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Raising A University Through Collective Bargaining

PREFACE:

Twenty years ago I was a puppy, having just landed an in-house counsel's job at Ferris State University in Michigan, leaving behind my brand new license to practice law in New York and the comforts of my father's private law practice. It was then that I began a journey that has paralleled my personal growth as an adult and eventual parent of three very different, very important and often children, full of life, promise, opportunity and by nature, bundles of anarchy. It was then that I was first provided both an opportunity and a responsibility that took several years to understand and even longer to appreciate.

THE CONSTRUCT:

Corporations, by their very structure, are at the mercy of their agents. They are as good or as bad, if not worse, than their principle agents. While institutions of higher education are corporate entities regardless of their public or private origin, their principle agency is clearly dissimilar from mainstream, capitalistic, profit-driven, nationally and internationally mobile entities. The entity by design is led by a duality of principle agents; faculty and managing, policy responsible administration. While increasingly the private sector's faculties are considered "managing policy responsible administration," and therefore may not organize for the purpose of collective bargaining, faculty and administration primarily (and all agents to a lesser extent) are responsible, by nature of their employment and their institution, for the welfare of the college or university they serve. This premise leaves no room for self-dealing, selfish idealism, secret motives, loss of focus, slick maneuvers or passive partnering. Just as parents must put aside personal, strongly held convictions and differences where those convictions and differences don't benefit the best example and/or direction for their children, so too must the principle agents of a higher education entity put aside those often fair and honorable distinctions in manner and method of operation where the entity is the victim of disagreement. While this construct does not of itself resolve anything, it does serve as a principle for academic and institutional excellence through commitment to its basic, innocent and accurate premise.

THE OPPORTUNITY:

Collective bargaining at its idealist core promises to "love, honor and respect till death do us part." Historically that has been about as successful as the institution demanding the promise as a condition precedent to the marital union formed. Nevertheless, the progeny of that union, no matter how difficult and imperfect, is the responsibility of that union. Even where there is no duality, there remains a responsibility that is both transparent and undeniable to mold, grow, influence and set an example of excellence for the higher education entity to grow into. This responsibility is then borne of the greatest, purest and most honorable opportunity. It is from this perspective that collective bargaining yields the best results for the entity. It is from this perspective that I approach collective

bargaining, however confounding, irritating and obnoxiously particular it seems, as spirit, intent and letter of the rules for the organization to grow by are fashioned.

THE FOUNDATION:

Often called a “filibustering, head of a pin dancing nit-picker,” or something less complementary, I believe in rules, transparent definition and explanation of the rules, understanding of the rules and adherence to the rules. This, while immediately lengthening many negotiations, is akin to proper direction, example and concern displayed to growing members of the family. Ambiguity is much easier to negotiate, justify to stubborn constituents, sell as necessary to diverse constituents and rationalize as excellence in striking harmony. I find it, virtually always, an abrogation of the hard work, periodic heartache and commitment to properly develop a code of operation for mature, collegial, powerful, team-based delivery of the best an institution can offer. I am reminded of the great and raw similarity between this situation and a parent flipping a hyperactive, ego-seeking, precociously spoiled teenager a hundred-dollar bill, while the parent sips a martini and talks fiction of “insider information” within ear shot of the now richer, more spoiled teenager, who promptly delivers his own insider trade for a case of beer and a bag of weed for the road trip.

We reap what we sow in higher education and our entities need rules, direction, transparency and example from among those in positions of power and influence such as the negotiators in collective bargaining.

I have suffered the legalized slander of “lawyers love ambiguity, also known as legalese.” I don’t know what legalese is beyond “heretofore” or “whereas,” but *this lawyer doesn’t love ambiguity*. It is a seed which sprouts inconsistency, promotes thuggery from both sides of an argument, and makes labor lawyers and arbitrators rich as they are repeatedly called to give the ambiguity “context.”

I love context because it is at the foundation of meaning and intent; but context need come from the facts surrounding the rule, not a 33rd version of a provision’s parameters.

Flex and fluidity of a concept embedded in a contractual provision is to be distinguished from ambiguity. You don’t raise a family or an institution with ambiguity at the core of doctrine; you neither raise a family or an institution with extreme rigidity and without flex to deliver the context of a rule’s purpose and intended result. Rules without flex--intended, envisioned and provided for in overarching scheme--provide dogma, invite rebellion and lead to anarchy, often at significant financial expense, and always at the expense of institutional maturity and integrity. This all too common result of the “overzealous and understudied” may be illustrated through myriad examples, likely familiar to most colleges and universities:

A concern with the timely arrival of white collar support staff, instead of being discussed and explored as an issue of uncertain cost and certain poor example, results in the “on a hunch” purchase of an electronic

timekeeping program whereby staff “punch in” by logging onto their computer (if they have one) upon their arrival and by logging off each day; the white collar time clock.

Six months into this marvelous attendance and tardiness solution, the obvious occurs... anarchy!

The secretary who is really the “right hand” of the department is not so mechanistic that she dogmatically punches in upon arrival; she finds herself two hours into the work day before she even remembers to log in. Her boss, distressed with her pay docking and the disciplinary warning recommended by Human Resources, tells her the system is stupid, writes a letter to HR, beginning a memo “war of the wilted roses,” and starts punching her in whether she’s there or not.

This is the context which breaks up families and retards the growth and competitive legitimacy of the college and university. I once knew a university provost who proudly proclaimed, “anarchy is the best form of institutional governance.” Needless to say, the labor relations climate was less than stellar.

BUILD IT 101:

No one ever told me how to be a parent and raise children, although I remember my mother telling me “you love ‘em and love ‘em and love ‘em some more.” That is roughly equivalent to the totality of sage advice I have receive concerning my fiduciary duty with respect to those institutions of higher education I have represented as counsel. That’s not bad, but it kind of falls into the ambiguity trap mentioned earlier.

Many of us here at the conference proceedings are builders. Some of us are architects. Some are still wondering what’s wrong with that provost’s position on anarchy. To the first two groups I offer a bit more than my mother offered me on parenting.

You need to know, so well that you need not study, your institution’s rules, mission, (including future interests), political climate, current culture, standing impediments, available legal alternatives and available budget -- the last being the maximum monies necessary (and hopefully available) to dedicate to fielding the team that can get the job done. In other words, you need to invest in and really get to know your institution, just as a parent needs at the outset to care enough to invest enough time, intellectual and emotional energy, and sometimes spend painfully. You need to know the unique and not so unique qualities and character of your children.

It sounds so simplistic, yet in my over twenty years of serving as a chief negotiator in higher education, it is rarefied air! Gimmicks are often substituted for knowledge, investment and the pain of commitment. Gimmicks are easier to pick up, bandy about as expertise without doing the homework, and then find their way into collective agreements. I was recently (or perhaps not so recently) to protect the innocent and avoid

the wrath of the “experts”) in a management strategy meeting called to discuss bargaining strategy. Fifteen minutes into the meeting I found myself compelled to ask one expert if I could see the magical tonics and wares for sale, strapped beneath his/her travelin’ jacket. It never works! Gimmicks may just be one major characteristic of the fall from grace of “Corporate America,” but that’s another topic for another day. Gimmicks are the tools of the lazy and/or largely uninformed. We’ve all known parents who are into gimmick child rearing: One chaperoned event to the next, dressed in full regalia, and clueless of the object, value and meaning behind the daily regimen except chat fodder and “best in show” value. It’s a disservice whatever the venue.

There are sexy concepts that may become very valuable tools and programs for discussion and inclusion in a university’s policies and procedures menu, paralleling its maturation and journey toward excellence. These tools (e.g. “win-win bargaining”) or programs (e.g. the long derided “merit pay”) may have gimmicky names, but the problem only arises if they are constructed and implemented as gimmicks rather than basic core values of approach and delivery. It’s not the tools and/or programs which have failed--it’s the “Gimmick Masters,” peddling tonics and wares, clueless again as to utilization beyond the \$29.00 seminar for those who wish to imitate “Collective Bargaining Agents.” The responsibility to avoid gimmicks, and yet not immediately discard the new and/or uncomfortable, is critically important to the ultimate health of not only the individual institution but the entire higher education enterprise.

Perhaps the biggest mistake parents make when raising their children (I am certainly guilty) is that they fail to really listen--listen to what is said, what is behind what is said, and explore the merit, however clumsy, of what was said. As a result, we too often operate and govern under theoretical constructs, and rationalize or simply ignore connection with our children and the effect of our example, direction, manner of delivery, and the rules which we impose. In collective bargaining, the entity is at the receiving end of the conversation of the fiduciaries. The willingness to listen, or lack thereof, is too often a chronic problem there as well. Where that conversation is fraught with mistrust, hyperbole, stubborn dogma, deceit and agendas not on the table, the entity suffers greatly.

Attached to this piece, for your certain pleasure, is an example of listening as a bargaining principle and its outcome. These are two collective bargaining agreements between the university I represent and a National Education Association (NEA)-affiliated university’s facilities union. The successor agreement came about because of listening to the unit’s negotiators, engaging in conversation that invited real discussion, and avoiding “showing off”, leveraging, sneaking in slick passages or blindly maintaining agendas. The focal point became the university and not Mom’s or Dad’s agendas. No gimmicks and no defending previously won territory, but neither necessarily yielding to every point made in or from the discussion. While I’m sure ambiguity remains in the agreement, we worked hard to define, illustrate and eliminate as necessary, to give the agreement context, direction and flexibility for a healthy adolescence. Most would agree that extremes are generally not healthy for raising children (with inherent exceptions such as “No Capital Crimes”). The collective bargaining venue presents the same needs and is susceptible to the same unproductive and often counterproductive compromises, where

there should be flexibility to firm and fairly held constructs that provide example, direction and healthy tolerance.

Finally, the impact our conversations (or lack thereof) have on our progeny is rarely (if ever) admitted. While this passive indifference may not govern our conscious approach to either parenting or negotiations, it is as deadly as gimmicks or stubborn dogma to the example and direction cried out for by our progeny. This reality needs to be kept front and center in any approach to collective negotiations. In my twenty years of negotiating in higher education, it has been far too common that indifference to the entity's health results from the parties' clash of egos and platforms. In the end, this stems from an indifference to the effort necessary to raise an institution that is, even more than children, dependent on its faculty and administration to offer example, balance, opportunity, reward, conscience, ethics, edge, and future. After all, aren't those qualities what higher education is all about?

Talking Points:

- Faculty's role in collective bargaining: enhancement and protection of the Academy and/or enhancement and protection of the college/university?
- Collective Agreement as rule book, road map, statement of spirit and intent, reference point for collegial governance, all of the above, none of the above?
- Institution as means to an end, or an end which needs means?
- Validity of concepts outlined in the collective bargaining arena?
- Compromise vs. Creative Issue Resolution
- Is the entity really innocent...are our children really innocent?