

City and County of San Francisco
Department of Human Resources

Scope of Bargaining

2015

Employee Relations Division



The Starting Points

- **TWO Main Sources of Law**
 - **MMBA - State law**
 - Meet and confer in good faith
 - Over wages, hours, and terms and condition of employment within the scope of representation.
 - But excludes the “merits, necessities, and organization.”
 - MMBA requires local municipalities meet and confer with the unions before changing working conditions within scope of bargaining. (This is true whether or not the subject is mentioned in the MOUs – unless the MOU very clearly waives the Union’s right to meet and confer.)



The Starting Points

- **Charter - Local law**
 - Charter sections A8.409 and A8.590
 - Those sections make interest arbitration available under certain circumstances
 - Both sections refer to MMBA when determining scope of representation



Collective Bargaining Laws – Specific Requirements

- *Obligation to meet and confer in good faith . . .*
 - Good faith requires:
 - Meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions and proposals
 - Endeavor to reach agreement on matters within the scope of representation, including adequate time for impasse resolution process
 - Refraining from taking unilateral action that would effectuate a change in a mandatory subject of bargaining



Good Faith

Examples of Good Faith Bargaining:

- Meet promptly upon request
- Fully consider presentations
- Continue meeting for a reasonable period of time
- Free exchange of information, opinions and proposals
- Endeavor to reach agreement in good faith
- “Totality of the Circumstances” Test



Bad Faith

Examples of Bad Faith Bargaining:

- Surface bargaining
- Failure to exchange proposals or attempt to reconcile differences
- Delaying tactics
- Negotiators who announce that they do not have adequate authority
- Unilateral changes
- Bypassing Union representatives (going straight to employees)
- Failure to provide notice
- Regressive bargaining



Scope of Bargaining



Mandatory Subjects of Bargaining

Issues Within the Scope of Bargaining

- Examples of Issues Within Scope
 - a. Wages
 - b. Hours
 - c. Certain Working Conditions



Scope of Bargaining - Overview

- Mandatory Subjects of Bargaining
 - Hours, wages, terms and conditions of employment
 - Safety, workload and most benefits are mandatory subjects of bargaining
- Permissive Subjects
 - Staffing (City policy – don't agree to meet and confer over minimum staffing!)
- Excluded
 - Charter (retirement, health plan design)
 - Excluded from interest arbitration (civil service “carve outs”)
 - Clarification of existing policy



Examples of Subjects Within Scope of Representation

- Working Conditions
 - Hours of work, work schedules, and breaks
 - Shift bidding, Rotating Days Off, Part-time Schedules
 - Workloads
 - Uniforms and Equipment
 - Discharge and Disciplinary Procedures
 - Grievance procedures and grievance arbitration
 - Reassignment/Transfer Procedures
 - Workplace safety issues
- Past Practice Clauses
- Non-discrimination clauses
- Union/Management Issues
 - Management rights clause
 - Agency shop agreements
 - No-strike clauses
 - Union release time
 - Zipper clauses



Issues Outside the Scope of Bargaining

- Management Rights or “Merits, Necessity or Organization”
- Nature and Extent of Services to be Provided
- Fundamental managerial or policy decision, however, effects bargaining may be needed if decision has a significant and adverse effect on the wages, hours or working conditions
- Right of Assignment (unless the relevant MOU requires otherwise)
- Minor Changes in Working Conditions
- Decision to Lay Off (as opposed to the impact of a layoff)



Is a Matter Within Scope?

- The test the California Supreme Court announced:
 1. Determine whether the management action has a significant or material effect on bargaining unit employees' wages, hours, or working conditions. (If not, no need to meet and confer.)
 2. Determine if the significant or material impact arose from the implementation of a fundamental managerial decision.
 3. If the question involves both the implementation of a fundamental managerial decision and a significant adverse impact on working conditions, then a balancing test is applied.
 4. A matter is within the scope of bargaining only if concerns over employer/employee relations outweigh management's need to make unencumbered decisions.



Unilateral Action

- The Rule – The City must meet and confer before changing a term and condition of employment that has a significant or material relationship to wages, hours or other working condition within the Scope of Bargaining.



Meet and Confer

What Happens if the Parties Cannot Reach Agreement in Meet and Confer?

- Under MMBA, Management may implement its last, best, final offer after Management exhausts available impasse procedures.
- What procedures apply?
 - Interest Arbitration?
 - A8.409 only applies to successor MOUs
 - A8.590 applies interest arbitration more broadly
 - A8.403 – no interest arbitration at all



Meet and Confer

- Fact-Finding?
 - CCSF is exempt from FF to the extent that we have binding interest arbitration. (We have interest arbitration for every bargaining unit except or RNs and Supervising RNs.)
 - Does it apply to mid-MOU disputes? PERB says yes. Two superior courts say no. Appellate courts will decide. In the meantime Governor Brown recently vetoed “clarifying legislation.”
 - The Jury is Still Out!
- ALWAYS CHECK TO MAKE SURE THE CHANGE IS NOT BARRED BY THE MOU!



Charter Carve-Outs – Not Bargained

- Certain benefits excluded from bargaining because the voters made it so.
- Issues that sound like mandatory subjects under the MMBA but in San Francisco are “carve-outs” and not bargainable: Retirement benefits, design of health benefit plans, & vacation accrual.



Charter Carve-Outs – Civil Service

- Accrual and definition of sick leave
- Probationary periods (except duration)
- Status rights
- Examination or selection process



PERB

- Enforcement of MMBA requirements
 - Public Employment Relations Board – PERB
 - Quasi-judicial administrative agency that administers labor statutes covering public employees
 - Current PERB is expanding circumstances under which meet and confer is require.
 - It is very easy for Unions to file an unfair practice charge if they believe the City has changed working conditions without meeting and conferring.



Recent PERB Rulings

- Union's failure to make a clear demand to bargain is not fatal when employer implements without giving Union the opportunity to meet and confer over foreseeable effects.
- Employer must seek to clarify a Union's response to a meet and confer notice to determine whether the Union is seeking to bargain over a matter within the scope of representation.
- PERB will closely examine time limits placed on bargaining to meet external deadlines.



The Take-Aways

- With the threat of fact-finding hanging over us, it is crucial to carefully analyze all proposals to determine if an item is within scope.
- Call ERD or City Attorney's Office before agreeing to a "meet and confer" or "meet and discuss" process.
- Always check to make sure the relevant MOUs do not bar the proposed changes.



Questions?



Thank You!

