

Journal of Collective Bargaining in the Academy

Volume 0 *National Center Proceedings 2017*

Article 3

March 2017

Workshop: Training on Unionization and Collective Bargaining for Administrators

Nicholas DiGiovanni
Morgan, Brown & Joy, LLP

Follow this and additional works at: <http://thekeep.eiu.edu/jcba>

 Part of the [Collective Bargaining Commons](#), and the [Higher Education Commons](#)

Recommended Citation

DiGiovanni, Nicholas (2017) "Workshop: Training on Unionization and Collective Bargaining for Administrators," *Journal of Collective Bargaining in the Academy*: Vol. 0 , Article 3.
Available at: <http://thekeep.eiu.edu/jcba/vol0/iss12/3>

This Proceedings Material is brought to you for free and open access by The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.

NEGOTIATING A FIRST COLLECTIVE BARGAINING AGREEMENT

June 26-29, 2002
Nicholas DiGiovanni, Jr.
Morgan, Brown & Joy
Boston, MA

I. Importance of the Initial Collective Bargaining Agreement

A. Establishing the Relationship

For those who have been at bargaining tables for first contract negotiations, the memories of such experiences tend to linger like the recollections of war veterans. While the periodic renegotiations of collective bargaining agreements may take its toll on an institution and the participants in the process, nothing quite measures up to the pressures and tensions of that first round of bargaining. Whether the bargaining unit is one comprised of tenured faculty or service and maintenance employees or graduate teaching assistants, the stakes are always very high and the challenges always very special in that first combat across the table.

The reasons for the uniqueness and importance of the first contract are multiple, and they begin with an understanding of the emotional setting in which both sides find themselves. First contracts, like treaties after a war, are often negotiated in strained and tense climates. In the aftermath of a union campaign, what may be remembered first is that both sides may have attacked the other in seeking votes. When the dust settles and the union has won, the administration may still be angered at the results and not inclined to make life any easier for the upstart labor organization. Unions, depending on their margin of victory, may come to the table with the arrogance of success and a mandate to improve the lot of the unit members. Or at the very least, they may come to the table determined to rectify the problems that led employees to turn to them in the first place.

Style and tone at the table, then, become critical elements in establishing the long term relationship between the parties. That relationship will evolve from the way the two sides relate to one another during these early days. Factors such as the ferocity of each side's rhetoric, the demeanor of the negotiators, the nature of the proposals, the insistence on demands, the tone of the dialogue, and the way the parties handle the side issues that occur while bargaining the initial agreement will all take on particular meaning in that initial round.

B. The Political Climate of the First Negotiations: Internal and External

The first round also carries political implications. First, in the world of higher education, as opposed to the corporate world, there may be a campus community with

sympathetic views towards the union and thus, at appropriate times, members of that community may place pressure on the administration to bargain in good faith and make certain concessions to the union. This can occur over such issues as a living wage for lower paid workers or can demonstrate itself in faculty support for the efforts of graduate teaching assistants. Second, in the public sector especially, it is likely that left-leaning politicians from state legislatures to executive mansions -- will want to bolster their labor support by encouraging administrators to do their best to meet union demands, or join labor rallies when impasse or strike situations occur. Third, the Board of Trustees, itself often a band of people with diverse political perspectives, may be highly sensitive to how the administration handles the negotiations or may choose to become directly involved themselves. Institutional leaders need to be aware of all these forces at work and deal with them as best they can in the first round.

Sensitivity must also be paid to the administrators at the institutions, be they deans and chairs in academic units or supervisors and directors in support units. For them, unionization may be a brand new experience, and it is likely they will struggle in the early going until they adjust to the new climate. The needs of such individuals and the special internal politics they present-- must be taken into account, since they will be the chief administrators of the new agreement. Much hand-holding and consultation will be needed here.

Beyond these examples, another type of politics underpins first contract negotiations, and that is how the process and its results will be perceived by the non-unionized employees on the campus and whether it will motivate them to unionize. A union successful in organizing service and maintenance workers may someday want to organize clerical and technical workers. The union's best calling card to such groups will be the record of its first contract for the service and maintenance workers. If the union achieves real protections and better economic security for that group, it may persuade those clerical or technical employees to sign a union card the following year. Its push for strong contract protections and compensation increases thus serve a secondary organizing purpose as well. Not surprisingly, the administration will be just as sensitive about not giving too much away in that first agreement in order to combat any perception that employees are better off with a union. In such a setting, an administration may pause before it makes certain concessions that could lead to a settlement, not because they are necessarily burdensome or costly, but because of how they may be perceived by other groups on campus.

While all these issues can rear their heads in any round of bargaining, they will be particularly apparent in the first days after unionization.

C. The Importance of First Contract Language

Perhaps foremost on the list of special features of first contract negotiations is the language of the contract itself. It is axiomatic that the first contract is the most important in terms of contract language. Each side starts with no language in place, not even a title page. And

from this void, an agreement governing the working conditions and compensation of hundreds of employees must be chiseled and shaped. Moreover, since the provisions of a union contract do not easily change from one round to the next, the language that is negotiated into that first agreement is absolutely critical, especially on the key areas of the contract such as grievance procedures, management rights and matters of academic judgment, to name a few. In many cases, language negotiated twenty years earlier will still survive in subsequent contracts without amendment. This is because of the burden in later rounds of making changes. The party coming forward with language changes in any future round bears a practical burden of persuasion, and gains that were hard fought in previous rounds will not be easily given back. For example, the establishment in a first contract of just cause protection for discipline or the right to arbitrate grievances are provisions that are not likely to disappear in later rounds, and any administrative effort to take them back is likely to fall on deaf ears.

Public sector contracts are even more difficult to change from year to year due to the absence of the right to strike (in most states) and the substitution of other devices to resolve bargaining impasses. Under many public sector labor statutes, when impasse is reached, the parties may proceed to advisory factfinding or even binding arbitration. These processes are notoriously conservative, and most neutrals will not recommend wholesale changes in fundamental contract language, thus making it more difficult for a moving party to alter original contract provisions. None of this is absolute, of course, and language changes of some sort are made in every round of bargaining. But on the fundamental core provisions set in that initial round the years only serve to cement their stature in the agreement.

D. Time

Another unique aspect of an initial round of bargaining is the sheer time it will take to reach final agreement. With no language in place, with skeptical and wary participants and with all of the above cited issues, it is little wonder that the negotiations of most first contracts take well over a year.¹ As bargaining proceeds, the time itself becomes a burden, taxing the schedules of the participants, the expenses of the institution, and the patience of all. The ability to understand this reality early will help an institution cope with the tedium, the frustration and the periodic outbursts of tempers along the way.

With all these considerations, among many others, looming before an institution, it is easy to understand the enormous pressures that weigh on a bargaining team and an administration as it goes into first round bargaining with any new unit.

¹ The Federal Mediation and Conciliation Service reported a few years ago that over 75% of all first contracts take over a year to negotiate. Since the FMCS was largely reporting private sector settlements, it is reasonable that in the public sector, with the added statutory impasse mechanisms of factfinding or arbitration, the time is even longer.

II. Establishing Institutional Goals and Principles

The key to effective negotiations starts with effective planning. Never is this more important than in the first contract negotiations. In addition to the normal bargaining preparation and data collection that accompanies every round, the initial season at the table requires the development of a certain type of grand strategy and a delineation of essential goals and principles that will guide the team and the administration through the months ahead. To accomplish this, an institution must set aside considerable periods of time to define and refine this strategy and to sketch out a broad vision of the future.

As one example of this, administrators, in approaching an initial round of bargaining, will first want to consider whether they will have a particular overall stance to the bargaining itself. For example, will the administration simply seek to preserve the status quo and prevent the union from encroaching too much on management prerogatives? If so, it will be on the defensive most of the time, seeking to avoid substantive change wherever possible.

On the other hand, the administration may pursue a more aggressive approach and propose major changes in the status quo. First contract negotiations may be seen as an opportunity to address problems of performance, productivity, governance or economics that may not have been dealt with effectively in other settings. An administration adopting this approach will be formulating major initiatives to present at the table.

Beyond the broad picture, the administration will turn to particular themes and principles in preparing for bargaining. These can include many different concepts that vary depending on the nature of the bargaining unit. For example, in dealing with a support staff unit, the administration may want to center its attention on preserving maximum flexibility in getting the work done economically and efficiently. This will invariably focus on such concepts as:

- preserving the right to outsource services
- preserving the right to use temporary help, student help and volunteers without
- retaining the right to decide who will do the work
- retaining the right to decide whether to fill a vacancy or whether to hire a part

With a full time faculty unit, concerns may extend to establishing or maintaining sound evaluation procedures, focusing on language that will enhance academic quality, defining the legitimate lines of governance, and restricting matters of academic judgment from arbitral review. With part time faculty, the focus may be on keeping costs low, avoiding the extension of major benefits and maintaining control of assignments as much as possible.

With every bargaining unit, then, there will be special institutional aims that can be developed into operating principles in addressing many of the issues at the table. They will

constitute the broad priorities as well as the reasoned underpinnings of the administration's approach in the months ahead. This kind of planning does not seek to define every piece of contract language with precision nor does it set forth fixed tactics that must be followed week to week. Such matters should be left instead to the negotiators, who must be responsive to what the other side is doing, what circumstances develop and what opportunities emerge. But instead this pre-negotiations work on goals and principles can be important grounding for the institution and can provide guidance on any particular issue. As the bargaining proceeds, it will be useful to refer back to these principles periodically to make sure everyone is staying close to the charted course.

III. First Considerations at the Table: Ground rules

Once the teams are at the table, where do you start? The very first consideration should be ground rules. Ground rules are sometimes not even considered as the parties approach bargaining but they are indispensable to a smooth first contract round and indeed for all subsequent rounds of negotiations. They establish, along with the legal framework, the rules by which the parties will play, and, once established in the first round, they often continue without major changes for future rounds.

A first bargaining session should be centered on establishing and signing off ground rules, and the administration should come to that meeting with a proposed set ready for signature. Among the many items to be considered here include:

1. The location of the meetings and frequency and times of meetings
2. The number of people on each team
3. Identification of the chief spokesperson
4. Provisions for communications between the parties between sessions
5. Time lines for submission of initial proposals
6. Understandings that articles may be T/A=d (tentative agreements) and put aside once
7. Provision that nothing goes into effect until contract is ratified by both sides
8. Provisions regarding who may or may not attend bargaining sessions, including
9. Whether or not there will be any restrictions on press releases or other public
10. Release time provisions for employees participating in the bargaining and whether or
11. Agreement to set agenda of an upcoming meeting at close of any given meeting
12. Provisions as to the number of copies when materials are exchanged
13. Sharing of expenses if bargaining takes place off-campus at hotel or other rented
14. No smoking rules
15. General principles of civility and good faith to govern the bargaining affirmed by
16. Understandings with regard to data requests
17. Provisions for changing the rules by agreement

provisio

Out of all of these provisions, perhaps none is so important as the one dealing with who may attend meetings and whether there will be a restriction on each side publicizing what goes on at the table. Bargaining tends to work best with reasonably sized teams on each side and few if any spectators. It is usually a good idea, then, to restrict the meetings from the casual observers, be they students, other employees or members of the public. Just as Washington, Madison and friends made sure that our constitutional convention in 1787 was closed to the public in order to focus the participants on the work at hand, bargaining tends to work better without an audience and thus without the temptation for each side to posture and present speeches for the various constituencies who may stop by.

Similarly, a restriction on press releases goes hand in hand with the privacy of the meetings. While communications between a union and unit members cannot be restricted, pronouncements on the steps of the administration building, rallies in front of the president's house and press releases can and should be restricted. Such restrictions have the beneficial effect of keeping both sides flexible at the table and not forced to stand behind public statements made for political purposes. They also lessen the likelihood of miscalculation at the table by one side based on someone's public statement on the other side.

Some unions balk at such restrictions for political reasons but seasoned negotiators on the union side will usually agree to such terms. The secrecy provisions and ban on press releases may be lifted if and when the parties reach a statutory impasse, and this too can be discussed as part of the ground rule discussion.²

IV. Key Contract Building Blocks for the Administration

A. The Central Non-Economic Provisions

² Case law also favors this type of ground rule as well as generally restricting public access to or information about bargaining in the interest of getting the parties to agreement quicker. See, for example, *United Electrical, Radio, and Machine Workers of America, Local 267 v. University of Vermont*, 21 VLRB 106 (1998)(violation of duty to bargain in good faith if a party engages in one sided release of information about pre-impasse negotiations in a setting where negotiations are being conducted in private; see Vermont LRB website at www.state.vt.us/vlrp); *Appeal of Town of Exeter*, 126 NH 685, 495 A. 2d 1288 (1985); *Burlington Community School District v. PERB*, 268 N.W. 2d 517 (Iowa, 1978); ; *Board of Selectmen of Marion v. Mass. Labor Relations Commission*, 7 Mass. App. Ct. 360 (1979); *County of Saratoga v. Newman*, 476 N.Y.S.2d 1020 (1974); *Talbot v. Concord Union School District*, 114 NH 532, 323 A. 2d 912 (1974); *Bassett v. Braddock*, 262 So. 2d 425 (Fla., 1972)

Once the ground rules are set and the parties begin work on the contract itself, it is usually the case that they will turn to the non-economic areas first, and among these areas, the parties are well-advised to start with smaller scale articles that do not present fundamental conflicts in approach or philosophy. A recognition clause. A health and safety article. Perhaps the non-discrimination provisions. Working on these less controversial areas can establish a certain rhythm and provide the participants with some sense of movement. Parties may also move around between articles as they come to know each other at the table and establish some sense of relationship.

At some point, however, the parties will come to grips with more difficult articles and in the end, how an administration handles several of these key areas will determine to a large degree its ultimate success in bargaining the first agreement. Like home inspectors checking foundations and wood quality, one can get a sense of how sound an agreement may be by checking certain key provisions in a contract, and these in turn should focus one's attention when negotiating an initial agreement.

While some may differ, the following would seem to be a representative list of the essential building blocks for a good management contract:

- A strong management rights article
- Zipper clause
- Grievance procedures with management protections
- Clauses that allow the institution to deal with economic downturns
- Clauses that allow for administrative judgments on personnel status changes and
- Workload and assignments articles that allow an administration to get the work done

Since these are among the most difficult provisions to add or modify after the first round of bargaining, considerable attention should be paid to these articles in that initial round.

1. Management Rights

At the centerpiece of the contract, from the administration's point of view, should be the Management Rights, or Board Rights article. This article serves as a counterweight to all of the provisions that are later negotiated which define employee or union rights. In some sense, it is an article that, in its purest and best form, memorializes and defines the pre-union period. With management trying to preserve as many of its pre-union rights as possible, and the union trying to trim those rights as much as possible, the Management Rights article can be seen as a kind of final scorecard of that struggle. When the contract is done, the article will lay out the rights of the administration in all key areas, subject to any limitations later in the agreement. In some cases, clauses in the Management Rights article will stand unencumbered by any contract restrictions after the bargaining is done. For example, a clause may read that the administration has the right to decide the type of personnel who will perform the duties or the right to decide whether or not

to fill a vacancy. These may be unrestricted rights, and if a later dispute develops about who should be assigned to do a task, or whether a vacancy in a tenure line has to be filled with a tenure track recruit, these clauses will be the institution's primary defense in support of its decisions.

On the other hand, certain management rights may be limited elsewhere in the agreement. For example, a clause may say that management has the right to evaluate employees, but there may, in fact, be a much more detailed evaluation article elsewhere in the contract that lays out certain procedures that management must follow.

If there are later limitations, one may ask whether there is any value in spelling out the rights in detail in the Management Rights article. On balance, there is merit to listing the rights, even if the right is later circumscribed in some manner. This is because the Management Rights article can serve as a default line if there is some doubt about the extent of a certain right. For example, an arbitrator may see the right to evaluate employees clearly stated in that article. He or she may see some limitations later, such as the need to follow a certain procedure wherever management does evaluate. But if the issue before the arbitrator involves whether someone could be evaluated more than once in a given year, and if there was no other clause limiting the number of times someone could be evaluated, the arbitrator may look at the Management Rights article and conclude that the administration has fought to retain the right to evaluate at any time and thus could not be restricted to only an annual review. Without that provision, the arbitrator may instead decide the language is unclear as to the right to evaluate, and then decide to turn to the more vague evidence of past practice or bargaining history to glean the parties' intent with more mixed results.

Beyond serving as a means of providing clarity to an arbitrator, a strong management rights article can also serve as evidence that a certain topic does not require mid-term bargaining. In many situations, unions will contend that something management is doing was not anticipated by the parties when they were at the table, that there is no language allowing management to do what it proposes to do, and that therefore there is a duty to bargain over the proposed change. If the right is delineated in the management rights article, however, the institution will have a sound basis for saying it is acting pursuant to its previously-negotiated management rights and that there is no need to bargain further. The union, in essence, already agreed management has the right to act by agreeing to the management rights article.

For example, let us say that there is a contract clause stating that management may not discipline or discharge someone except for just cause, certainly a fairly typical if not quite universal provision. Let us say that after the contract is in place, management issues a rule or regulation which delineates 20 different types of misconduct for which an employee may be disciplined. The union may argue that there is a duty to bargain over such a list. The administration may claim it has the right to issue the list without bargaining. If there is a provision in the management rights article which states that the administration has the right to

issue rules and regulations providing they do not conflict with the agreement," the institution will be in a stronger position to claim it can act unilaterally.³

Usually, the counterpoint to strong management rights articles is the Maintenance of practices or past practices clause under which a union will seek to preserve whatever it failed to specifically reference in contract language. This safety net for unions will be cited whenever management tries to alter a policy or practice in a way that impacts employees. Unions will say that such a clause blocks unilateral action by management even if there is not a specific clause elsewhere that is being violated by the action. And indeed such clauses can have that kind of impact. In choosing which areas to fight over at the table, there is perhaps no better ground to dig in on than this conflict between a strong management rights clause versus an expansive maintenance of practices clause.

2. Zipper clause

Zipper clauses, sometimes called effect of agreement clauses, are not indispensable, but they work well with Management Rights articles by providing evidence that the parties did not anticipate that there would be any residual duty to bargain during the life of the Agreement over anything. In other words, a union cannot argue that there is some duty to bargain during the life of the contract over some issue that the contract may not specifically address. In arguing that it has the right to take unilateral action, management may state that no clause in the contract directly prohibits the action contemplated and then may point to a zipper clause as further evidence that the union was waiving its right to demand mid-term bargaining over anything else.

3. Grievance Procedures

a. Definitions

The enforcement provisions of a collective bargaining agreement, of course, are the grievance and arbitration procedures, and these are among the most important provisions in a first contract negotiations. First and foremost, an administration should strive to limit what can

³ These cases can arise as either grievances under the contract or as unfair labor practice charges filed with the labor board claiming a refusal to bargain over a mandatory subject of negotiations. It is worth noting that the National Labor Relations Board has tended to be more open to the idea that there is a duty to bargain even in the face of strong management rights language unless it is convinced that there has been a clear and unmistakable waiver on the union's part to negotiate over the change. *Trojan Yacht*, 319 NLRB 741; *Exxon Research*, 317 NLRB 675. Arbitrators and courts reviewing Board decisions tend to be more inclined to view strong management rights language as evidence that management can act unilaterally and often do not look beyond such strong statements for further evidence of waivers. See, for example, *NLRB v. Postal Service*, 8 F. 3d 832 (DC. Cir.)

be grieved and arbitrated. Usually, the optimum provision is one that restricts a grievance as an alleged violation, misinterpretation or misapplication of the collective bargaining agreement. Above all, such a restricted provision has the benefit of clarity the four corners of the document present the extent of an institution's obligation and the extent to which an outside arbitrator can review management action. Broader definitions sought by unions, such as grievances over changes in past practices or unfair treatment, suffer from vagueness and often conflict with management's ability to act. For example, if a strong management rights article protects an institution's ability to respond to change circumstances and to adjust practices accordingly, allowing grievances over past practice changes can nullify such a right. Moreover, past practices might be challenged at the local department level or at the institutional level.

Allowing a claim of unfair treatment may sound reasonable on some level. After all who wants to concede that any supervisor will engage in unfair treatment? But it lacks an anchor. It is subject to the eye of the beholder, and thus can be a dangerous clause in the hands of an arbitrator who wants to Ado justice.

Extending grievance rights to alleged violations of written policies or rules and regulations are slightly less onerous, since at least there is a written document to review, but in institutions with local department or divisional policies, it may be particularly hard to keep track of everything.

It should be noted, of course, that even if an institution is successful in limiting a grievance to an alleged violation of the agreement, a union may have other ways of broadening its reach. For example, if a maintenance of practices clause ends up somewhere else in a contract, a union can simply file a grievance over an alleged violation of that article and achieve the same result as if it had secured a broad definition of a grievance.

The battle over a definition of a grievance is clearly a first round battle. Once the definition is in place, either side's efforts to expand or contract it will likely fall on deaf ears.

b. Authority of arbitrator

An administration should also do its best in a first contract to limit the role of the arbitrator to interpreting the agreement and in not second-guessing management decisions. Strong language in this regard may include a provision that once a grievance lands in front of an arbitrator, he or she shall have no power to add to, subtract from or otherwise modify the agreement. In addition, in higher education, restrictions on the ability of the arbitrator to substitute his or her academic judgment for those of the institutional decision-makers are also useful.⁴ Once again, this type of language should get into the contract in the first round as it will be very difficult to add later.

⁴ See the excellent papers by Thomas Hustoles and Joyce Villa entitled *AThe Unionized Professoriate*. Key

c. Time provisions

The time between steps in a grievance procedure carries some importance but can be altered in subsequent rounds. However, what is very important in the first round of bargaining is a clause which states something along the following lines:

Failure by the grievant to comply with the time limitations of step one shall be the grievant of the decision rendered at the last step. (*Agreement between University System of New Hampshire Board of Trustees, Keene State College, and KSC Education Association, July 1, 1999- June 30, 2003.*)

The companion piece for this clause is that a grievance should be filed at step one within X days of the time the grievant became aware of the facts which form the basis of the grievance, or could reasonably have been aware of such facts. These types of provisions keep the process flowing smoothly and expeditiously and allow the administration the chance to argue that the merits of a case should never be heard if the grievance was not filed in time or not processed to arbitration in time.

d. Limiting arbitration rights to the union

Whenever possible, it is worthwhile to limit the right to arbitrate to the union and not the employee. This way the administration can avoid frivolous grievances by employees that unions would not touch.

Issues in Negotiating Collective Bargaining Agreements: Preserving Institutional Right, @ presented at NACUA New Orleans conference, Faculty Employment Issues in the 21st Century, this past March dealing with this and related issues of key clauses in contracts and best approaches for management.

One exception to this rule, however, may be if the institution is trying to set up a system whereby all cases of discrimination must be processed to arbitration exclusively rather than the agencies or court.⁵ In such cases, an administration may be well served by having the individual be able to decide on his or her own whether to arbitrate a discrimination claim rather than have to rely on the union.

4. Reduction or replacement of unit employees or positions

Clearly, some of the most important areas of the agreement and areas that warrant particular attention in a first round are the many provisions dealing with the rights of the institution to manage economically, efficiently and in response to changed circumstances. Among these provisions are:

- a. the right to layoff employees
- b. the right to subcontract services
- c. the right not to fill vacancies
- d. the right to fill vacancies with part time personnel
- e. the right to fill a tenure track line with a non-tenure track line
- f. the right to use temporary or other non-unit employees
- g. the right to use students or volunteers to do bargaining unit work
- h. the right to use supervisors to do bargaining unit work
- i. the right to reduce programs and make other major changes in the direction or

Once again, while such articles may be fought over in every round of bargaining, getting off to a strong start in these areas is imperative.

For example, it is most important to preserve the right to layoff or retrench employees as needed. While there is nothing wrong with negotiating consultation provisions, selection procedures, notice dates and the like, the need to preserve the fundamental right of the institution to decide when it has to trim staff should be the top priority in this area. Negotiations of these articles can provide examples of where a sensible administration will give ground on issues such

⁵ This area of the law remains in flux. Compare *Alexander v. Gardner Denver*, 415 U.S. 36 (1974)(arbitration of discharge under CBA no bar to judicial action of race discrimination) with *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.) cert denied 117 S.Ct. 432 (1996)(CBA arbitration clause precludes civil action federal anti-discrimination law. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998)(Court leaves open question of whether a union's A clear and unmistakably waiver of right to judicial forum would be enforceable). See, however, *Carson v. Giant Food, Inc.* 175 F. 3d. 325 (4th Cir, 1999) (no unmistakable waiver found in CBA); *Quint v. A E. Staley Mfg. Co.*, 172 F. 3d 1, (1st Cir, 1999)(no waiver of right to judicial forum); *Durham Life Ins. Co. v. Evans*, 166 F 3d. 139 (3d Cir., 1999)(no waiver to judicial forum)

as how much notice someone receives about layoff, or may agree to consult with the union for 30 days before anyone is laid off, or may agree to generous recall provisions as long as the final right to act is preserved.

The right to subcontract or outsource services is another critical component of a first agreement, especially on the non-faculty side. Institutions will often find the need or benefit to subcontract out services to save money, to ensure better quality work on campus or for similar reasons of sound and efficient management. Ideally, this right should be clearly stated so there is no ambiguity. Once again, if it is necessary to negotiate a consultation clause, notice procedures or other employee protections or process issues, such concessions are generally worthwhile trade-offs as long as, in the end, management retains the final right to outsource the work.. Unions will fight hard to preserve unit work, and will particularly oppose subcontracting clauses that could result in employee lay offs. In this battle, an institution may not always prevail, but it is indeed worth the fight for future administrations, even if a current administration does not expect to be doing any immediate subcontracting of services.⁶

When an employee leaves, the institution should have the initial right to decide whether or not to fill the job, and if so, with what type of employee. Often, in tight economic times, an institution may choose not to fill a vacant full-time slot, or else to fill it partially, to save money. Or in planning the future direction of its educational programs, an administration may not want to replace a retiring tenured professor with another tenure track position but may instead want to put in a one year terminal contract faculty member, or two or three adjuncts professors. In all these cases, management will want language, often found in the management rights article, that states clearly that it has the right to do any of these things. Unions, to preserve unit strength and to avoid any effort to erode the unit, will oppose such clauses, but once again, these are areas of critical management concern. In planning budgets, in planning future directions, an administration will want these tools in hand and will not want to lose the opportunity, for example, to save \$40,000 or more by simply not filling a slot, or partially filling it.

Along the same lines, institutions will also want to preserve the right to use temporary employees, students, volunteers and other non-unit personnel to save money, and of course will want to preserve the right of supervisors to do unit work or administrators to teach. These rights are best spelled out as well and are worth fighting over.

5. Employee performance and status changes

Some of the most essential of management functions will involve assessments on the quality and performance of the employees. Whether one is reviewing an administrative assistant

⁶ Indeed, in negotiating the critical clauses in a first contract, it is especially important to think about the long term impact of a concession on future administrations, not just how a particular clause will impact the next year or two or how the current administrators may deal with the issue.

at the end of a probationary period or whether the case involves a grant of tenure to a faculty member, the goal of management will always be the right to assess performance; to keep the excellent performers and the right to dismiss the poor performers. Consequently, the process and standards under which people are reviewed will be important provisions of any agreement.

In dealing with a faculty contract, for example, an institution will want to make sure that there are sound standards in the contract under which faculty are reviewed for reappointment, promotion and tenure.

Hand in hand with that is the need to limit the degree of second-guessing that an external arbitrator may bring to the table, and here there may be sharp differences depending on whether one is dealing with a staff contract or a faculty contract. For example, in staff settings, it is quite common for management to ultimately agree to a just cause provision for discharge. This type of language, a term of art in labor circles, does indeed allow an arbitrator to second-guess a decision to fire an employee. While this is still a concession that an institution may pause over before conceding, it is not an unusual concession.

On the other hand, a tenure denial that also ultimately leads to the employee leaving the institution should not be subject to a just cause standard. Indeed, quite the opposite. As noted earlier, these are the types of profound academic judgments that have life time impacts and should not be second guessed by an arbitrator. Arbitrators can be limited here by contract language that specifically precludes them from substituting their own judgment for that of a dean or provost. They may have the right to remand a matter if they find a procedural violation in the evaluation, but they should not be given the power to reverse a tenure decision and reinstate someone with tenure unless there are strong and clear countervailing reasons for allowing an arbitrator such power.

For other status decisions reappointment or promotion decisions, for example there can be a range of standards depending on what an institution wants to yield and the relative bargaining strength of the parties.

While there are no absolutes, one of the best guidelines in approaching the issue of management decision-making and academic decision-making is that, whenever an administration can preserve the right to act in exchange for procedure, the trade is usually worth it. Whenever management can secure important language rights in exchange for compensation, the trade is usually worth it.

6. Workload and assignments

Workload and assignments are also important areas of the contract, especially in the first round. For staff employees, these articles embrace issues such as overtime provisions, on call procedures, job classification and reclassification issues, and shift assignments. For faculty, the issues may be centered on contact hours, office hours, the balance between research and teaching

responsibilities, the right to engage in consulting work, distance learning issues and other such matters.

Key questions here may be how precise or how general the language of the collective bargaining agreement should be. In some full-time faculty agreements, the language of the workload article may be purposely very general, in contrast to non-professional units where detailed hours and duties may be described.

B. Compensation matters

Most of the areas discussed above are particularly important in a first agreement because it is very difficult to modify them in future rounds. Sometimes language in these areas will remain the same for many years. Compensation matters are a bit different. Even though these are routinely bargained over and changed in every round of negotiations, there are still some key structural matters and essential pay principles that should be preserved in the first contract, mostly to establish precedent and tone.

For example, as a general rule, unions are not strong advocates of wage and salary increases based on merit. Instead, unions will tend to argue for across the board increases, automatic step increases or some other non-discretionary method of increasing pay that does not provide for individual recognition. Consequently, if an institution cares to preserve merit as a component of pay, it is best to argue strenuously for such a right in the first agreement. Failure to get it in round one may make it increasingly more difficult to get in subsequent contracts. The same is true, especially in faculty contracts, of the ability to make market adjustments or to make matching offers to individuals from time to time during the life of the contract.

Similarly, on the other side of the coin, if an institution agrees in the first agreement to a step system of compensating employees or some other automatic structure of pay increases, it may be difficult if not impossible to ever get such a structure changed in the future.

V. Other Clauses of Particular Value to the Union

First round arguments over clauses that hold value to the union can be very important as well. A strong union security article, for example, is a central goal of virtually every union. In its best form, unions will want a union shop under which every employee must join the union (or at least pay collective bargaining fees) within 30 days of ratification of the contract and, for new employees, within 30 days of hire. Lesser forms of union security include agency fee arrangements; requiring union dues or agency fees only of new hires not current employees; maintenance of membership provisions; or similar variations.

The importance of these clauses is less in their value to the administration putting aside arguments of principle and more in the recognition of their value to the other side. In other

words, knowing how important such clauses are to the union, any willingness to concede in the area should be tactically handled very carefully, with a demand for appropriate concessions back as part of such a move.

This same principle understanding the value of certain proposals to the union side should also guide management in dealing with issues such as released time for union negotiators, officers and stewards; union rights on campus; union service as a factor in promotions; data provisions and other such matters.

VII. Miscellaneous Concerns

Frequently, collective bargaining agreements end up supplanting staff or faculty handbooks or their equivalent. However, it is very important in a first round of bargaining to be clear about what, if anything, is retained from those prior documents and what is null and void. Either side can make a false assumption that parts of those prior documents are still in effect even after the first CBA has been settled. Either side may, then, try to enforce provisions of those documents that may not directly conflict with the language in the new contract. There is no right or wrong answer to how this issue is handled. Some institutions may prefer to leave parts of those documents in effect or even referenced in the union contracts. Unions may be similarly inclined. But the central point is to make sure the two sides are on the same page regarding this issue before everyone leaves the table.

VIII. The Long Interim and the Status Quo

One of the key challenges to the first contract period is knowing what to do while that first agreement is being negotiated. This is a peculiar issue of the first round, since for the long stretch of time between union certification and final agreement, the institution is supposed to maintain the status quo or, if changes are desired in matters affecting wages, hours and working conditions, the institution must present these proposed changes to the union and give it a chance to negotiate over them.

Given the lengthy period of time for first contract negotiations, it is often the case that a myriad of issues will arise as to what an administration can do unilaterally and what must be bargained. Certainly, many of the day to day operations will continue without change. For example, normal work assignments will continue as will maintenance of benefit programs and current wage and salary levels. And *de minimis* changes are also usually going to be allowed without the need to bargain. But if an institutions wishes to increase the job responsibilities of a unit member; modify someone's salary; layoff employees; make major changes in shift assignments; or otherwise move toward a substantial alteration of the status quo, it will be necessary to notify the union and give them a chance to bargain. It is important that counsel be

consulted on any of these issues as they arise to determine if a bargaining obligation exists, and it is important to communicate with first and second line managers and administrators so that they understand the need to check with counsel before making changes in the status quo.

As a practical matter, unions will not want to bargain over everything. In some cases, an administration simply has to send a letter to the local union steward or president indicating what the planned change may be, stating that the change will take place in 10 days unless the union indicates an interest in negotiating over the change. If the union declines, the administration may proceed with the change knowing that it has satisfied its obligation to notify the union and gave them a chance to negotiate which they declined. If the union asks for negotiations, then, of course, negotiations must proceed. If agreement cannot be reached over the particular issue, then the matter is handled in the same way as a broad impasse on a contract, with the attendant rights of labor and management being similar. In the public sector, this may be governed by applicable state law and could actually involve the use of some of the impasse tools of factfinding. In the private sector, management may be able to implement its last best offer on the subject if it has clearly bargained in good faith to impasse. All of this may move on a parallel track while the main bargaining is still be conducted.

Another issue that is arising now with more frequency are claims by unions that management must provide normal salary increases *even while bargaining a first collective bargaining agreement*. Such contentions, seemingly antithetical to the whole notion of exclusivity and unilateral action, actually spring from the underlying premise of maintaining the status quo: if management has an established practice of doing something regarding a bargainable topic, then management has a responsibility to maintain that practice while bargaining the first contract. If, for example, every year on July 1 an institution had provided employees with an increase in salary exactly equivalent to the nation's CPI for June, there may be a compelling argument that the institution may have to provide the same salary increase *even though* the newly elected union is bargaining for compensation increases at the table. These cases, however, become more difficult to analyze when past salary practices are mixed, as to amounts, criteria and the degree of managerial discretion.⁷

IX. Conclusion

The points made in this paper are broad brush strokes only. They are designed to focus administrators on the most central issues that come up during first round bargaining and where attention should be paid in terms of approaching contract language. The needs and culture

⁷ See *NLRB v. Katz*, 369 U.S. 736 (1962)(seminal case on unilateral action; illegal for employer to unilaterally grant merit increases that were not simply automatic raises to which the employer had already committed itself.); But see *Daily News of Los Angeles v. NLRB*, 979 F. 2d. 1571 (D.C.Cir., 1992) and 73 F. 3d 406 (D.C. Cir., 1996); *Acme Die Casting v. NLRB*, 93 F. 3d 854 (D.C. Cir., 1996); *Dynatron/Bonda Corp.*, 323 NLRB NO. 217 (1997)

of each institution are unique; formulaic approaches to bargaining and canned language (with some exceptions) do not always fit from one institution to another. Each institution must develop and understand its own proposals and how it will respond to those of the other side. In addition, the particular tactics of getting from labor board certification to signature ceremonies will vary dramatically from place to place, depending on the personalities and bargaining styles of each side, the issues that are in play, the degree of flexibility each side brings to the table and the internal and external political forces that may drive the entire exercise.

The key message here, however, is to understand both the impact of language and the permanence of language. Mistakes made in first contract negotiations on the economic side can usually be corrected over time; mistakes made on language items and the fundamental rights of management are harder to rectify in subsequent rounds of bargaining. This reality signals the need for care and attention to detail when an administration sits down across the table from the union for the first time.