to participate in collective negotiations. The “collective negotiations” obligation involves far more than the responsibility to engage in sporadic rounds of bargaining: the obligation establishes a structured, ongoing and cyclical process that has a profound effect on districts’ daily operations. Understanding the legal requirements that define boards’ collective negotiations obligation is an essential aspect of effective school governance.

This “bird’s eye” view of boards’ negotiations obligation has been prepared to provide all board members with a general understanding of how the law’s requirements affect the conduct of their districts’ ongoing labor relationships. Additional, in-depth sources of information for each area discussed below can be found in the “Resources for Bargaining” article in the Reference Section of The Negotiations Advisor Online.

The Collective Negotiations Obligation

Boards’ labor relations obligations stem from the Public Employment Relations Act, *N.J.S.A. 34:13 A -1 et seq.* The provisions of the Act establish the process, the parties’ rights as well as their obligations to engage in collective negotiations.

The Major Provisions of The Law

The primary intent of the Public Employment Relations Act is to establish, and promote, a decision-making process in which terms and conditions of public employment are established through a mutual agreement between public

employers and public employees’ organizations (unions). This process, known as collective negotiations, authorizes school employees to choose to participate in defining their terms of employment by selecting a bargaining agent, or a union. School employees’ decision to exercise their bargaining rights triggers boards’ obligation to enter into the joint-decision making process and eliminates boards’ ability to unilaterally determine basic employment issues such as work hours and compensation.

To protect the decision-making process, the Act imposes the following rights and obligations:

- Public employees have the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.
- Employee organizations (unions) designated by a majority of employees in an appropriate bargaining unit become the exclusive representative for collective negotiations concerning the terms and conditions of employment of these employees.
- A majority representative of employees (union) is entitled to act for, and to negotiate agreements, covering all employees in the unit.
- A majority representative may also initiate grievances on its own behalf as well as represent the interests of employees in the processing of grievances.
- A majority representative bargaining for employees is responsible for representing the interests of all employees in the bargaining unit without discrimination and without regard to union membership.
- Unions and public employers must meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment of employees.
- When a union and public employer reach agreement on terms and conditions of employment, those terms and conditions must be included in a signed, written contract.
- Employers cannot change work rules without prior negotiations with the union.

To ensure that the stated public policy is enforced and administered in accordance with legislative intent, the Act established an administrative agency, The Public Employment Relations Commission (PERC). Public employers, employees and their unions can petition PERC to resolve any dispute and any questions that may arise under the Act.

Virtually every school district in New Jersey is involved in an on-going labor relationship with at least one union representing the district's teachers. Many districts also have a collective negotiations obligation towards other school employees who have chosen to exercise their bargaining rights. The major provisions of the Act cover all the following basic questions that may arise during a board's collective negotiations obligation.

Who Is Eligible to Participate in Collective Negotiations?

The Act contains a very broad definition of employees who are eligible to participate in collective bargaining. Other than the specifically excluded positions of managerial executives and confidential employees, the Act's definition grants all school employees, including supervisors, the right to exercise all the rights guaranteed by the Act.

Specific Exclusions: Managerial Executives and Confidential Employees In a school district, a "managerial executive" is defined as "the superintendent or other chief administrator, and the assistant superintendent of the district." It is generally accepted that all assistant superintendents employed by a school district are included in the definition of "managerial executive" and are therefore excluded from coverage under the Act.

"Confidential employees" are those whose official duties result in an incompatibility with membership in any negotiating unit because their actual job responsibilities provide them with advance knowledge of their employers' confidential positions on collective negotiations issues. Individuals who have *regular, not casual or infrequent*, knowledge of confidential *negotiations* information as an ongoing part of their work responsibilities are generally excluded from participation in collective negotiations. However, employees with knowledge of confidential information that is unrelated to negotiations (such as confidential student information) are not considered "confidential" employees under the Act and are not excluded from the right to participate in collective negotiations. In resolving questions over the status of a "confidential employee," PERC will look beyond the employee's job description to examine the actual work routinely performed by the employee.

Excluded employees are not eligible to exercise any rights, or receive any protection, under the Act. They may

not be part of a bargaining unit nor are they authorized to engage in collective negotiations.¹

Specific Inclusions: Supervisors Unlike private sector law, New Jersey's public sector bargaining law grants collective bargaining rights to supervisors. Supervisors and administrators in school districts, who are not managerial executives, may thus choose to exercise their bargaining rights under the Act and form their own bargaining units. However, administrators who are true supervisors under the Act's definition may be precluded from being included in a bargaining unit that also includes nonsupervisory personnel.

The Act defines the term "supervisor" to apply to employees who have "the power to hire, discharge, discipline, or to effectively recommend the same." Administrative and supervisory personnel who conduct evaluations of teaching personnel often have the power to effectively recommend discharge or discipline of those they supervise. This supervisory function can cause conflicts of interest within a bargaining unit and thus, PERC has held that supervisors may not be included in the same bargaining unit with nonsupervisory employees. Before PERC decides that administrative staff cannot be included in a unit of nonsupervisory staff, the board must establish that the administrative positions in question are true supervisors under the Act. Districts that can demonstrate that their supervisory staff's official functions can lead to a potential or actual conflict of interest with non-supervisory employees in the same unit have a good chance of removing supervisors from that unit.

This distinction, however, does not apply to bargaining units that are composed of all supervisory personnel. In those situations, PERC has found that the potential conflict of interest is minimal and that a unit composed of all supervisory positions may include individuals who evaluate other supervisors within the unit. Thus, principals may be in the same bargaining unit with assistant principals and departmental supervisors; however, departmental supervisors, whose job responsibilities include the actual supervision of teachers, cannot be included in the teachers' bargaining unit.

With Whom Does the Board Negotiate?

Under the Act, a union who is designated by a majority of the employees in a bargaining unit as the bargaining agent becomes the unit's exclusive representative. As such, the board must negotiate only with that duly selected majority representative or the union. Even if a negotiable issue affects only one member of the bargaining unit, the board must negotiate with the union representing the bargaining unit and not the individual employee.

The Act authorizes the union to negotiate all terms

¹ These employees may enter into *individual* negotiations with a board, but those negotiations do not include union representation and are not governed or protected by any requirements of the Act. Therefore, the labor relations process described here does not apply to negotiations involving your superintendent or other district employees who are excluded from the Act. Further, the collective negotiations obligation does not apply to eligible district employees who have not chosen to be represented by a union for the purposes of collective bargaining.

and conditions affecting any or all bargaining unit positions, whether or not individuals holding the positions are members of the union. Boards, therefore, cannot bypass the unit's majority representative to negotiate with an individual member of the unit or with another union that does not represent the bargaining unit. Boards can identify the positions included in their bargaining units, and their selected unions, by reading their contracts' recognition clause.

What Must Be Negotiated?

The Act defines the topics that must be subjected to the joint-decision making process. This includes very specifically defined subjects of: grievance procedures, including disciplinary review procedures;² assignment to and retention in extracurricular positions; and agency shop.³ The Act's definition of topics of negotiations also includes the very broad phrase "terms and conditions of employment." This general statutory definition has required further definition and clarification that has been provided by decisions issued by PERC and the courts. These decisions have established the "scope of negotiations"—that is, the issues that must be resolved through collective negotiations.

The scope of negotiations is subject to continuous changes stemming from an active interaction between the legislature, PERC and the courts. To be informed of the most recent definition of the specific issues that are considered mandatorily negotiable, board members must consult with their legal and labor relations resources. However, over the years a well-established framework has been evolving and serves as general guidance as to what topics must be determined through the process of collective negotiation. The framework establishes that, in school districts, the scope of negotiations involves two types of issues: mandatory topics and illegal topics of negotiations.

Mandatory Topics of Negotiations An issue will be found to be mandatorily negotiable if it meets all the following criteria:

- it intimately and directly affects employees' work and welfare, and
- it is not preempted by a statute or regulation that speaks imperatively to the issue to leave no room for employer discretion; and
- a negotiated agreement on the issue would not present significant interference with the exercise of

management's inherent right to determine governmental policy.⁴

The application of this balancing test of negotiability has established that "bread and butter" issues, such as work hours, paid leave, benefits, and compensation are mandatory topics of bargaining that must be determined through the negotiations process.

Illegal Topics of Negotiations Any topic that does not meet the three-pronged inquiry is an "illegal" topic of negotiations.⁵ It is quite clear, therefore, that *issues involving governmental and educational policies cannot be subjected to the joint-decision making process* and are illegal topics of negotiations. Matters such as those involving student safety, class size, criteria for staff employment and evaluation of staff performance, curriculum and curricular assignments, are policy decisions that are reserved for the exclusive determination of the board of education. Boards of education must recognize the difference between their statutory right to set educational policy and their obligation to negotiate over terms and conditions of employment.

Frequently, however, a matter will involve policy issues as well as terms of employment. In those instances, the board is free to unilaterally determine the policy aspect but it may have an obligation to negotiate over the affiliated terms and conditions of employment. For example, school management has the authority to assign teachers to supervise students; however should that assignment result in additional work load, or a reduction in contractual duty-free time, the impact of the assignment on the teachers' terms and conditions of employment may require negotiations. Given the complexities of what can and cannot be negotiated, boards are well-advised and well-served by discussing their obligation to negotiate over any specific issue with their attorney, professional negotiator, or the NJSBA Labor Relations Department.

What Does Negotiations Entail?

The Act requires boards to negotiate over mandatory topics with a good-faith effort to reach a mutual agreement to the issue under discussion. This simply means that boards must engage in the joint-decision making process, but it does not mean that boards have an obligation to concede to any issue that is placed on the bargaining table.

Not infrequently, boards that do not agree to union proposals may hear accusations of bad faith bargaining. Such union charges indicate either a basic misunder-

² Note, however, that the law establishes binding grievance arbitration as the final step of appeal of certain disciplinary determination imposed on school employees. Therefore, the appeal mechanism of these grievances is determined by law and not by local negotiations.

³ An agency shop is a provision that establishes that members of the bargaining unit who do not join the union and do not pay union dues, will be assessed a representation fee by the union. Although specifically cited as a mandatory topic of negotiations, a 2002 amendment to the PERC Law also authorizes unions who fail to obtain the provision at the local bargaining table to petition PERC to require inclusion of the arrangement in the parties' contract. If PERC finds that the union meets the statutorily required criteria, PERC then has the legal authority to grant the union's request.

⁴ *Local 195 88 N.J.393* (1982). For a detailed listing of the negotiability status of specific issues, please consult the Guide to Negotiability article in the NJSBA subscription service, *The Negotiations Advisor Online*.

⁵ An "illegal" topic means that the issue should not have been addressed through collective negotiations. As such, the contractual provision is null, void and unenforceable. Generally, issues that are outside the scope of negotiations may also not be submitted to binding arbitration.

standing of the bargaining process or a strategy designed to intimidate the board to agree to the union's position. Boards must therefore understand what is meant by good-faith bargaining and must recognize that the union is also bound by the good-faith obligation.

The Meaning of Good Faith Bargaining Good-faith bargaining requires the parties to approach negotiations with a genuine desire to reach a mutual agreement. Alleged violations of this basic requirement are submitted to PERC who determines, on a case-by-case basis, whether a school board or an employee organization has bargained in good faith. Other than a flat refusal to enter into negotiations with duly appointed representatives, the only way that PERC (and other labor relations agencies, such as the National Labor Relations Board) can assess good-faith is to scrutinize the party's "totality of conduct". This inquiry involves asking such questions as: did one party refuse to meet at reasonable times to negotiate? did a party seek extensive postponement of meetings? did one party refuse absolutely to discuss the other side's proposals?

This assessment, however, does not include an examination of the party's willingness, or unwillingness, to concede on any issue. PERC has carefully differentiated "hard bargaining" from a failure to bargain in good faith and has frequently held that:

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith.⁶

Boards must therefore keep in mind that neither board nor union concessions are required to demonstrate good faith bargaining. If one party makes a demand, the good faith obligation does not require the other side to agree entirely or partially to that demand.

Quite clearly, the object of both parties at the bargaining table is to reach a mutually acceptable agreement. This goal is not inconsistent with the well-established principle that no party can be forced to concede on a point it believes to be unacceptable. The appearance of bad faith in bargaining increases, naturally, if one party rejects outright, *without discussion or consideration*, the other side's demands. However, face-to-face bargaining situations in public education in New Jersey have shown little evidence of bad faith bargaining as boards and unions have come to understand and accept their mutual responsibilities to jointly define the terms and conditions of employment that will govern their local relationship.

What Happens If the Parties Cannot Reach Agreement?

The Act imposes a responsibility on local parties to reach a mutual agreement on terms and conditions of employment. However, it also provides specific mechanisms to assist the parties in the event of a bargaining impasse—that is, a point during negotiations where either or both parties perceive that further meetings and discussion will prove unproductive in resolving their outstanding issues. Because public employees in the State of New Jersey do not have the right to strike, the legislature has determined that a suitable alternative was needed for the resolution of any impasse that might occur during the process of collective negotiations. To assist the parties to solve their impasse and to reach a mutual and voluntary agreement over the terms of a successor contract, the Act provides mandatory impasse procedures that introduce a neutral third party in the negotiations process. Three progressive procedures exist for school districts facing an impasse in negotiations: mediation (where the mediator tries to persuade the parties), factfinding (where the parties try to persuade the factfinder) and, in the event the first two procedures have not resulted in an agreement, superconciliation. PERC assumes the costs of mediation, while the two parties must share the expenses of factfinding and superconciliation.

Mediation Upon the request of one side or both sides, PERC will assign a third party neutral who attempts to help the parties reach agreement. *A mediator has no authority or power to make recommendations which are binding on either party.* The mediator's function as a neutral government representative is to assist and guide both parties toward arriving at a mutually acceptable compromise. The mediator does not have the authority to impose a settlement upon the parties. It is important to remember that the mediator is not interested in fairness or equity nor concerned with the long-term impact of the terms of agreement on either party. Rather, the neutral's goal is simply to bring an end to the impasse by encouraging and assisting the parties to find any settlement that will be acceptable to them.

If the parties do not reach agreement during mediation, the mediator may recommend to PERC that factfinding be invoked to resolve the ongoing impasse.

Factfinding Factfinding is a formalized procedure used in those cases where a settlement is not achieved during mediation. Through the parties' oral and written presentation and relevant supporting evidence, the factfinder examines the dispute and then issues written, *nonbinding* recommendations to resolve the continuing impasse.

Factfinding is less the finding of facts than it is the finding of acceptability. Because the parties are free to

⁶ *State of New Jersey*, E.D. No. 79, 1 *NJPER* 39, aff'd 141 *N.J. Super* 410 (App. Div. 1976), a decision that is frequently cited by PERC in assessing allegations of bad faith bargaining.

reject the factfinder's recommendations, the fact finder will be far more sensitive to the acceptability of issues than to the equity of a recommended settlement. The parties to the dispute are given the opportunity to accept or reject the factfinder's recommendations. The law also requires that the report be made public release ten days after the parties first received the factfinder's report.

Super Conciliation If the parties are unable to reach agreement within 20 days after the issuance of the factfinder's report, the law invokes the final impasse procedure of super conciliation. If the super conciliation process fails to yield a settlement, the super conciliator is to issue a recommendation, which is to be released to the public within 10 days of its receipt by the parties. Even if the factfinding or superconciliation report does not resolve the impasse, the recommendations narrow the differences between the parties and serve as a basis for continuing local negotiations and an ultimate voluntary agreement.

Maintaining Terms and Conditions of Employment Not infrequently, a negotiated contract will "expire" before the successor negotiations process results in a new agreement. Under those circumstances, boards of education are expected to maintain the status quo—that is, boards must continue to honor all the terms of the old agreement until a new contract is in place. This means that all benefits, work hours, and other negotiated provisions must be maintained during on-going negotiations. As such, a school district contract never really expires and, in spite of unions' allegations, stalled negotiations does not mean that school employees are working without the protection of a contract.

Under certain circumstances, when increments are automatically related to years of experience, the responsibility to maintain the status quo may also require the payment of increments under an "expired" guide. However, in accordance with a New Jersey Supreme Court decision, boards of education are prohibited from paying increments to teaching staff members (teachers and administrators) at the expiration of a three-year contract that covers certificated staff.⁷ PERC has also held that this prohibition applies to any classification of noncertificated staff that is included in the teachers' bargaining unit. The court's prohibition does not apply to the expiration of teaching staff members' one or two year contracts nor does it apply to noncertificated staff contracts of any duration if those employees are in their own bargaining unit. However, specific negotiated provisions (other than the three year contracts covering teachers' units) may control boards' obligation to pay an automatic increment upon the expiration of the contract. Given the many different possibilities, boards would be well-advised to consult their labor relations resources, including the NJSBA Labor Relations Department before paying increments upon the expiration of a negotiated agreement.

The Eventual Settlement School districts' experience with collective negotiations indicates that the process established by the Act works. Ultimately, all district negotiations end with the parties' voluntary settlement. Very infrequently, local unions have chosen to violate the law and to stage illegal strikes. While incredibly disruptive to districts' operations and their on-going labor relationships, these strikes do not interrupt the collective negotiations obligation and are ultimately settled through the parties' voluntary negotiated agreements.

Summary

The provisions of the Public Employment Relations Act require boards of education, and school employees' unions, to negotiate in good faith over terms and conditions of employment. The negotiations obligation does not require boards of education to subject their policy decisions to the process of joint-decision making. However, agreements to many mandatorily negotiable issues, such as work hours, work load, and compensation, can have a profound impact on boards' ability to use their discretion in managing their districts' educational program within the constraints of limited resources. Therefore, boards of education must be exceedingly well prepared to conduct knowledgeable and effective negotiations.

Meeting the Board's Negotiations Obligation: Effective Approaches to Bargaining

The collective negotiations obligation has a profound effect on school management. This responsibility affects districts' personnel policies and dictates over 70% of a school district's budget; it also impacts on districts' ability to implement their educational program. It is therefore crucial that boards approach their negotiations responsibilities knowledgeably and effectively.

Maintaining Board Unity

Board unity may be the most essential factor in conducting effective negotiations. A board consensus on the process that will be used to conduct negotiations and a clear understanding of delineated roles, discussed below, assists boards to develop a unified, coordinated approach to bargaining. However, that approach must be firmly grounded on a shared understanding of the district's needs and the realities of the negotiations process. In the privacy of executive sessions, board members can, and should, participate vigorously in the process of establishing and reassessing their district's parameters. However, once consensus is reached, board members are best served by a public demonstration of solid board support and commitment to the district's negotiations position. Understanding

⁷ *Neptune Township Board of Education*, 144 N.J. 16 (1996). Note that PERC has found that the prohibition against payment of "increment" also applies to increased longevity payments and credits for additional educational experience obtained after the expiration of a three year contract.

the importance of board unity begins with an appreciation of the realities of negotiations.

Understanding the Realities of Negotiations As negotiations ultimately involve hard decisions over the allocation of limited resources, the process always involves a degree of conflict. Each party approaches bargaining from a perspective that may be inconsistent with the other party's goals and each strives to influence the outcome of bargaining to best serve its own interests. Before the conflict reaches its eventual resolution, a number of pressure tactics may be used to influence the outcome. Boards of education, who are accountable to the public, are unusually vulnerable to bargaining pressure as unions frequently seek community support. Faced with the threat that dissatisfied teachers may affect the quality and continuity of the educational program, parents can place intense and vociferous pressures to urge boards to reach a quick settlement.

Boards that are not prepared for the possibility of public pressure may overreact to the immediacy of a perceived crisis and may concede to union demands that will have a long-term negative impact on the district's operations. However, boards that are well-informed and well-prepared to handle the issues as well as the process will be far more effective in obtaining settlements that offer long-term protection to the district.

Keeping The Board Informed Boards that are fully informed of the progress of negotiations and the emerging realities for settlement are much more likely to establish and maintain a united front. To that end, it is important to establish an on-going communications process between the board and its negotiations team.

Regularly, in executive session, the team should brief the full board on the status of negotiations. A board that is kept fully informed can understand the need to compromise in certain areas and the potential for success, or failure, on other issues. Frequent communications permits a mutual, realistic assessment of the progress of negotiations and of the continued validity of the board's initial parameters. The process encourages a shared understanding among all board members that avoids surprises and prevents unanticipated rejections of tentative agreements reached by the team. However, good communications can only occur when all members of the board understand the importance of confidentiality.

Maintaining Confidentiality Board members must remember that discussions concerning negotiations are highly confidential. Failure to treat them as privileged information could seriously jeopardize the board's bargaining position. Remember, no one should deal with contract negotiations problems unless authorized to do so by the board or its committee.

A favorite union tactic during negotiations is to try to approach individual board members and administrators about bargaining problems. Sometimes, the union leader will contact a board member, assuring that person that the union recognizes him or her to be "responsible" and "not

like the others." Board members unwittingly may encourage this union tactic by outwardly showing sympathy for a quick settlement. Moreover, board members should not argue the board's position with union representatives because they may use arguments never before raised, or might find themselves contradicting the committee. Worst of all, they may end up making a commitment that the board may not carry out. *Board members who have not been authorized to speak on behalf of the board should be prepared to inform anyone who attempts to deal directly with them that bypassing the board's representatives is a violation of the PERC law.* This also applies to negotiating committee members who, in a given instance, are not specifically authorized to speak for the board.

Understanding the District's Process Effective negotiations begins with a coordinated district effort that is understood and respected by all members of the board. Productive negotiations generally involves a delineation of responsibilities between the board, its negotiations committee and its administrative team. It is important for all involved to understand and respect the respective and distinct roles that must be played in planning and managing the board's negotiations efforts.

The Role of the Full Board

Although the full board does not participate directly in the actual face-to-face bargaining process, it plays an essential role in negotiations. The contract negotiated by the district's bargaining team will represent a major district policy and thus the board must set direction for both the process and the outcome of negotiations. This means that the full board will determine whether the district will be represented by a professional negotiator or by a team composed only of board members. It also means that the board will set parameters for a settlement that it will ultimately ratify.

However, some board members, may not be permitted to participate in any aspect of contract negotiations. The School Ethics Commission has held that under *N.J.S.A. 18A: 12-21 et seq.*, the School Ethics Act, some board members may have a conflict of interest (such as a spouse in the district's bargaining unit) that precludes their participation in the negotiations process. This relatively new area affecting boards' negotiations obligation is marked by an on-going definition and redefinition of what constitutes a conflict of interest. Thus, to obtain the latest information as to who must be excluded from participation, and the extent of that exclusion, boards are advised to contact their labor relations resources to ascertain their full and most recent understanding of which board members must refrain from involvement in negotiating a contract.

Selecting the Board's Chief Spokesperson The PERC law guarantees that both employers and unions can freely select their own negotiators. Attempting to force the other

side not to use an individual as a member of the team is a violation of the Act, which is known as an unfair practice. Therefore, boards can determine who is best suited to represent the district in negotiations.

One of the most common, and earliest, board mistakes in preparing for negotiations is minimizing the importance of selecting a chief spokesperson. Negotiations is serious business and boards must give careful consideration to the identity of their bargaining representative. All board members who are not in conflict should decide whether to employ the talents of a professional negotiator, an “in-house” staff member such as a Director of Personnel or Labor Relations, or an experienced school board member. Because of the complexity of the process, more than 50% of school boards hire professional negotiators to conduct negotiations with their teachers’ bargaining units. If a board prefers to depend on board member representation, the selection of the spokesperson remains an important issue.

Generally speaking, the newest board members should not be given primary responsibility for negotiations. The board member selected to be the chief spokesperson should be a reliable member of the board who is familiar with the bargaining process, the board’s general functions, its budgeting procedures, the school district operations and the general tenor of the staff. The selected spokesperson should also be someone who can articulate the board’s position, forcefully if need be, but who also can maintain the dignity of the position at all times.

Delegating the Authority to Bargain to a Negotiations Committee The board’s actual bargaining responsibility should always be delegated to a committee that consists of a numerical minority of the board members who can participate in negotiations. This advisable and recommended practice protects the board in a variety of practical and legal ways. For example, if the full board were involved in negotiations, board meetings for all board members would increase dramatically and other district responsibilities could suffer; each negotiations sessions, though excluded from public attendance, would need to be posted in accordance with the Sunshine Law; and the at-the-table presence of all board members who can vote on the contract could indicate premature board acceptance of an agreement that has not yet been shared with the full union membership. However, delegation of actual negotiations imposes planning and coordination responsibilities on the full board that are discussed below.

Retaining The Full Board’s Right to Ratify Under certain circumstances, a negotiating committee can bind the entire board to a contract. PERC has ruled, that since the Act clearly allows the employer to act through its “agents,” a board may be bound by the tentative agreement reached by its bargaining team, even though the team represents less than a majority of the board. To avoid that possibility, and to retain the full board’s right to accept or reject the agreement reached by the team, the full board can, and should, limit the authority of the team. This is generally done by the board president, or chairman of the negotiations team, sending a letter to the union prior to

the first negotiating session establishing the team’s limited authority and the full board’s ultimate responsibility to approve, or reject, the tentative agreement.

Setting Parameters The right to ratify a tentative agreement carries with it the obligation to give the bargaining team direction as to what will, and will not, constitute an acceptable agreement. All board members who can vote on the contract must therefore establish the board’s objectives for the successor agreement. These bargaining parameters will provide the framework for the negotiations team bargaining efforts and should therefore reflect the types of changes the board is seeking to achieve, and is willing to accept, in its new agreement.

The board’s parameters must be clear enough to give the team a strong sense of what will be acceptable to the board. However, the parameters must also be broad enough to give the team sufficient room to negotiate.

Setting parameters that provide meaningful guidance to the team requires a careful assessment of the district’s needs for changes in the current agreement. The process of identifying the board’s bargaining goals involves a consideration of a number of factors, including: the problem areas of the current contract, such as contractual language and unanticipated costs; a comparative analysis other districts’ settlements; an assessment of union demands; and the district’s needs and resources. However, since parameters cannot simply reflect the board’s “wish list,” but must establish a realistically achievable framework for a settlement, parameters will also consider comparative data based on recent settlements of similar districts. As both internal and external conditions are subject to change, the board must be prepared to reexamine and possibly readjust its initial parameters as bargaining progresses. In other words, the setting of parameters is an ongoing process that requires reassessment and development throughout the course of a round of negotiations.

The board must also assess its ability to accept union proposals. In addition to the union’s obvious financial demands, many other union proposals can have economic and administrative implications for the district. These may include demands such as additional preparation periods, limits on instructional time, or longer lunch periods for staff. These demands, if granted, could require a district to hire additional staff or to pay more for substitutes and may create administrative scheduling nightmares. The implications of all union proposals must be considered by all board members who are not in conflict to give the negotiating team direction in its responses. However, as in the setting of its parameters, the board’s preliminary position in response to union proposals should be somewhat flexible. As negotiations progress, the board may change its position.

The board’s responsibility to set direction for the team exists whether its committee is headed by a professional negotiator or a board member. And, finally, having set parameters for settlement, the full board must remember the direction it has given its team and support any tentative agreement that falls within its parameters.

The Role of the Negotiating Committee

The committee is made-up of board members, at least one upper-level administrator, and possibly the board attorney or a professional negotiator. The committee performs the arduous task of narrowing differences and seeking compromises on wages, hours and working conditions. As a result of their training and the time spent preparing and negotiating, members of the committee frequently become the board's resident negotiations experts. However, members of the committee must always keep in mind that their expertise must be used to represent and advance the position of the full board and their authority is limited by the parameters established by the board.

Assisting the Board In Setting Parameters To assure ratification of its tentative agreement, the team must obtain direction from all board members who can vote on the contract. The team should therefore insist that these board members take the time to establish parameters and use its expertise to help the board set productive parameters. The team's familiarity with the district's contract and its costs, its knowledge of comparative data, as well as its understanding of the realities of the bargaining process serve as excellent resources to assist the board's in formulating meaningful parameters. For example, a knowledgeable team can help the board to use valid and appropriate comparisons. While comparisons of other districts' settlements may be a useful reference point to provide a needed perspective of the ranges of possible settlement, districts must be wary of inappropriate comparisons that compare dissimilar districts or ignore important details of the settlement, such as insurance "give-backs" or the date of the agreement.

Preparing Board Proposals The team will have the responsibility to translate the board's desired changes into bargaining proposals that will be presented to the union. The formulation of proposals requires an appreciation of the dynamics of negotiations and should be designed to give the team room to move from its initial positions as it participates in the joint-decision making process. Proposals need to be carefully drafted to avoid unclear contract language that holds unanticipated and undesired consequences. The assistance of administrators, legal or labor relations resources is most valuable in preparing well-drafted board proposals.

The Authority to Negotiate Within the framework of the board's parameters, the negotiating team has the authority to present board proposals, to respond to union proposals, to offer counterproposals, and to reach a tentative agreement. In order to engage in good faith bargaining, the team must be able to exercise its authority, without seeking board approval, to move within the board's guidelines.

However, the team does not have the authority to negotiate outside or beyond the board's framework. Should the team find that the board's parameters are unachievable in the current context of negotiations, the team must ask the board to reconsider its parameters. Good communications between the team and the full board should lead to the clear understanding that is necessary to avoid the negative impact of a tentative agreement that cannot obtain board ratification.

The authority to negotiate rests with the entire team. A team member may only negotiate independently when the entire team has delegated that authority to that individual. Unauthorized negotiations, by either a member of the team or a member of the board, can significantly undermine the position of the board.

Signing the Tentative Agreement Negotiations are generally concluded by the parties' signatures to a document that lists the agreed-upon terms of settlement. Members of the board team who sign the tentative agreement have a legal obligation to support the agreement and to vote for its ratification. Team members who do not believe that they can publicly vote in favor of the settlement should refrain from signing the tentative agreement.

The Role of the Administration

Administrative input is most valuable in assessing the district's need for negotiated changes and in establishing bargaining priorities. The district's administrative staff⁸ is best able to advise the board as to what, if any, contractual provisions have created operational difficulties. The staff should share this information with the superintendent, who, in turn, will share it with the board before negotiations begin.

The superintendent or his/her representative should be deeply involved in the analysis of both the current agreement and the initial union demands. As the educational and administrative leader of the district, the superintendent should be attuned to teacher aspirations and carefully balance their needs with those of the school district. This individual should serve as an advisor to the board in the negotiations planning stage and during the process itself. The superintendent or a designated representative should be present or available during negotiations. The superintendent's availability is critical, especially if a need arises to determine whether agreement over a contract clause would adversely affect school district operations; however, the superintendent should not, except in very special circumstances, negotiate directly. It is extremely difficult for any individual to participate in the adversarial process of negotiations while seeking to establish and maintain a working rapport with the staff, a function that is essential for any educational and administrative leader.

⁸ Note that administrators' participation may also be precluded by the School Ethics Act. Check with your labor relations resources to determine whether any of your administrators have a conflict of interest and the extent of their ability to contribute to the board's negotiations obligation.

Summary

Collective negotiations can have a profound impact on school district operations. While the contract is a labor agreement that simply addresses the terms and conditions of members of a bargaining unit, its provisions affect not only a district's budgetary allocations but also its ability to administer its educational program effectively and efficiently. Boards must therefore give serious consideration to the terms of their agreements and to the process they use to negotiate their contracts. Every board member who is not in conflict must participate in the board's negotiations effort by respecting the authority of the full board to set parameters and the exclusive authority of the bargaining team to negotiate within the board's parameters. To assure productive negotiations that protect the district's interests, every board member must scrupulously maintain confidentiality and avoid individual conduct that will undermine the district's unified effort to meet its collective negotiations obligation.

Meeting the Board's Obligation to the On-Going Labor Relationship

The parties' ratification of a negotiated agreement does not end boards' collective negotiations obligation. A new agreement simply signifies a new phase of the labor relationship where both parties are now required to live by the terms of the negotiated contract.

Contract Administration

While contract negotiations provides a time to change terms and conditions of employment, the contract administration phase is one that is intended to provide stability within the labor relationship. Thus, boards of education are required to respect the rights and obligations that have been negotiated and must wait until the next round of negotiations to seek changes in provisions that prove to be unfavorable to the district's administration.

District administrators and boards of education are required to honor all employees' negotiated rights and benefits of employment, consistently and uniformly, under the conditions established by the contract. However, district administrators and boards of education also have the right to, consistently and uniformly, exercise the authority granted to them under the contract. Contract administration places the same obligation upon employees and their unions who are also required to comply with the terms of the negotiated agreement. Yet, during this time of theoretical stability in the labor relationship, disputes will arise and will be handled by established mid-contract dispute resolution procedures.

Grievances Mid-contract challenges to administrative actions are expressed through grievances filed in accordance with the procedures established in negotiated contracts. These procedures generally involve a progressive mechanism of appeal through the district's chain of

command. A large majority of New Jersey school district contracts involve the board of education as the last level review within the district's hierarchy. Boards' decisions may then be appealed to an arbitrator.

Arbitration Employees and their associations may have a contractual or legal right to pursue their grievances to binding arbitration. In 1990, the PERC Act was amended to provide school employees with the legal right to submit their grievances involving certain disciplinary determinations to binding arbitration. Thus, almost all board actions involving employee discipline (except for the nonrenewal of a nontenured teacher or the filing of tenured charges) may become the subject of binding arbitration. Arbitration of nondisciplinary grievances remains subject to the specifically negotiated contractual procedures. Members of a district's management team must therefore be well prepared to understand the complexities involved in administering negotiated agreements.

Implications for Boards of Education Boards of education should be prepared to understand that midcontract disputes are a normal part of an on-going labor relationship. While dealing with grievances may be an unpleasant reminder of management's limited authority, these midcontract disputes can help boards to conduct more effective labor relations. First, grievances and arbitration awards can highlight problems in the current agreement that require a negotiated change. These areas can then be raised as board proposals in the next round of negotiations. Negotiated changes in troublesome provisions will result in contracts that are more protective of management's needs. Further, the need to process grievances can lead to more effective contract administration that is based on a full understanding of the board's contractual and legal rights.

Midcontract disputes frequently arise because the parties' different perspective affect their interpretation of contractual language. Understanding the rules of contract language interpretation that are applied by arbitrators in reading contractual provisions can provide boards and their administrators with a more "objective" framework for the administration of their contracts. Administrative decisions that are based on an impartial reading of negotiated provisions lead to a predictable, consistent management style that protects the parties' negotiated rights.

In addition, knowledge of the legal limitations on the jurisdiction of arbitrators can also help boards protect their rights as employers. For example, topics that are outside the scope of negotiations cannot, under the law, be submitted to binding arbitration. Thus, faced with a demand to arbitrate a grievance over the board's right to assign staff to supervise students, a knowledgeable board of education would petition PERC to restrain arbitration of this nonnegotiable and nonarbitrable subject.

Appropriate and rational contract administration is always marked by consistent and uniform application of rules of employment. However, it is also marked by the many complexities of contractual and legal requirements. Boards are well-served to seek guidance from their personnel, legal and labor relations resources to assure that

their contract administration respects both their rights as employers and the rights of their employees.

Respecting the Statutory Rights of Employees

At all times during the labor relationship, boards of education are required to respect the rights of their employees under the Act. This means that boards cannot interfere with their eligible employees “protected rights” under the Act: that is, the right to select a union, the right to join a union, the right to be an active supporter or advocate of the union, and the right to refrain from all of the above. Boards’ employment decisions must be “union blind”; that is decisions involving evaluations, promotions, hiring and firing and so on must be based simply on the individual’s qualifications as an employee and not as a union member. This also means that boards cannot let an employee’s union activism shield that employee from the district’s standards for performance. An employee’s protected right does not involve the legal right to use work time for union business, and unless this right is granted by the parties’ contract, a board would have legitimate right to require the employee to attend to work responsibility during work hours.

A failure to respect the rights of employees and their unions is a violation of the law called an unfair labor practice. In addition, employer violations of the Act have a negative impact on a district’s on-going labor relationship. Employees and their unions tend to interpret the employer’s violations as an attack on their rights to legitimately participate in their statutorily guaranteed and protected activities. Under these circumstances, unions generally respond with increased militancy that affects every aspect of the labor relationship. Grievances are filed over the slightest perception of a contractual violation and

the adversarial nature of the relationship is heightened to a degree that complicates negotiations of successor contracts. Conversely, boards that comply with the law and respect the bargaining process, as well as the rights of their employees, develop productive labor relationships which encourage unions to accept and respect the board’s rights to manage the school district.

Summary

Boards’ labor relations responsibilities require boards to participate in an on-going cycle in which all decisions affecting terms and conditions of employment must be subjected to the process of joint-decision making known as collective negotiations. This responsibility requires boards to respect the rights of their employees and their unions and to engage in good faith bargaining over mandatory topics of negotiations. However, the requirement to participate in collective negotiations does not obligate boards to agree to contractual terms that would have an adverse effect on district operations nor does it obligate boards to abandon their rights to establish educational policies and to monitor the performance of their staff.

Collective negotiations is a complex, pervasive obligation that involves specialized knowledge of legal requirements, personnel relations, the structure and dynamics of the negotiations process, as well as the art of bargaining. Effective labor relations that permit boards to achieve a balance between their responsibilities to their staff, their students and their communities requires assistance and training. Therefore, the first step that board members can take to meet their boards’ negotiations obligation is to become aware of, and rely upon, the resources available to build effective and productive labor relationship including their attorneys, labor negotiator, and the Labor Relations Department of the NJSBA.⁹

⁹ For a complete listing of NJSBA resources, please visit the Labor Relations Page at the NJSBA Web site, www.njsba.org or the “Resources for Bargaining” article in the Reference section of *The Negotiations Advisor Online*.