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Tips From the Other Side of the (Bargaining) Table

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Vance represents public and private sector entities in employment litigation, commercial litigation, and labor matters. He advises public agency clients in all matters, including wage and hour issues, labor and collective bargaining issues. Before joining Kronick, he represented public employees and their unions, mostly peace officers, in a variety of areas including disciplinary hearings, unfair practice charges, collective bargaining, and grievance procedures.

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Ian has a diverse litigation background, having represented both public and private sector clients in a wide variety of issues including wage and hour actions, employee discrimination, harassment and whistleblower claims, real estate disputes, and construction matters. He also has experience prosecuting and defending actions before administrative agencies, including the Public Employment Relations Board and the Department of Industrial Relations.

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Kevin advises and litigates on behalf of public agency clients in all matters, including wage and hour issues, labor and collective bargaining issues, due process and discipline for public sector employees, discrimination, harassment, disability accommodation, 42 U.S.C. § 1983 litigation, public employee privacy rights, leaves of absences, writ of mandate proceedings, and other public employment based actions. He also advises the firm's municipal and special district clients on elections law disputes, including CVRA and FAIR MAPS issues.

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The View From the Other Side

- Pressures on bargaining teams
- High expectations
- Feeling wronged or underappreciated
- Bad faith and "surface" bargaining

Legal Guardrails on the Bargaining Process

- Employment Relations Boards (PERB, ERB, NLRB)
- MMBA, HEERA, Dills Act, etc.
- Unfair Practice Charges/Writs/Injunctive Relief
- Significant intersection between good bargaining practices and legal requirements for bargaining

The Usual Suspects (of bad faith bargaining)



Some Common Complaints From the Union Perspective...

- Delays
- Lack of Response to Proposals
- Lack of any Justification
- Lack of Authority
- Not being "Heard"



Delay, Delay, Delay- the Law

- Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.)
- PERB has found that evasive tactics and delay – e.g., cancelling or delaying meetings – can constitute evidence of bad faith. (See, e.g., *Gonzales Union High School District* (1985) PERB Dec. No. 480 (long delays between meetings and failure to schedule meetings during the summer may indicate bad faith))

Delay, Delay, Delay- Practices

- **Common Practice**: Cancelling bargaining sessions, not being prepared with proposals or counter proposals
- **Better Practice**: Be realistic about your timetables and communicate any reasons for delay clearly.

Making and Hearing Proposals- the Law

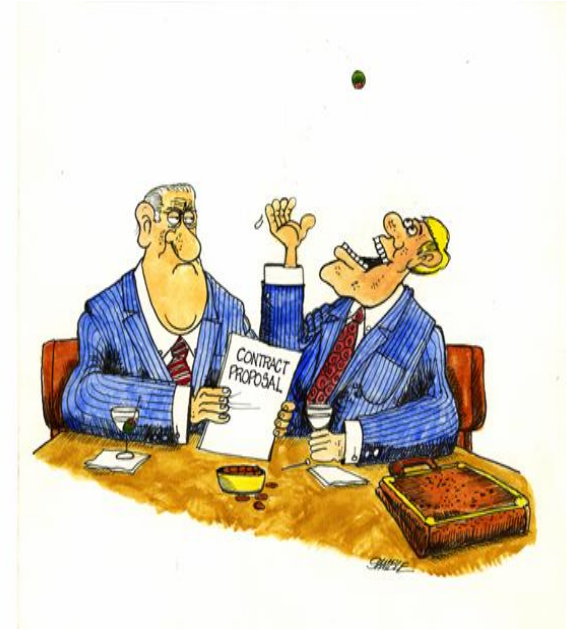
- "A flat refusal to reconcile differences by failing to offer counterproposals could be construed to be in bad faith if no explanation or rationale supports the employer's position." *Oakland Unified School District* (1981) PERB Decision No. 178.
- To meet its obligation to bargain in good faith, a party must be willing to exchange reasonable proposals and try to reconcile differences. (See *Oakland Unified School District* (1981) PERB Dec. No. 178
- Parties must explain the reasons for a particular bargaining position with sufficient detail to "permit the negotiating process to proceed on the basis of mutual understanding." (See *City of San Jose* (2013) PERB Dec. No. 2341-M.)

Making and Hearing Proposals- Best Practices

Common Practices: Proposals with minimal justification or unclear motives. ***Especially asserting inability to pay.***

Better Practices:

- Have a reason for each proposal and convey that reason.
- Provide documentation if possible.
- An employer's refusal to provide information to back up its bargaining claims may be evidence of bad faith bargaining.



Making and Hearing Proposals- Best Practices

Common Practices:

- Ignoring or not responding to proposals or positions, focusing discussion only on employer's proposals.
- Responses to proposals that make no sense and/or have no justification.



Making and Hearing Proposals- Best Practices

Better Practices:

- Ask questions about proposals.
- Assess priorities.
- Try to make some progress or find a way to give a small win that does not have a large financial impact.
- And remember it goes both ways- asking for union reasoning and documentation behind their proposals is also fair game, and they should be held to the same standards. This can be very helpful in discussions with your principles.

Lack of Authority and Hard Bargaining- the Law

- A negotiator can discuss issues and make proposals that are subject to ratification by the employer unless the limited authority "was intended to or was used to foreclose the achievement of any agreement." (*Department of Personnel Administration* (1986) PERB Decision No. 569.)
- Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain in good faith because it amounts to merely going through the motions of negotiations. However, adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith – the obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. PERB found an employer engaged in lawful "hard bargaining" when its proposal **was supported by rational arguments that were communicated to the union during bargaining.** (*Regents of the University of California* (2010) PERB Dec. No. 2094-H.)

Lack of Authority and Hard Bargaining- Practices

Common Practices:

- Not getting sufficient authority to negotiate.
- Blaming lack of authority for not being able to negotiate.
- Insisting that the first position taken is as far as will ever be authorized, without sufficient justification.

Better Practices:

- Get enough authority so you have room to negotiate
- Have document-based reasoning to support positions with a hard stance.

Lack of Authority and Hard Bargaining- Practices

- Asserting "internal equity" (i.e., "if we give this to you, we would have to give it to all of our other groups")
- An employer comes "perilously close" to bad faith when it insists that it will not under any circumstances agree to different terms for different employee groups. (See *City of San Ramon* (2018) PERB Dec. No. 2571-M.)

More Pet Peeves

- Again, asserting inability to pay when there is an ability to pay.
- Asserting a need for "internal equity."
- Refusal to truly consider reasonable proposals.

THANK YOU.

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