THE PERC LAW AND THE BARGAINING PROCESS

The Public Employment Relations Act authorizes collective negotiations in New Jersey's public sector. The law establishes and protects the process of negotiations as the State's established public policy to determine terms and conditions of employment for public employees, including eligible school employees. Although the law requires that public employers, upon their organized employees' request, participate in bargaining and the law establishes what issues must be bargained, the law does not impose resolution of negotiable issues upon the parties contract.1 However, the provisions of the law establish specific requirements which affect the bargaining process. Boards of education should be aware of the law's requirements which can affect their behavior at the bargaining table.

The Authority to Bargain

N.J.S.A. 34:13A3(b) defines a public employer as:

> *...an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification....*

By allowing a delegation of the bargaining authority, the law does not reserve the right of final ratification of an agreement to the full board of education. Therefore, PERC has held that the full board can be bound by a tentative agreement reached by a committee of the board (a numerical minority), if that committee was cloaked with the authority to represent the board.[2]

Therefore, a board of education that wishes to retain its full authority to review, ratify or reject the tentative agreement reached by its bargaining team must specifically reserve that right to the full body. This reserved right can be established by a letter, known as a "Bergenfield letter," which is sent to the union by the board president prior to the onset of negotiations. A typical Bergenfield letter may read as follows:

> *The Board of Education has selected the following individuals to be members of the Negotiating Committee of the Board: (insert names)* _____ . *The Board hereby authorizes this Committee to enter into discussions with (enter name of the union) concerning a successor contract for the* _____ *school year for the unit which includes all (list the job classifications in the contract).*
>
> *The Negotiating Committee is directed to act in good faith on all matters relating to a successor contract. The Board of Education reserves to itself the final and ultimate authority concerning any agreement to a successor contract.*
>
> *The Board's position in this matter is based upon its understanding of its public obligation and its obligations under Chapter 123, Public Laws of 1974.*

In the absence of a formal letter, or in confirmation of an official communication, the board's bargaining team should, at the first negotiating session, establish its limited authority to bargain to a tentative settlement and specifically reserve the final right of ratification for the full board.

A formal declaration of the board's ultimate authority to ratify the team's tentative agreement will avoid the inadvertent forfeit of the full board's right to review and to act on the agreement. Under the law, a "Bergenfield" declaration protects the board's interests in negotiations.

The Onset of Bargaining

PERC's regulations call for the parties to begin negotiations no later than 120 days prior to the public employer's budget submission dates, unless the parties mutually agree to commence at a different time.[3] In public school districts, the budget submission date has been linked to the school budget election. When the school election was held in February, districts were obliged to begin negotiations in mid-October. Many school contracts then established that negotiations would begin no later than October 15. When the school election date was changed to April, the parties' legal obligation to begin negotiations fell sometimes in December. However, where contractual agreement includes another more liberal date,

[1] For a discussion and listing of negotiable topics, please consult the article on "Scope of Negotiations" and "A Guide to Negotiability" in other sections of *The Negotiations Advisor.*

[2] *Bergenfield Board of Education*, PERC No. 90, 1 *NJPER* 44.

[3] *N.J.A.C.* 19:12-2.1.

the parties are bound by their contractual dates; changing the date of the onset of local negotiations must then be accomplished by mutual agreement or during the process of negotiations.

Starting negotiations too early is not, generally, in boards' best interests. In mid-October, boards are usually unaware of their budget caps, their anticipated state aid, or their local budgetary constraints and planning informed economic parameters at that time is simply unrealistic. Further, many experienced school negotiators believe that the longer the board sits at the table, the more the board will be pressured to give more to the union. You may therefore wish to assess your contractual provision and your local situation to approach your union to seek a mutual postponement in negotiations until 120 days before the school budget election or you may wish to consider a negotiations proposal to replace your current contractual provision with:

> *The parties agree to enter collective negotiations over a successor agreement according to the timetable established by the Public Employment Relations Commission.*

As this language merely restates your legal obligations, it is not necessary except as an appropriate substitute for present language that binds you to a specific date.

The Composition of the Bargaining Teams

Under the PERC Law, each party is free to select its own bargaining representatives.[4] Section 5.4 of the Act protects that right by prohibiting both public employers and public employee unions from interfering with the other's selection of bargaining representatives. Therefore, neither party can refuse to negotiate because of its objection to the composition of the other negotiating team. Neither the board nor the union team can object to the other's decision to utilize a professional negotiator as the team's chief spokesperson nor can either party object to the presence of any individual representative at the bargaining table.

Further, a board cannot refuse to negotiate with the teachers' Association because the teachers' team includes individuals who are members of different bargaining units. PERC has held that these negotiating teams are appropriate as long as negotiations are limited to terms and conditions affecting the teachers' unit.[5] Thus, whether or not you approve of the union team, you have an obligation to meet and to bargain in good faith.

The "Good Faith" Bargaining Requirement

The PERC law requires that the parties "negotiate in good faith."[6] This standard for a bargaining attitude is the cornerstone of all bargaining laws affecting the public as well as the private sector. Very simply, the "good faith" standard requires that the parties approach bargaining with a genuine desire to reach a mutual agreement.

In determining the existence of "good faith," PERC will look at the party's totality of conduct rather than at isolated incidents. Basically, the standard used to determine whether the parties have bargained in bad faith revolves around one question: does the bargaining which has taken place indicate that one or both parties came to the negotiations table with no desire to reach a mutual agreement on the contract? The question is easy to ask; the answer is a good deal harder to provide. Unless a party has absolutely refused to meet with and discuss negotiable issues with the other side, the Public Employment Relations Commission must analyze the entire course of bargaining to reach a decision. The difficulty is that no one position can serve as an indicator of bad faith bargaining, and PERC's investigators will not be equipped with motivation machines capable of revealing the true intentions of a party when it entered bargaining. The "totality of conduct" approach will involve these observations, among others: did a party refuse to meet at reasonable times to negotiate? did a party seek extensive postponement of meetings? did a party refuse absolutely to discuss the other side's proposals? does its conduct suggest that it was simply going through the motions of bargaining rather than approaching negotiations with a good-faith desire to reach a settlement?

However, the obligation that a party bargain in good faith does not require the party to make a concession on any specific issue. If one party makes a demand, the other side is not required to make some movement toward that position. For example, the union may demand dental care. The board has estimated the cost of dental care and decides that its cost would be prohibitive. The board rejects the union's demand. The board does not have to offer a modified dental plan to meet its obligation to bargain in good faith. The board might respond that a dental plan would be acceptable if there was a concurrent lessening of the salary increase or if certain other changes could be made in the terms of the contract, but even these responses are not required by law.

Quite clearly, the object of both parties at the bargaining table should be to reach a mutually acceptable agreement. Such a goal is not inconsistent with the well-established principle that no party can be forced to concede on a point it believes unacceptable. PERC has 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"*

[4] Please note, however, that the composition of the board team may be affected by the provisions of the School Ethics Act. For a discussion of that law's impact on the composition of the board, please turn to the "Labor Relations Issue Summary: Opinions of The School Ethics Commisison Affecting Negotiations" in the References section of this publication.

[5] *North Brunswick Township Board of Education*, PERC No. 80-122, 6 *NJPER* 11095.

[6] *N.J.S.A.* 34:13A-5.3.

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.[7]

Boards' bargaining, however, has been found to be lacking in good faith when: boards implemented a change in terms and conditions of employment during negotiations;[8] refused to negotiate over mandatory topics of negotiations,[9] including a refusal to reopen negotiations, midcontract, when the Legislature has created a new mandatory topic;[10] and refused to reduce an agreement to writing (see discussion below).

The obligation of the union to bargain in good faith is no different than the board's obligation. The union has the same responsibility to fairly consider the proposals of the board and boards are not limited to reacting to the demands of the union. Board can, and should, make initial proposals to change contract terms in order to alleviate unacceptable burdens placed upon them by the current contract or to clarify certain language in the contract. Counterproposals and board demands have a rightful place in the bargaining process.

Some unions may characterize a board's bargaining position as evidence of "bad faith." These charges, however, may be designed to threaten or intimidate the board team to make concessions. Board teams that fully understand the meaning of good faith bargaining will not be pressured into tactical errors that will damage the board's bargaining position.

Boards should note, however, that the obligation to bargain in good faith is suspended when a valid question of representation exists. PERC has held that it is an unfair practice for an employer to continue to negotiate with an incumbent union when a challenging union has filed a representation petition.[11] During the pendency of representation proceedings, an employer must appear neutral and thus must cease to negotiate with the challenged majority representative; however, all terms of the agreement negotiated with that union must remain in effect.

Reducing the Agreement to Writing

The PERC law specifically declares that "refusing to reduce a negotiated agreement to writing and to sign such agreement"[12] is an unfair labor practice. Therefore, both the board and the union have an obligation to put the agreement in writing and to sign the agreement. The requirement, however, exists only when a "meeting of the minds" can be proven to have been the result of negotiations. When a refusal to sign an agreement is based on a genuine disagreement as to the intent of the agreement, PERC has found that the parties had not reached a final, mutual resolution of the issue. Under these circumstances, PERC has dismissed unfair practice charges.[13]

The obligation to reduce an agreement to writing applies only when the agreement represents the conclusion of negotiations. Thus, a public employer who has retained its authority to approve its bargaining team's tentative agreement also retains its right to refuse to reduce in writing or to sign the tentative agreement.[14]

Signing the agreement, therefore, normally occurs after the full board has ratified the settlement. Most board members who can participate in negotiations are free to vote as their conscience dictates at the time of ratification; however, board members who served on the bargaining team and affixed their signatures to the Memorandum of Understanding or the tentative agreement have a special responsibility to "present the memorandum to the full board and to recommend its acceptance."[15] Failure to do so is considered a repudiation of the agreement. Therefore, team members who anticipate their inability to support the tentative agreement should not sign the tentative agreement.

Summary

The provisions of the PERC law structures the bargaining process. Although the law does not impose resolution of negotiable issues upon your negotiated agreement, it does require that both parties to local bargaining follow certain expected procedures. These statutory and legal expectations are designed to protect the process of collective negotiations; a failure to abide by these procedures is an unfair labor practice. An awareness of your legal responsibilities towards the process will allow you to conduct your negotiations knowledgeably and effectively, without damaging your ongoing labor relationship.

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[7] See, for example, *State of New Jersey*, E.D. No. 79, 1 *NJPER* 39; and *Mount Olive Board of Education*, PERC No. 84-73, 10 *NJPER* 15020.

[8] *Mount Holly Board of Education*, PERC No. 84-27, 9 *NJPER* 14252; also see article "Balancing Management Rights with the PERC Law" in this section of *The Negotiations Advisor*.

[9] *Cliffside Park Board of Education,* PERC No. 77-2, 2 *NJPER* 252.

[10] *Wayne Board of Education*, PERC No. 81-106, 7 *NJPER* 12067.

[11] *County of Bergen*, PERC No. 84-2, 9 *NJPER* 14196; and *Middlesex County*, PERC No. 81-129, 7 *NJPER* 12118.

[12] *N.J.S.A.* 34:13A-5.4a(6); b(4).

[13] See, for example, *Borough of Matawan,* PERC No. 86-87, 12 *NJPER* 17052.

[14] *Borough of Little Ferry,* PERC No. 86-151, 12 *NJPER* 17203.

[15] *Lower Township Board of Education,* PERC No. 78-32, 4 *NJPER* 4013.