THE
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To: Introduction to Oregon's Negotiations Process

NEGOTIATIONS PROCESS

Oregon law (PECBA) provides for a structured bargaining process with multiple steps:

STEP 1: 150 days of good faith bargaining

This period begins with the exchange of initial proposals by both teams. HB 2265A, passed in 1997 and effective Jan. 1, 2018, allows the parties to agree in writing to a starting date for the 150-day period and removes the requirement that parties receive initial proposals before the 150-day period begins. In case the parties are using an IBB process, ideally the ground rules should specify the date when the 150-day period begins. Usually by the end of the 150 days the two teams have met numerous times and resolved some of the articles of the collective bargaining agreement (CBA). "Good faith bargaining" means that the parties have made some effort towards resolving their differences and have explained their positions to the other party, but does not require that the parties concede their position on any issue. The resolved articles often are "TA'd" (tentatively agreed to) and then cannot be reopened without mutual agreement, or if the school board or the unit membership vote to reject a total package tentative agreement.

STEP 2: Mediation

Anytime after 150 days from the date when the parties initially met or the date they jointly designated, either side can ask for mediation. The parties can jointly request mediation before the end of the 150 days. The request for mediation services is made in writing to the Employment Relations Board (ERB). Usually a mediator is available within 4-6 weeks, but the other team as well as the district team control the scheduling of the session. The parties may continue to meet for bargaining sessions while waiting for the mediator, but this is not required.

Mediation is a step that, statewide, produces settlements a very high percentage of the time. The alternative to requesting mediation is simply to keep meeting, probably at least monthly, whether or not further progress is being made. During mediation (and even before), a party can make a "supposal" that is not binding as a proposal and may have a time limit for acceptance. This avoids the problem of being accused of "regressive bargaining" if your board later decides not to hold to that offer because settlement was not reached. However, "supposals" cannot be communicated to the members as "proposals."

Mediation costs are partially offset by fees paid by the District and the Union. For the first two mediation sessions, the cost is $1000, split between the parties, and additional costs apply to subsequent mediation sessions.

Factfinding is an optional step after mediation, but since it became optional in 1995, no public employer/union has ever used factfinding. Experience before 1995 was that factfinding took months of time and was very expensive but resolved very few disputes. The Factfinder is chosen by the parties from a list furnished by ERB. The Factfinder conducts a hearing, hears evidence on the disputed items, and makes a recommendation – which is only advisory. Each party must accept or reject the recommendation in total.

In Oregon education units, the contract usually is set to expire on June 30, so bargaining often continues without a collective bargaining agreement in force, during what is called "the hiatus period." The employer still has to maintain the "status quo" on mandatory issues, but can make changes in permissive topics because permissive language ceases to exist when the CBA expires (but must maintain permissive practices if they have an impact on mandatory topics). Also, features such as the grievance procedure, fair share, and some union rights expire as of the expiration date, although employers may continue to honor and apply those provisions. If no grievance procedure is in force, the union can file a ULP if they assert that the employer is violating the "status quo" concerning a mandatory issue or a permissive issue that impacts a mandatory issue of bargaining.

The Public Employee Collective Bargaining Act (PECBA) specifies that during the hiatus period (between CBA expiration and unilateral implementation or a new agreement is ratified), the employer must continue to provide step and longevity increases (but does not mention cost of living increases) but does not need to implement any increase in the employer contribution for insurance, unless the expired contract specifically provides otherwise.

STEP 3: Final Offers

The law provides that any time more than 15 calendar days after the first mediation session, either side may call for "final offers." This request triggers a seven-day period during which both teams must submit their most recent

proposals on all unresolved articles, and also submit a costing of what their proposal would cost, both in total and in new dollars over the prior year. The purpose is to signal to the public that negotiations have entered a serious phase and to give the public information about the issues dividing the parties. Of course, the same information also helps inform the unit members about how far apart the teams are. Make sure you meet the deadlines for final offers and costing, and get legal advice on costing your final offer.

At the end of the seven days, the Mediation Service "publishes" the final offers of both sides. Actually, there is no active role for the Mediation Service except to provide copies of the Final Offers if requested by the media or any party. Of course, the Final Offers can usually be obtained just by asking each team.

STEP 4: The "Cooling Off" Period

During the 30-day period following the publication of Final Offers, the parties may meet to attempt to resolve their differences. The Mediation Service usually schedules one or more mediation sessions. Both sides usually "ramp up" the public relations efforts. The Association team would survey members to see if they have sufficient support for a strike. Usually OEA units will not go out on strike unless they feel they can count on support from at least 80% of unit members. An important factor for the Association will be the perceived support or lack of support from the community.

STEP 5: The "Self-Help" Period

At the end of the "cooling off" period, the school board can unilaterally implement part or all of its Final Offer (which may have been modified during mediation sessions or bargaining sessions after the publication of "Final Offers" 30 days previously). The school board must give at least 5 days advance notice of its intent to implement and must vote in open session to implement.

The associations appear to assume that a school board will want to unilaterally implement as quickly as possible. However, unilateral implementation does not mean that bargaining is at an end. ERB case law states that any time the union substantially changes its position on even a single item, the parties would have to hold another bargaining session to see if they can then reach settlement.

At a time, such as during the 2008-12 recession, when many districts wanted to cut employee work days to save money, school boards often want to make immediate changes in some items with financial impact but unions were "dragging out" the bargaining process. In most years, while the district would like to make changes in some contract terms or language, these are not items critical for immediate change. The district could simply continue to operate without an operational CBA, and hold onto dollars that have been offered in salary and benefit increases. During such a "hiatus" period, the district must maintain the

"status quo" on all mandatory items and any permissive item that has an impact on a mandatory item.

The "self-help" step for the Association(s) is a legal strike. The association intending to strike must give at least 10 days' notice of a date certain for a strike. That date could be the 31st date after publication of Final Offers, or it could be weeks or even months later. The association is likely to try to exert enough public pressure on board members to obtain a favorable resolution (from the employees' perspective) without actually going to strike.

In a strike situation, unit members may decide to work and get paid by crossing the picket lines. Members who go on strike are not paid. After a certain period of time, district insurance contributions could be withheld as well. OEA has in the past provided some financial support to striking members – usually payment of a month's insurance premium if the strike continues that long.

The law allows a public employer to replace striking workers, either temporarily or permanently. Teachers and other professional staff generally do not worry about this because their licensure requirements or a college's accreditation requirements make it unlikely a district or college of any size could find that many replacements with the right qualifications. Classified employees tend to worry more about that possibility, although it has never happened in the case of a K-12 strike in Oregon. (Of course, although there have been several dozen teacher strikes in Oregon, there have only been two strikes of classified employees).

If teachers only are on strike, classified unit members would have to cross the picket lines to work, and vice versa (unless they are part of the same bargaining unit, which is true in Eagle Point and maybe in some smaller districts).

In years past, K-12 school boards have tended to try to run schools despite a strike by teachers. This usually allows the union to seize media attention day after day. An alternative plan is to provide day care using classified employees in the schools or an alternative setting for parents of elementary students who need someplace for their students to go during the work day, and to continue classes for seniors and for special education students with substitute teachers.

For community college, continuing classes with substitutes is almost imperative because it is difficult to extend the term more than a few days and students have paid to obtain credits needed for graduation.

Hopefully, labor disputes can be resolved short of strike. But the possibility of a strike may be greater if employees feel that they sacrificed during the recession and are working very hard, with high work loads, and seeing no economic gains. Employees have limited understanding of how much the district/college must pay for rising PERS costs, unless concerted efforts are made to educate them, over time. However, if the district does its work over the long haul, connecting with

employees, community and business leaders about the financial offer that has been made and how average teacher pay compares to community average per capita income, as well as on key non-economic issues, the association may be restrained by lack of community support.

STEP 6: Settlement and Ratification

At some point, the parties will agree on terms for a replacement contract. In some districts where the association is a part of a bargaining council, this step is complicated because the council as well as the local employee unit members must ratify any settlement. If either the association/council or the school board reject the tentative agreement and fail to ratify, then the bargaining teams must return to the bargaining process to seek a different agreement that their respective "constituents" will ratify.

COMMUNICATION

Before and during a labor crisis, the district/college should:

--Maintain continuous close internal communication about the issues remaining, using executive sessions, so that the board's team can plan counterproposals that will have board support. Note: This is one time news reporters can be excluded from executive sessions.

--Communicate with unit members. The only prohibition is that the district may not threaten and may not make new proposals directly to membership without first presenting those proposals to the association bargaining team. It is important to start brief, regular communication directly from the Superintendent/President/Board to unit members well before a labor crisis.

--Keep information flowing to unit members through regular newsletters/emails, updates on the district/college website, etc. The best strategy is specific information on single topics such as how your employees' salaries compare with others in similar districts/colleges (if that is a bargaining issue).

--Educate the public and community leaders early on about areas of contention and troublesome proposals from the association.

COMMUNCATION DURING AND AFTER MEDIATION

- Choose a single spokesperson from the board, but make sure all board members know the major issues and each board member is able to give a clear but simple response to "Why don't you have a settlement?"

- Step up efforts to communicate to bargaining unit members and other employees about the board's position, and what has been offered.

- Use executive sessions for board discussions about bargaining positions, but also schedule at the beginning of board meetings regular "reports to the board" in open session, where a key member of the bargaining team reports to the board (and public) what the district's position is on remaining issues and why.

- Get expert help on your communication plans and strike preparation plans.

MID-TERM BARGAINING

Even after a CBA is signed, during the term of an agreement, there may be times when the District is obligated to bargain with the Association:

- Many multi-year CBAs provide for a reopener at the end of the first or second or third year for negotiating a limited number of issues, usually including salary and insurance benefits, and generally one or two non-compensation issues that each side wants to open. The process required is the same as PECBA requires for successor bargaining (when the whole CBA has expired or is about to expire) UNLESS the reopener clause in the CBA specifies a different or shortened process.

- If the District wants to make a change in some condition of employment that is written into the CBA, the District Superintendent or HR Director can approach the Association about the need for change in a particular provision. If agreement is reached (often without even having a formal bargaining session), then the revised CBA language must be ratified by a Board vote and the Association must ratify as well, by whatever process is spelled out in their bylaws. An example might be if the District is having trouble attracting and retaining bus drivers and so proposes a 5% add-on to the salary range for bus drivers only for the remaining year(s) of the CBA.

- The PECBA contains a provision requiring that any part of the CBA invalidated by a court decision or legislative action must be reopened upon demand of either party. This is what happened this past six months when "fair share" was found unconstitutional by the U.S. Supreme Court in the *Janus* case. Under the PECBA, the expedited (90-day) bargaining process is to be used.

EXPEDITED BARGAINING

- If the CBA doesn't address certain issues but the employer is planning to make changes in the "status quo," if the provision is MANDATORY for

bargaining, the District has to notify the Union President in writing of plans to make a change in the status quo, and must allow the Association 14 days to demand to bargain. A simple example: Parking for staff has always been free but because of construction of a new building addition on what was the parking lot, parking will be limited and parking permits will cost $20 per year.

In that case, if an Association demand to bargain over the proposed change in the status quo is made within 14 days, then the District cannot implement that change until the end of a 90-day period, counting from the date of District notification. During the 90-day period, the District must bargain in good faith to attempt to reach agreement; if not, it may unilaterally implement its last offer (with 5 days advance notice to the Association).

- Even if the issue is PERMISSIVE for bargaining, the District will have an obligation to notify the Association and bargain upon demand, using the expedited process, if the change has an IMPACT on a mandatory issue. For example, the high school student schedule is permissive for bargaining, but a different student schedule may very well change the amount of "student contact time" (a mandatory subject) that some or all teachers have during the 8-hour day. IMPACT bargaining must be completed, either to agreement, or else unilateral implementation by the District Board, before the change can be implemented.

New legislation, such as the amended Equal Pay Act provisions that go into effect Jan. 1, 2019, may result in a need or desire by the District or Association to re-bargain provisions of the current CBA, but both sides must agree to reopen bargaining (unless certain CBA language is now illegal, or bargaining is mandated in the legislation). More frequently, new legislation may require bargaining over issues that are not addressed in the CBA, but where changes must be made in the "status quo" regarding mandatory issues, or those permissive changes that have an impact on mandatory issues. The result would be an obligation to meet the PECBA requirements for expedited bargaining.

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