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Workshop Training: Collective Bargaining and Contract Implementation for Administrators

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This Much I Know is True: The Five Intangible Influences on Collective Bargaining

Nicholas DiGiovanni, Jr., Esq.¹

There are many good articles and books about collective bargaining, and they cover the gamut from discussing the varying styles of negotiations to the essentials of economic preparation and how to cost out labor agreements. As a practitioner, I have found some of these helpful to a degree, and, for the novice, I would imagine they can be very useful. However, I find that one problem with any treatise on collective bargaining is that it will inevitably fall short if it does not account for the less quantifiable intricacies and subtleties of the process.

In thinking about the many rounds of collective bargaining with which I have been involved over the years, I have generally agreed with the adage that each round has a life of its own, and one never knows how things will turn out. At times, then, I have been dismissive of utilizing formulaic approaches to bargaining, such as the much-heralded interest-based or “win-win” bargaining approach, that promise much but often fail in real time. I sometimes think that each round is so different that it is a fool’s errand to seek a perfect template for successful bargaining or to try to sketch out a reusable set of blueprints to guide negotiating teams.

There’s a lot that I don’t know about bargaining, even though I’ve been doing it for almost 40 years. It’s rare that I’m not surprised about something that occurs at the table, and it’s seldom that I don’t learn something new about the process and my own work within it.

But this much I do know. There are five hidden influences that have informed virtually every round of bargaining with which I have been engaged, from negotiating with unions representing tenured and tenure-track faculty to those representing the lowest paid workers in an organization. These five somewhat intangible influences are: 1) the role of history; 2) the setting of expectations; 3) the nature and character of the people in the process; 4) the aspects of timing in negotiations; and 5) the element of catharsis.

Undoubtedly, there are other more concrete factors that drive the bargaining process, such as the economic climate, the cost of living, the financial state of the employer and its resources, competitive forces within the industry, comparability statistics, and many more. Such factors comprise the nuts and bolts of negotiations, the hard data that are pitched across the table by one

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side or the other to buttress its position on any given issue. However, I'm convinced that the five factors I discuss here, while often less tangible, can carry as much if not more import than all the data generated in a round of bargaining.

The Role of History

What is history but a pack of lies agreed upon.
Napoleon Bonaparte

Perhaps the single most distinguishing characteristic of labor negotiations from all other contract negotiations is the fact that it occurs in the context of an on-going relationship that can span not only years but generations. Labor unions, once certified, are rarely thrown out. Unions, despite their democratic nature, do not stand for election every year or two. The initial decision to unionize made by workers in an institution or company decades earlier will still bind the employer and the current employees who may not have even been born when unionization first came into being. A single round of bargaining, then, is but an elongated episode in the long continuum of the parties' relationship.

And thus, the first reality for a negotiator entering any round of bargaining is the need to recognize and appreciate the history of the relationship. Simply put, a negotiator who fails to see this will struggle to understand the context of all that follows.

The labor history between the employer and the union will be drawn over many years and will involve its share of moments of great strife as well as peaceful periods. Obviously, that history will include the evolution of the enterprise itself, its struggles, successes, and challenges. It will also embrace the general culture and ethos of the institution as it has evolved over time and as it marks the common understanding of what the institution represents. Particular successes, failures, and other events between labor and management will especially be remembered. And, like family history, it will also be filled with memories of real characters, great and small, visionary and bland, well-meaning and just mean.

In the context of bargaining, the long arc of the parties' history will often be recalled at the table in many ways. For example:

- A poor administrator – long gone from the scene – may still cast a shadow across the table and influence how willing the union will be to trust any administrator;
- An employer may bristle at the past duplicity of a union officer, or at a broken promise or a failure to deliver a change in union perspective;
- The sound and fury of a bitter strike will usually echo for years in the relationship between the parties;

- A union bargaining team may recall salary concessions made in prior rounds to hold onto benefits and may balk when the employer now tries to take those benefits back in a subsequent round;
- A horrendous discharge decision from years before may still influence a union's attitude on discipline;
- Grievances filed and arbitration cases fought will take its toll on the relationship;
- A recent denial of tenure to a faculty member may end up influencing an entire article of the contract on evaluations and criteria for tenure;
- A bad economic year in the distant past in which the union had to agree to zero pay increases may grow in memory as a reluctantly given favor that now needs to be returned;
- A discussion of comparability years earlier may now be recited as an actual pledge to raise salaries to those levels – when in fact the institutional representatives only remember it as an aspirational hope;
- A bargaining team will remember slights from years' past. A member of the team may remember what he perceived to be an insult from a manager;
- In general, people remember when they were wronged, insulted, treated badly, bullied at the bargaining table itself.

All such examples and countless more form the collective history and memory for the parties. They create a subconscious database that will inform a decision as to whether or not to trust the other side.

But in addition to such expected remembrances, the history between the parties, just as in families, can be terribly distorted and poorly recalled. History is debated. History is recorded. But mostly history is *perceived*. Never is that more true than in the labor-management relationship. The sharp peaks of actions and words, so vividly seen and heard when they occur, can become hazy over time, appearing years later as simply blurred remembrance, part truth, part myth. When this happens, it creates further complications for the opposing negotiation team since the parties are not working off the same historical page.

Certainly, to the extent erroneous recollections can be corrected at the bargaining table, so much the better. But even if the history cannot be corrected—and indeed this is most often the case—the negotiator must at the very least recognize that one side or the other comes to the table with its deep impressions of how it has been treated in the past. This can be an irrefutable reality and must be factored into whatever happens in that round of bargaining. At a minimum, this recognition of history—both the real and the perceived—will help inform a team as to how the other side is likely to react when certain proposals are placed in front of them.

The Setting of Expectations

It is important to not have the unrealistic expectation that we will find a magic key to help get rid of all suffering. It takes determination, patience and more than one week.

Tensin Gyatso, 14th century Dalai Lama

What makes a good deal at the bargaining table? What makes a bad deal? While these may seem like complicated questions, the answer is really quite simple. Every bargaining team wants to come away from a round of bargaining with a contract that has met the goals set in the planning stages of the process. The closer a team comes to meeting those goals, the better the deal looks. Therefore, the real test of whether a deal is good or bad is the degree to which the final settlement has met, or failed to meet, the *initial expectations going into bargaining*.

This is another reality of collective bargaining. If history influences the course of negotiations, the *expectations* of the parties going into contract bargaining play an even greater role. When one side has lofty—and sometimes unrealistic—expectations of what it can get out of the negotiations, it can blunt efforts to settle more than any other single factor and can later lead to bitter assessments of how the negotiations went.

The setting of unrealistic expectations can often occur when the leadership of one side had changed since the last agreement was negotiated. A new union president may feel the need to promise a great deal to his constituency in order to cement his political position. A new administration may seek to undo, in one fell swoop, all of the “bad language” and economic provisions that prior administrations had agreed to at the table. Even without leadership changes, one side or the other simply sets the bar too high as to what can be obtained in bargaining. When bargaining does not proceed the way they think, when efforts at radical change are met with raised eyebrows and no movement on the other side, the ability to reach a settlement is made that much more difficult. In those settings, the overreaching party is forced to either brace for a serious confrontation—such as initiating or accepting a strike—or else is forced to back peddle with appropriate loss of face.

High expectations are usually born with good intentions from the perspective of the party setting them, but when they reach the level of unrealistic wishes, they will stop a round of bargaining in its tracks. Those on the receiving end of implausible demands may react with anger and outrage and may even feel a covenant of fair play has been broken and that there is an ulterior and sinister purpose behind the demands. The bargaining process can be seriously set back.

Bargaining has always been, and probably always will be, an incremental process. It is rare that either side in bargaining is willing to strip away sound language that it has negotiated and nurtured for years or that radical economic increases or cuts will willingly be accepted by one

side or the other. Instead, progress –from whatever perspective - is slow and deliberate with meaningful concessions reluctantly given and usually with a hard price.

Not only do unrealistic expectations lead to strife at the table, but, inevitably, the final judgment as to whether or not the negotiations were successful will be measured by those initial expectations. A round of bargaining is certainly subject to emotional assessment as well as one based on reasoned information. For example, one might look at a settlement and conclude that the union did very well on the economic aspects of the deal. However, if the union leadership could not deliver what it had promised to the membership, it will forever be perceived as failing to achieve its bargaining goals.

Similarly, an employer who has a uninformed and unrealistic perspective of what it absolutely must obtain in a given round of bargaining can come away from a final settlement that is full of real gains thinking that it has ultimately failed.

And so, it is quite important that expectations be managed, that each side have some sense of realism when it comes to what it can and cannot get in bargaining. A thoughtful discussion of goals and expectations right up front in the preparation part of the process is essential in order to achieve maximum opportunity for a successful round. Many a round of negotiations have crashed and sunk on the cliffs of high expectations. And while this does not mean that one side or the other should not have aggressive goals when necessary, it does mean that the singular desire to meet those goals in one round must be tempered by the reality of the bargaining table. Experience and leadership are necessary on this point. In planning for a round of bargaining, the negotiator and the decision-makers must be realistic in what can be achieved, or they will inevitably set themselves up for disappointment.

The Nature and Character of the People in the Process

The fault, dear Brutus, is not in the stars... but in ourselves...
Shakespeare, Julius Caesar

In the end, it's about people. Well, perhaps not entirely, but the role of individuals in the bargaining process may be the single most influential factor that guides the parties. The negotiators and the decision-makers play the pivotal role in the drama that is collective bargaining and much will ultimately rest upon their insightfulness, objectivity, creativity, and openness.

At the table, the dynamics of any round is often driven by the personalities and character of the team members, especially the chief negotiator. In my negotiating experience, fools are not tolerated and good people are listened to. There have been many times in my career when I and my team have been willing to stretch in our positions to meet the well-articulated needs of a

thoughtful union member across the table. I have often been more inclined to advocate a union position or concept to my client for consideration if thoughtfully presented by a conscientious union negotiator.

However, on other occasions when the union message is carried by an insulting or belligerent agent, then the inclination to be accommodating or open about a proposal is sharply diminished. No deference or attention is paid to obnoxious buffoons. Even more troubling, these types of individuals can create a toxic atmosphere at the table and can set back the course of bargaining by many weeks.

Sometimes, even the people in the background who play no direct role in negotiations will influence how things go at the table. A provost may have serious concerns about the direction of some union proposals or may try to steer administration in a certain direction. A vice president of finance may play a large role on the economics of various offers. The general counsel may be a thoughtful advocate for a more conciliatory—or a more aggressive—stance on certain language issues. On the union side, while much is voted upon by the membership, union leaders away from the table can influence the direction and conclusion of a negotiations round. All of these folks can play a key role in coming up with a mutually acceptable settlement.

But in the end, the chief negotiator probably plays the largest role in guiding the outcome of bargaining. Regardless of which side he or she is on, the chief negotiator is the face of the team, the representative of the institution or of the union. The negotiator must persuade, cajole, and otherwise advance his or her client's proposals. He or she is responsible for assessing the impact of proposals, crafting effective contract language, judging the importance of different concessions, and, perhaps most important of all, maintaining the absolutely critical perspective as to what is crucial at the table and what is just noise. And finally, the chief negotiator sets a tone for the discussions, and his or her attitude towards those across the table can be central in how a given round is perceived by the other side. At best, the chief negotiator should leave the relationship as good as or better than he or she found it.

The Aspects of Timing

Patience is power. Patience is not an absence of action; rather it is "timing"...
it waits on the right time to act, for the right principles and in the right way.

Fulton J. Sheen

In its broadest view, timing involves the setting of the stage. Timing is the "times" in which the parties find themselves. Although sometimes factors outside the negotiators' control direct actions, the experienced negotiator recognizes the internal factors and the opportunities when they present themselves and acts on that recognition.

Timing can involve other things beyond the negotiators' control, such as another settlement in the same industry that will impact the final economic discussion at the table, or, as a recent example, the recession that began in the fall of 2008 that affected virtually everyone who sat at a bargaining table thereafter. Perhaps it is a more local event within an institution that happens at just the right—or wrong—time and can affect the conduct of the parties. For example, the hiring of new administrators at particularly high salaries may occur during the same time that the institution is pleading poverty at the table. In such a case, the new highly-paid administrators will become the focal point of the economic discussion.

There is not much a negotiating team can do about the timing of such external events. At best, like the parties' history, they must be acknowledged. They must be factored into the equation throughout the bargaining, but, like past history, they remain uncontrollable factors.

But, on the other hand, timing can involve the decisions of the participants as to when to take action and when to hold back. This aspect of timing is firmly within the control of a bargaining team. Many contract rounds fail or succeed based on matters of timing. A hand well-dealt can still be poorly played. Therefore, the questions of when to deliver a proposal to the other side; when to hold tight; when to counter propose; and when to have off-the-record discussions all involve knowing the right moment to act while practicing the related virtue of patience. For example, in the beginning of the process, a well-meaning administration may want to put its best foot forward and place a proposal on the table that is generous and close to its final position. The administration may wish to be perceived as thoughtful, accommodating, generous and anxious to conclude a deal. But ironically, a major concession made too early will not always receive the accolades of the other side, as it might later in the process to settle the contract. Too liberal a set of proposals at the beginning of bargaining—for the limited purpose of seeming reasonable to the other side—may be simply a waste and ironically lead to higher expectations that even more will be forthcoming. Patience should be practiced here and it should play a fundamental part in any strategic discussions.

On the other hand, there are sometimes windows of opportunity for settlement that remain open only for limited periods. When those windows open, putting one's best offer out there may be just right. Moving quickly may be the best play. The good negotiator can see or sense those opportunities and knows when to act with a telling proposal to resolve a round of bargaining.

One of the most intense periods in negotiations can be just before impasse is declared. Here, the parties have met a lot, perhaps agreed on a lot, and yet are still divided. One side may be willing to make a big move to settle but must gauge the timing of the offer. Is it best to do it now, before impasse? Or will the move carry more weight in a mediation session? Will going to impasse unleash new emotions among the members such that an agreement becomes even more difficult to achieve? Or does the other side need the cover of mediation to conclude a deal and

thus the proposal will be better received within that process? These are weighty decisions for any negotiator and, in the end, are judgments based upon a correct sense of timing.

In the end, all strategic decisions and all bargaining tactics are set within the bargaining calendar and carried out at the point in time when they can be used to maximum effect. Perfect timing cannot be taught. It is a skill developed only with experience and, even then, not always utilized to best effect.

Catharsis

Courage is what it takes to stand up and speak;
courage is also what it takes to sit down and listen
Winston Churchill

The fifth influence is the element of catharsis. Collective bargaining is many things, but it is always a cathartic event for the participants. If, as we noted above, a round of bargaining is but a point in time in the long relationship between the parties, that particular point in time becomes the opportunity for each side to express what they need to say to each other in the safe environment of formal negotiations. And it is especially true that individual members of bargaining teams—especially on the union side—will often use that opportunity to process long-festering complaints. How all this plays out at the table will differ, but there is little doubt that the cathartic element of negotiations has its role in influencing the outcome.

It is often said in union campaigns that unions can promise the moon but cannot guarantee a single cent or a single contract provision. However, there is one thing that unions can deliver upon: they can make management listen. Never does this reality play itself out so well as at the bargaining table. The members of a union bargaining team will want to talk, if not on all issues, then on selected issues. They have stuff to get off their chests; there are emotions to be purged. Collective bargaining provides that opportunity.

We sometimes forgot how emotional the workplace can be. Most of us spend the lion's share of our waking hours in the workplace. Next to family matters, what happens in the workplace affects us the most. We define ourselves in part by who we are in the workplace; how we are treated; how we are evaluated; and how we are nurtured. In negotiations, the emotions of hundreds of employees can be represented by the anger of a few members at the table. Sometimes this can be hostile, if a past injury has been sufficient. Sometimes it can be communicated with great affect.

For the negotiator on the receiving end of such emotions, there is a fundamental need to acknowledge that the person has been heard. Sometimes a counterproposal can address the issue expressed. However, if it cannot be done with a substantive contract response, it can always be

done with an empathetic ear. This is true even when the negotiator does not agree with the issue expressed across the table. In some cases, that empathetic ear can soften the hard tensions that can arise. People are largely reasonable and know that they can't always get what they want. But a tiger can be unleashed if they feel their point of view has not even been heard. Only a foolish negotiator will fail to give due deference to what is being said. If handled correctly, if the issues are acknowledged and the voices heard, the cathartic nature of bargaining can be turned into a positive and sometimes pave the way for a final agreement.

Conclusion

The above sections outline five intangible influences that have a major effect on negotiations -- history, expectations, people, timing and catharsis -- and provide practitioners some insight into how they effect negotiations. This group of influences differs from what is often seen in negotiations texts, where the tangibles dominate. The five intangible influences mentioned here are somewhere in the mix in every round of bargaining, and thus there is a universality to them that is readily apparent and applicable. In the end, all of these elements will play a role in the swirling, sometimes chaotic environment of collective bargaining. It is a wise negotiator who will remain focused amidst the furies and will bring his or her own wisdom to the table in sufficient measure to influence a worthy settlement. It is a wise negotiator that will know how these sometimes subtle factors influence the outcome of any round of bargaining.