



# ANALYZING SELECTED CONTRACT CLAUSES AND BARGAINING PROPOSALS

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Virtually all school districts have entered into negotiated agreements with their teachers' associations. These contracts contain anywhere from half a dozen to over fifty contractual articles, depending upon the size of the district, the scope of the bargaining unit, the bargaining history and the imagination and persistence of the parties. Some clauses, such as the recognition clause, the grievance procedure, benefits and compensation, are found in all contracts. Most contracts also contain articles defining work load, evaluation procedures, and employee rights. Although the title of contractual clauses tend to be identical, the specific provisions vary considerably from district to district as a result of local needs and the local bargaining process.

Regardless of their contents and volume, all contracts establish the terms and conditions which govern the bargaining unit's employment relationship with the Board of Education. As such, the existing contract becomes the basis for future negotiations as each party seeks to improve upon the *status quo*. Therefore, the ability to analyze the effectiveness of existing contractual provisions can assist a board to prepare its position in future negotiations. Discovering problems in existing contractual language can lead to the formulation of board proposals which seek to rectify an undesirable condition. Identifying the kind of language which has created problems for the management of the local district can assist a board to analyze union proposals and to formulate counterproposals which can avoid or prevent agreements that will perpetuate and aggravate administrative difficulties.

A careful, systematic analysis of contractual provisions and bargaining proposals can be easily implemented. An effective analytical approach involves an assessment of: the legality of the clause; the clarity and precision of the language; the components necessary to express the purpose of the clause; and the degree to which the provision protects the needs of the board.

## Legality of the Clause

In New Jersey's public sector, not all issues which may be of interest to employees are negotiable. Boards must be careful to not enter into negotiations over issues which are legally not negotiable. The area of nonnegotiability involve managerial prerogatives, statutory directives, and

regulatory provisions. Agreements to any illegal topic of negotiations can significantly interfere with boards' ability to set educational policies and, as those agreements are unenforceable, can create potential problems in boards' on-going labor relationships. To assess the legality of existing contractual provisions and union proposals, please turn to the "Scope of Negotiations" article in The Structure of Negotiations section of *The Negotiations Advisor*. To assure complete accordance with the quickly evolving and volatile area of negotiability, you may also want to consult your board attorney, your labor relations consultant, or the NJSBA's Labor Relations Department.

## The Clarity of the Language

One of the critical aspects of contractual provisions is the clarity of the negotiated language. Issues which seemed to have been mutually understood and received mutual acceptance at the bargaining table frequently become a source of disagreement and dispute during contract administration. Somehow, the written contractual clause is discovered to hold the possibilities of divergent interpretations. An analysis of the existing agreement should include a review of the clauses which have been open to conflicting interpretations and have caused problems in the district. Your administrators' comments and records of grievances and difficulties arising under the contract can be a good way of identifying areas in need of attention; achieving clarification of the clauses which have been troublesome to the district is a legitimate bargaining goal.

However, not all unclear and imprecise language need written clarification. Some language may appear vague to a board member or to a reader unfamiliar with the district's operation, but that language has been administered consistently, to the board's satisfaction, and has never been challenged by the union; in this instance, clarity has been provided by the district's practice. Written clarification is not only not necessary but may also be unwise: the union may seek to negotiate a change in the practice and the board's unnecessary proposal may complicate negotiations. If the unwritten practice, however, does not meet the board's needs, then a change in the practice can, and should, be proposed by the board.

Good contract language depends upon careful drafting

of bargaining proposals and counterproposals. Thus, board proposals and responses should also be analyzed for clarity and precision.

Do the words and the sentence structure accurately reflect your intention? Is your meaning clear to any reader or can the words suggest an undesired and unanticipated interpretation? Does the proposed clause address the issue at hand or does it also implicate other situations not intended to be covered by the provision? The clarity and precision of your proposal can be easily established by having several board members read and comment on their interpretation of the proposal. Administrators' perspectives in analyzing board and union proposals and responses is particularly important when the issue affects school operations; their expertise can help you to identify a potential loss of administrative flexibility or situations which could inadvertently be affected by the proposal. Rewriting a proposal to eliminate undesired ambiguities and extensions of intent is well worth the time and effort.

Contract clauses, proposals, and potential agreements must also be examined in light of the contract's other articles. Is there any conflict or contradictions with other existing or considered contractual provisions? Does the new language negate any existing articles? Each proposed addition must be read in the context of the entire contract. Again, the time and effort is worthwhile as it may avoid future problems during the administration of the next contract.

## **The Purpose of the Clause and Its Components**

To avoid misunderstandings and differing interpretations, the language of a clause needs not only to be clear on its face but it also needs to precisely and comprehensively cover the issue. The words must be related to the purpose of the clause. What is the intent of the clause? What is it providing? Are all members of the bargaining unit eligible or is it reserved only for tenured staff? Is the provision automatically available or is it triggered by a specific circumstance? Is administrative approval necessary? If there is a cost involved, who will be responsible?

The details of the clause, which address the "who, what, when and how" of the issue, constitute its components and provide clear understanding and consistent administration. Occasionally, the parties to negotiations deliberately determine to draft a vague provision. Generally, however, a full description of the provision, and the extent and conditions of its coverage, is beneficial to both parties as it clearly defines and describes the details of their understanding.

Contract clauses, proposals and counterproposals should, therefore, be examined and analyzed to identify how clearly and precisely the intent is described. The components of specific provisions will depend upon the issues and the parties' intent. Specific components can

be identified by examining the purpose of the clause and the specifics needed for smooth implementation. Usually, applying the journalistic "why, what, who, when, where, and how" will yield the clause's necessary components and result in clear and precise language.

The importance of good contract language construction cannot be over emphasized. However, clear and precise language does not, in and of itself, constitute "good" contract language. From a board's perspective, good contract language must also meet the board's needs and protect its interests. Therefore, an analysis of the contract and of bargaining proposals must be grounded in a clear awareness of the district's needs and an understanding of how those needs can be protected by negotiated provisions.

## **Protecting the Board's Needs Through the Component Analysis Approach**

It has been said that since all negotiated agreements place limitations on boards' ability to take unilateral actions, negotiations is a process which inherently damages boards' ability to manage their schools. However, carefully constructed provisions, which recognize the district's educational and operational needs and which address the board's needs in the clauses' components, can protect the board's ability to manage the schools.

For example, many contracts contain a provision which permits employees to review their personnel file. Consider this provision:

*Employees shall have the right to review the contents of their personnel file at any time and to receive copies, at Board expense, of any documents contained therein. Employees may, at their discretion, be accompanied by an Association representative during such review.*

This clause contains all the necessary components: it explains who is entitled to this term of employment, when, and under what conditions. However, the components reflect only the employees' perspective and does not consider the administration's needs in this area. Under this provision, employees must be given the opportunity to examine their files at anytime. This could present problems for administration which could range from a slight inconvenience to serious interference. Indeed, this clause could be used, in a "worst possible" scenario, to harass the administration.

The same term of employment could, however, protect the administration if the components of the clause recognized and addressed the concerns of the district. Compare the above provision to this:

*Employees, upon written request to the Superintendent, shall have the right to inspect their personnel files at a mutually scheduled*

*time. Employees may be accompanied by an Association representative and may receive, at Board expense, a copy of any document contained in the file.*

This clause also contains the “who, what, when and how” components, but its components have been constructed from both the employees’ and the administration’s perspective. The required advance notice and mutually scheduled time allows the Superintendent to plan the review and to avoid unnecessary inconveniences and complications.

Clauses written from only the employees’ perspective can result in more difficulties than simple administrative inconveniences. Contractual clauses which ignore the board’s and administration’s needs can present serious interference with the district’s ability to predict expenditures or with the necessary flexibility needed to provide an effective and efficient educational program; whereas clauses which include components necessary to the district’s ability to meet its educational and operational goals reduce the contract’s intrusion into the management of the district.

The contractual components necessary to protect a board will depend upon the provision and its purpose in the contract as well as upon the individual district’s needs in relationship to the clause. However, in spite of these differences and variations, all boards share similar needs in contract administration: ease of administration, predictability of cost, administrative authority and flexibility to implement the district’s educational program. These general board needs, as well as local needs, should be accommodated or protected by specific contractual aspects or components.

The individual components necessary to each clause can be easily identified by analyzing each clause in the context of:

- *Its purpose:* what is this clause intended to provide?
- *Its effect on the district:* what are the positive and negative implications on the district? the administration? the educational program?
- *Its ease of administration:* does this, as written, present problems for the principal? the superintendent? the board?
- *Its effect on expenditures:* what does this cost? is the expenditure predictable and can it be planned for in the budget?
- *Its effect on the effectiveness and efficiency of the educational program:* how does this effect the educational program? does it reduce the administration’s flexibility?

This analysis can identify problems in existing or proposed clauses and can also suggest possible additions to the language which could become potential solutions. The inclusion of these additional provisions can result in a clause which is more effective in protecting the board’s interests. Clauses which include components to assure ease of administration, ability to predict expenditures and administrative flexibility to implement the districts’ educational program are always beneficial to the board.

Contractual clauses are the results of negotiations. The best way to ensure that the locally negotiated agreement contains provisions which protect the board’s needs is for the board to include protective components in all its proposals and counterproposals. To that end, the board’s proposals, the union’s proposals, and the board’s responses should always be subjected to a component analysis to ensure that the necessary protection is identified and addressed before agreement is reached. All the components which would, ideally, be necessary to fulfill the purpose of the clause as well as to protect all of the board’s needs should be included in the board’s positions. Not all may be achievable; boards may not be successful in achieving all the protection they would desire, but if protective components are not included in bargaining proposals and counterproposals then no protection will be achieved and the contract will indeed reduce the board’s ability to manage its schools.

## Summary

An effective analysis of contract clauses involves an assessment of the legality of the clause, the clarity and precision of the language, and its ability to protect the board’s needs in the management of schools. The same technique applied to the formulation of the board’s proposals, the analysis of the union’s proposals and the preparation of board responses can result in carefully drafted provisions which clearly balance the needs of the bargaining unit with those of the board.

Contract language controls the employment relationship between the board and its organized employees. Poor contract language, which ignores the board’s educational and operational needs, can be far more damaging to the district, and far more expensive, than an unfavorable economic settlement. Writing good contract language is not easy and cannot be left to the midnight hour or to the mediator. A systematic, analytical preparation and development of contract language throughout the bargaining process can prevent costly last minute mistakes.