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ATTORNEYS AT LAW

Collective Bargaining Workshop

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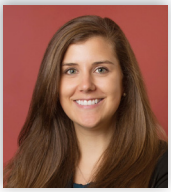
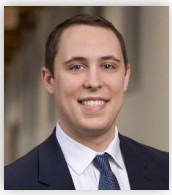
Presented by:

Mark T. Broth, Esq.
Drummond Woodsum
mbroth@dwmlaw.com



Anna B. Cole, Esq.
Drummond Woodsum
acole@dwmlaw.com



Patrick A. Landroche, Esq.
Drummond Woodsum
plandroche@dwmlaw.com

NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION
EST. 1941

800.727.1941 | dwmlaw.com

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Mark T. Broth, Esq., Anna B. Cole, Esq., and Patrick A. Landroche, Esq.

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Collective Bargaining Workshop

I. Legal Framework of Collective Bargaining

The Public Employee Labor Relations Act (RSA 273-A or the "Act") was enacted by the New Hampshire Legislature in December 1975. The Act allows public employees to organize as collective bargaining units, and elect an "exclusive representative" who is responsible for negotiating "terms and conditions of employment" on behalf of the employees in the bargaining unit with their "public employer."

A. Key Terms

1. "Public Employer"

All towns, cities and counties in New Hampshire are considered "public employers" for the purposes of The Act.

2. "Public Employee"

The Act defines "public employee'' to mean any person employed by a public employer except:

(a) Persons elected by popular vote;

(b) Persons appointed to office by the chief executive or legislative body of the public employer;

(c) Persons whose duties imply a confidential relationship to the public employer; or

(d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call.

3. "Bargaining Unit"

A "bargaining unit" is a group of employee positions that share a "community of interest" that has been formally recognized (aka certified) by the Public Employee Labor Relations Board ("PELRB"). The Act identifies the following criteria that may show that positions in a proposed bargaining unit share a "community of interest":

(a) Employees with the same conditions of employment;

(b) Employees with a history of workable and acceptable collective negotiations;

(c) Employees in the same historic craft or profession;

(d) Employees functioning within the same organizational unit.

A bargaining unit may be comprised of professional and non-professional employees. However, employees who exercise supervisory authority involving the significant exercise of discretion may not belong to the same

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bargaining unit or union as the employees they supervise.

4. "Exclusive Representative"

Once a bargaining unit is formed and certified by the PELRB, the newly formed bargaining unit elects its "exclusive representative" (aka union). Once elected, the union has the following rights and responsibilities:

- The right to represent employees in collective bargaining negotiations and in the settlement of grievances.
- The right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement, except as otherwise stipulated in the Act.

Once elected, the exclusive representative also has the obligation to fairly represent all members of the bargaining unit, regardless of whether they choose to become a member of the union.

5. Subjects of Bargaining: "Terms and Conditions of Employment" versus "Managerial Prerogative"

The Act requires public employers to negotiate in good faith with a properly certified bargaining unit's exclusive representative regarding the employees' terms and conditions of bargaining unit employees' employment. "Terms and conditions of employment" are defined to mean "wages, hours and other conditions of employment *other than* managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute" (emphasis added). The Act goes on to construe the phrase "managerial policy within the exclusive prerogative of the public employer'' to include, without implied limitation, "the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions."

Unfortunately, based on these definitions alone, it is difficult to identify whether a particular subject must be negotiated or not. Accordingly, when provided with the opportunity, the PELRB and the New Hampshire Supreme Court have stepped in and broken subjects down into three categories:

- Mandatory Subjects of Bargaining, aka those subjects over which the parties are *required* to bargain. Examples of mandatory subjects of bargaining identified by the Court and PELRB include: wages/step increases, health insurance, work schedules, work shifts/rotations, and leave benefits.
- Permissive Subjects of Bargaining, aka those subjects over which the parties are free to bargain over or not. While the Court and PELRB

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have specifically identified certain subjects as permissive, including, for example, the whether the "just cause" standard will apply to disciplinary decisions, as a practical matter, all subjects that are neither mandatory nor prohibited are "permissive" subjects of bargaining.

- Prohibited Subjects of Bargaining, aka those subjects over which the public employer is prevented by law from submitting to the bargaining process. Examples of prohibited subjects of bargaining identified by the Court and PELRB include: employee job title/rank, use of the merit system for recruitment/appointment/promotion, and the structure of the employer's organization.

B. The Duty to Bargain in Good Faith

As explained above, the Act requires public employers and public employee representatives to bargain over the employees' terms and conditions of employment in good faith. The failure to do so is a violation of the statute, also called an "unfair labor practice" or "ULP," which may result in a hearing before the PELRB.[1] Generally, claims that the public employer failed to bargain in good faith result from three types of conduct: unilateral changes in a mandatory subject of bargaining, bad faith conduct at the table during collective bargaining negotiations, and direct dealing.

1. Unilateral Change in Mandatory Subjects of Bargaining

It goes to the heart of the Act that a public employer may not make a unilateral change in a mandatory subject of bargaining without first bargaining that change with the employee representative. At its essence, the Act requires employers to sit down with employees and come to an agreement on wages, hours, and other terms and conditions of employment. Thus, if employers could unilaterally change those terms that fundamental obligation would be hollow. Accordingly, the PELRB has determined that any unilateral change in a mandatory subject, absent limited and specific circumstances, constitutes a *per se* violation of the bargaining laws, regardless of whether the change is made in good faith or for the benefit of the employees.

2. Bad Faith Conduct during Negotiations

Fundamentally, "bad faith" conduct at the table is behavior or activities that, when viewed in their totality, evidence an intent not to reach an agreement. The following is a general description of the most common such conduct:

[1] Other employer conduct prohibited by the Act includes interference with employees' rights under the Act, interference in the formation or administration of a union, discrimination against employees for the purpose of discouraging or encouraging membership in a union, lockouts, and, violation of a collective bargaining agreement.

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- Surface bargaining. Surface bargaining is when parties go through the motions of collective bargaining with no intent of reaching an agreement on the matters under discussion. Surface bargaining is evident when a party fails to make "some reasonable effort in some direction" to compromise, such as when a party fails to make a written proposal, explain a proposal, strike language, make compromises back and forth, and provide justifications for its proposals on various issues, as would be expected in traditional negotiations.

- Bargaining without or beyond authority. Bargaining representatives must be *clothed* with sufficient knowledge, guidelines, and authority to enter into tentative agreements on behalf of its principal. Thus, it can be argued that a party who has no bargaining authority or has bargained outside their authority, or merely acts as a conduit of information from the bargaining table to his/her constituents is guilty of bargaining in bad faith. Similarly, once a tentative agreement is reached, the bargaining team must advocate for the tentative agreement before its constituents for ratification purposes.

3. Direct Dealing: Circumventing the Exclusive Representative

The duty to negotiate in good faith is the mutual obligation of the public employer and the bargaining unit's exclusive representative (union). Therefore, an employer violates the duty if it seeks to circumvent the employees' union and attempts to deal directly with an employee in the bargaining unit employees for purposes of negotiating wages, hours, or other working conditions. While there is no prohibition against a public employer communicating directly with employees, unlawful circumvention occurs when one party seeks to deal directly with the other principal party, avoiding the latter's bargaining representative or when an employer alters the terms of the collective bargaining agreement for one particular employee without the consent of the bargaining agent. In addition, unlawful circumvention can occur when one party seeks to discredit the bargaining agent of the other and suggests that the parties could reach an agreement without the assistance of the other's bargaining representative.

C. Contract Negotiation Process

Any party wishing to engage in collective bargaining must serve the other party with written notice of its intentions at least 120 days prior to the budget submission date. Given that cost items must be approved by the legislative body (as outlined more fully below), negotiations (or any dispute resolution process) must be completed prior to the deadline for submission of the budget to the governing body or the budget committee (if applicable), as required by law.

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Other than these timing considerations, however, the Act does not specify the exact process used in the negotiation of collective bargaining agreements other than to require that the negotiations must be undertaken in good faith. As outlined above, the requirements of good faith are generally satisfied if both parties' bargaining representatives engage in negotiations with the intent of reaching an agreement and are provided with sufficient knowledge, guidelines, and authority to enter into tentative agreements on behalf of its principal (aka either on behalf of the bargaining unit or the municipality). Generally, the approach used in negotiations is either "traditional" table negotiations where the parties exchange proposals or "problem solving" where a more collaborative approach is used.

Once the bargaining representatives of the public employer and bargaining unit have reached a "tentative agreement" on terms and conditions of employment, the agreement must be ratified by the members of the union and the municipality's governing body. To the extent the agreement requires the appropriation of additional funds, these "cost items"[2] must be submitted to the municipality's legislative body (e.g., town meeting) for approval before the negotiated agreement becomes final and binding on the parties.

While both parties are required to participate in negotiations in good faith, the Act expressly does *not* require either party to agree any particular proposal. Therefore, in the event the parties are unable to reach an agreement, the Act also specifies a process for resolving the impasse.[3] However, if that process is unsuccessful, the Act merely directs the parties to resume negotiations.

D. Status Quo

In the event the parties' collective bargaining agreement expires without a successor (or during the negotiation of the initial collective bargaining agreement), the parties are required to maintain the "status quo." Under the status quo doctrine, the public employer must maintain all wages, benefits, and conditions of employment at the levels in effect at the time of the expiration of the collective bargaining agreement (or at the time the new

[2] RSA 273-A: 1, IV, defines a "cost item" as "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." Language in the collective bargaining agreement which does not require the appropriation of funds only requires approval of the governing body and the members of the collective bargaining unit.

[3] Pursuant to RSA 273-A: 12, if the parties are unable to reach agreement on the terms of an initial or successor collective bargaining agreement within 60 days prior to the budget submission date, the parties are required to engage in mediation. If the parties are unable to resolve the outstanding issues through the mediation process within 45 days prior to the budget submission date, the parties can engage in fact finding in a further attempt to resolve the outstanding issues.

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bargaining unit was formed). This means that the employer is not required to grant longevity steps or other similar types of wage escalators during status quo. The only exception to this rule is a promised wage change resulting from an employee's attainment of an advanced educational degrees/credits (often referred to as horizontal track or lane movement).

The Act specifically prohibits public employees from engaging in job actions, work stoppages, slowdowns, or strikes. Accordingly, true strikes by public employees in New Hampshire have been extremely rare and, if they were to occur, could not be official union activity. As a result, when unions wish to demonstrate their dissatisfaction with the progress of negotiations or status quo, they will commonly engage in so-called "work to rule" actions pursuant to which bargaining unit employees perform only that work which is mandated by workplace rules or contract. These actions often results in employees refusing to perform any "extra" services such as voluntarily meeting after the specified work day or providing certain supplies for their classrooms.

E. Enforcement of the Collective Bargaining Agreement

The provisions of the collective bargaining agreement are generally enforced in one of two ways. The first and foremost is through the grievance process. The Act requires all collective bargaining agreements to have a "workable" grievance process. While the Act defines the term "grievance" as "an alleged violation, misinterpretation or misapplication with respect to one or more public employees, of any provision of an agreement reached under this chapter," it does not stipulate what it considers to be "workable." Nonetheless, most negotiated grievance processes include some form of final and binding resolution of grievances, usually through arbitration.

The other means of enforcement of the collective bargaining agreement is through the unfair labor practice (ULP) process before the PELRB. The Act specifically identifies particular conduct that, if engaged in by either party, violates the Act. That conduct includes the breach of the collective bargaining agreement by either party. To the extent the PELRB determines that a particular party's conduct violated the Act, the PELRB has the authority to order the party to cease and desist, require periodic reporting, order the payment of costs, in appropriate circumstances reinstate an employee with back pay, or order other relief as the PELRB deems necessary. However, it is worth noting, that the PELRB generally declines to exercise jurisdiction over an alleged ULP if the parties' agreement includes a process for binding and final resolution of the alleged violation.

II. Contract Interpretation

A. Principles of Contract Interpretation

Collective bargaining contracts are legal documents defining the rights and responsibilities of the parties. Nonetheless, these documents are often

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less than clear. Therefore, the following canons of contract interpretation, as set forth in the *Restatement (Second) of Contracts*, assist employers to read and apply the language of collective bargaining agreements:

- Interpretations that give "***a reasonable, lawful, and effective meaning to all the terms***" are preferred over interpretations that result in all or part of the language as "unreasonable, unlawful or of no effect";
- ***Express terms*** are favored over past practice;
- ***Specific terms*** are favored over general language;
- The provision or contract should be interpreted ***as a whole***;
- Provisions should be read together and interpreted ***in context***;
- ***Technical terms and terms of art*** should be accorded their technical meaning when used within their field;
- General terms should be interpreted in accordance with their ***generally prevailing meaning***.

Ultimately, the overarching principle that should be applied when an employer is called upon to interpret ambiguous contract language is good faith.

B. Past Practice

Parties to a collective bargaining agreement are presumed to have reduced the terms of their relationship into writing (aka the collective bargaining agreement itself). However, there is an acknowledgement that the contract cannot cover every eventuality that may arise between the parties. Accordingly, past practices can arise to delineate matters where the contract is otherwise silent. Alternatively, past practices are used to demonstrate how the parties' have interpreted particular language in the collective bargaining agreement. Importantly, however, such "past practices" are only *binding* on the parties if they are (a) clear and consistent, (b) repeated over a reasonable period of time, and (c) accepted by both parties.

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A Practical Checklist for Negotiators:

Be Prepared

It is almost impossible to overstate how important being prepared is for ensuring a positive outcome when you negotiate contracts. You can be sure that your employees or other bargaining unit employees will come to the table with a specific list of demands and issues, and they may even have the resources and data available from their union to back them up. Employers should be sure to take the time necessary away from the bargaining table to be successful at the table.

The following checklist will help ensure that you are prepared when you go to the table to negotiate:

- ❑ **Review your existing collective bargaining agreement.**
  - ☐ Bring the governing body and management together to discuss it.
  - ☐ Gather recommendations from supervisors.
  - ☐ Check for impediments to desired operational changes.
  - ☐ Draw on outside consultants (it can be useful to have your contract reviewed by an experienced negotiator outside who can pinpoint potential trouble spots and unclear language that may need attention).
- ❑ **Review the grievance history during the life of current collective bargaining agreement.**
- ❑ **Prepare an analysis chart of salaries and benefits for all union and non-union employees. Unions often seeks parity among different employee groups and you should have a clear picture of the salaries and benefits of all groups.**
- ❑ **Prepare a salary/benefit analysis chart of "comparable" counties, municipalities, and employers in your area.**
  - ☐ Review contracts from other public employers in your area (be sure to include those with which you compete for employees) and create a comparison chart of salary, benefits, and important language provisions is valuable.
  - ☐ Think beyond health insurance when considering benefits. If course reimbursement, sick days, or other benefits are on the table, see how other contracts compare.
  - ☐ Avoid reliance on data presented by the other party. Do your own analysis.

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- ❑ **Look at the big financial picture.**
  - ☐ Check federal and state Department of Labor information, including Consumer Price Index (current and past few years).
  - ☐ What is happening in surrounding communities?
  - ☐ What is happening with private employers in your area?
- ❑ **Review the bargaining history and proposals (Employer-side and Union-side).**
  - ☐ This is particularly important if the management team is new to the process.
  - ☐ Any past conflicts? Fact finding? Interest arbitration? Unfair labor practice complaints?
- ❑ **Review salary and benefits data.**
  - ☐ Review the current cost of salaries.
  - ☐ For context purposes, calculate the cost of a 1% increase.
  - ☐ Project the cost of step movement.
  - ☐ Review current and projected health/dental insurance costs.
  - ☐ Review payroll and overtime practices for FLSA compliance.
  - ☐ Review leave policies for compliance with state and federal leave laws.
  - ☐ Think in terms of aggregate cost (the cost of percentage salary increase plus step and longevity payments), not simply the cost of adding a percentage to the base salary.
  - ☐ Review employee use of leave benefits to see if there are any problems that need to be addressed. Have there been unanticipated costs?
  - ☐ Check for increases in other benefit costs (life insurance, tuition reimbursements, travel reimbursements, etc.).
- ❑ **Get training.**
  - ☐ Learn about bargaining laws and issues.
  - ☐ Find out about the current trends and developments in negotiations around the state.
  - ☐ Practice the art of persuasion - the goal is to get an agreement!

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- ❑ **Select your negotiating team and assign roles (spokesperson or facilitator, note taker, etc.). Possible members include:**
  - ☐ Administrator/Manager
  - ☐ Finance Director
  - ☐ Human Resources Director
  - ☐ Department Head
  - ☐ Outside consultant (particularly important if the union has professional assistance at the table).
- ❑ **Determine and prioritize goals.**
  - ☐ Prepare bargaining guidance memorandum for negotiating team.
  - ☐ Know the limits of your authority.
  - ☐ Prepare ground rules.
- ❑ **Determine the data to be used early on.** Capital budget costs, employees in unit, step placement, etc. Agree on this with union if possible. Best to use a snapshot in time.
- ❑ **Develop bargaining proposals or issues.**
  - ☐ Check for clarity and unintended consequences.
  - ☐ Prepare supporting data and arguments.
  - ☐ Anticipate and prepare for union responses.
- ❑ **Prepare communications strategy.**
  - ☐ Stress the positive and long-term goals: improved operational efficiency, staff quality, etc.
- ❑ **Review union proposals/issues.**
  - ☐ Cost out union proposals.
  - ☐ Look at the big picture.
  - ☐ Don't commit to proposals until you're ready.
- ❑ **Keep all bargaining notes and proposals.**
- ❑ **And finally, when you're in doubt, don't hesitate to get advice or assistance.**