THE PUBLIC SECTOR

When the process becomes the substance

by Jon Holtzman

We all know that labor law is supposed to establish a *process* for dispute resolution. That's a good thing. From an anthropological point of view, labor law creates a channel in which a healthy exchange of views is possible while, for the most part, containing and channeling the dispute so the parties can continue to work together after it's over. For the most part, I think the Meyers-Milias-Brown Act (MMBA), which covers local governments, special districts, and a large variety of other public agencies, accomplishes that goal well.

But increasingly, the procedural rules of the MMBA are being used to prevent public agencies from making needed changes in the way they do business. Consider the following: Just over a year ago, the California Legislature passed **AB 646.** While it purports to require nonbinding "fact-finding" after a bargaining impasse, it really constitutes advisory arbitration. And while the bill sets time lines that roughly translate into a 90-day delay in unilateral implementation, in reality, the delay is often far longer. I am aware of at least one jurisdiction in which the delay is over six months.

The problem is that there are no teeth in the time line. If one party says it's unavailable on the dates offered by the fact finder (and has any reasonable excuse), the fact-finding gets kicked to a later date. The practical effect of AB 646 is to make it virtually impossible to complete negotiations in time for the budget enactment. So in these still-lean times, public agencies are left with a stark choice: assume savings that may not occur, cut services, or deplete remaining reserves.

Now, Assemblyman Raul Bocanegra is proposing to *lengthen* the time period during which a union can demand fact-finding from 30 to 60 days. In **AB 616,** the assemblyman also proposes to make it more difficult to declare an impasse in negotiations by permitting an immediate appeal to the Public Employment Relations Board (PERB). In my view, the period to request fact-finding after impasse should be three days.

At the same time, Assemblyman Rob Bonta is proposing to make mediation mandatory. While I strongly favor mediation and believe it's far more effective and cost-efficient than fact-finding, adding mandatory mediation to mandatory fact-finding makes the path to implementation even longer and more costly.

Meanwhile, the PERB is taking the view that mandatory fact-finding applies not just to negotiations over memoranda of understanding but to all disagreements within the scope of bargaining, including, for example, impact bargaining over layoffs.

I think there is a prevailing, erroneous view shared by unions, the PERB, and some politicians that employers just want to get to impasse so they can implement their last best offer. That certainly could be true in some jurisdictions, but I have yet to find one. (Admittedly, I do most of my work in northern California.) Legislative bodies are almost universally hesitant to unilaterally impose their last best offer because they are concerned that unions will undermine them politically. Managers are almost universally hesitant to recommend unilateral implementation because of its consequences in the labor relations realm. Frankly, an unhappy workforce is the last thing anyone wants when they're trying to accomplish the public's business.

That said, the *prospect* of unilateral implementation when the parties are truly stuck has the effect of motivating *both* parties to make a deal and bring closure to the matter for a year. As long as that threat is remote, it becomes harder to reach an agreement in settings in which money is tight or fundamental reforms are necessary. Without a time line, it's very difficult to bring closure because hope springs eternal that things will get better, political will fades, elections occur, managers turn over, and so on.

I believe in "fact-based" bargaining—coming to the table with the real facts so that negotiations are transparent and the parties can make intelligent judgments about their mutual best interests. Sometimes we forget that public-sector labor issues are often a zero-sum exercise. Higher benefit costs impair government's ability to provide services and lead to layoffs. They also prevent it from giving raises. Our interest in addressing the fundamental issues is—or at least should be—shared.

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