

10 WAYS YOU CAN BE TRAPPED IN ACT 111 COLLECTIVE BARGAINING/INTEREST ARBITRATION AND HOW TO AVOID THEM

By Bruce D. Campbell, Esq.

It's that time of year again – time to gear up for the next round of bargaining. Before you find yourself at the table, it's appropriate to plan your strategy and, in doing so, plan to avoid some of the pitfalls along the way. Bargaining will be a success if traps in bargaining set either by the other side or your own side are avoided or countered successfully. Success in bargaining requires realism as to achievable collective bargaining goals, knowledge of the applicable law, familiarity with patterns of settlement and what is common in collective bargaining agreements, and patience. It is not possible to mimic the private sector because the options available in the public sector are significantly limited compared to the private sector, especially under Act 111 of 1968. This article will focus mostly on bargaining under Act 111 because that is the most challenging and the requests we receive for assistance usually relate to Police and Fire bargaining.

1. **The union often wants to start bargaining at a time during the year when it is perceived as being too early or at a time when the public employer feels that it is not ready.** The failure of the public employer to respond promptly with a timely date for the first meeting makes the other side angry, suspicious, and therefore harder to settle with. It raises the ante. The answer is to agree to set up the first meeting promptly. Then the opportunity for a reasonable settlement is enhanced. Recognize that the Union starts at a time that seems early because they default the right to go to arbitration for that year if they do not start bargaining before 12:01 a.m. on July 1. Therefore, they should be sending the employer a notice well in advance. The first meeting does not require a lot of planning. The Union has given notice the UNION wants more and therefore wants to negotiate a new agreement to replace the existing agreement. All the public employer has to do is show up and allow the Union to present its demands. It is the remainder of the meetings that will require the real work.

2. **A common trap that public employers impose on themselves is to set goals in bargaining that are unrealistic.** This is harmful to the bargaining relationship and tends to set the employer up for a bad result. This often happens because of false comparisons to the private sector or to public sector bargaining where the employees do not have the right to binding arbitration. This problem is best avoided by setting relevant goals based on patterns of settlement, especially patterns of settlement in arbitration. Since the Union can go to arbitration, the Union should have goals based on what they can get from arbitration. Similarly, the employer should be willing to indulge a settlement which represents the pattern of settlements in arbitration. Research the arbitration awards for comparable municipalities and be cognizant of those results as you enter into bargaining.

3. **The Union threatens arbitration if its demands are not met.** This is designed to intimidate the employer into making concessions which it should not make. Often public employers fall for the threat. Do not let it happen to you. The fact is that where the Union has the right to go to binding arbitration, bargaining goals must be set on the basis of what the parties can reasonably expect to happen in arbitration. Therefore, the trap is to get the employer to offer more than it will have to give up in arbitration. The trap is avoided by making a realistic offer

and telling the Union that the employer believes it fairly represents what they can get in arbitration and that if they think they can get more they should go. It may be a surprise to many public employers, but unions often miscalculate and end up being burned badly. If the employer's goals are realistic and the other side is not, it is an opportunity to succeed.

4. **A common strategy in collective bargaining is to attempt to get agreement on individual demands without reference to a total package.** The avoidance is to condition any concession on achieving a reasonable "package", a total settlement on all issues. Unions uniformly come to the bargaining table with a laundry list of demands. It is not necessarily difficult to argue that some of the demands, viewed in a vacuum, are reasonable. However, it is the totality of the package viewed against patterns of settlement which is relevant in determining what concessions should be made and how they should be made. There is a serious limit to the number on minor concessions it should take to get a settlement. It is okay to make a minor concession to show that you are reasonable and mean business; it is a mistake to make a number of concessions unless you feel confident that it is necessary and reasonable to buy a settlement. Usually the additional minor concession should only be made in order to seal the deal. Minor concessions rarely make the deal.

5. **One of the most common traps in bargaining is to rely on inappropriate or inaccurate information provided by the union or to agree to a demand without adequate information as to its legality.** It is not difficult to do the research which is required and it prevents big mistakes. Too often public employers accept wage and benefit settlement information from the Union which is inconsistent with the pattern of settlements or which is from a contract in a municipality with circumstances which are so different as to make it irrelevant. Researching settlements in surrounding municipalities with similar ability to pay characteristics is not difficult and is fundamental to sound bargaining.

6. **One of the most common traps in bargaining is to forget that arbitration is part of the process and to enter arbitration without an even playing field.** This occurs for a number of reasons. It occurs because employers do not identify enough demands which the employer wants in the beginning of the bargaining process. It should be obvious that if it is okay for the other side to ask for the world then it is also okay to respond to a laundry list with your own laundry list. It levels the playing field. As bargaining continues, the playing field should be kept level. Do not take your demands off the table unless the Union also takes an equivalent number off of the table. If the Union says that if no deal is made then all of their demands go back on the table for arbitration, then tell the Union that you intend to do the same thing. The fact is that if no total agreement is reached by the arbitration deadline, the Union will identify its original demands as the issues in dispute for arbitration. The employer needs to do the same thing.

7. **A costly trap in bargaining is to seem to reach an agreement in whole or in part at the bargaining table without first having reduced the agreed upon item or the elements of the settlement to writing.** There is no agreement until it is in writing. The parties are required by law to reduce their settlement to writing. You do not really know whether you have an agreement in whole or in part until you have agreed on how the deal should be reduced to writing and included in the written contract between the parties. Parties do not necessarily understand the same thing based upon their oral exchanges at the bargaining table. The real

understanding of each party becomes much clearer once it is reduced to writing. The writing is necessary also to see how the agreement fits into the preexisting collective bargaining agreement. Therefore, each element of the settlement should be reduced to writing as you go along.

8. **One way a Union tries to get a leg up in arbitration is by eliciting a decent offer in bargaining and later, when no settlement is reached, trying to use the decent offer against the public employer as the starting point in arbitration.** For example, the employer offers three per cent in response to a ten per cent demand. The Union rejects the demand, proceeds to arbitration and tells the arbitrator that the settlement should be somewhere in between three and ten per cent. The employer is better going into arbitration asking for a wage freeze. As a practical matter many arbitrators will not admit into evidence or consider offers of settlement during the bargaining process. They should be inadmissible. However, for surer protection, the employer should not make any realistic proposal for a settlement, especially on money, unless it is understood, preferably in writing, that any offers exchanged by the parties in bargaining cannot be presented as evidence in arbitration. It is not uncommon that the Union itself is leery about making a realistic proposal, and knowing that its offer, once made, cannot be used against them is often helpful to encourage real good faith bargaining. On the other hand, when the Union is not willing to agree to such a ground rule, it is usually conclusive evidence that the Union has no intention of negotiating a reasonable settlement in any event.

9. **Do not get sucked into bargaining over the few issues which are not mandatory subjects for collective bargaining and do not refuse to listen to the Union about an issue which is clearly of great concern to the employees and the Union.** The Labor Board has not carved out many areas over which an employer does not have to bargain, but there are a few. An employer does not have to bargain about imposing or stopping a light duty program. An employer does not have to bargain over the eligibility requirements for promotion where there is civil service. The selection of a pension actuary is not a mandatory subject for bargaining. There are others. If you refuse to bargain the worst that can happen is that you end up in arbitration, but this is likely to happen anyway. What an employer should do first is not refuse to bargain but get advice from someone with knowledge and experience who can tell you what are subjects are not mandatory subjects for bargaining. Perhaps more important is the discussion of those issues which seem to be important to the other side, even if the matter is not a mandatory subject for collective bargaining. If you simply refuse even to discuss the matter, it will only anger the Union bargaining committee and be counterproductive to negotiating a settlement. You can state that you will not bargain the issue but that you are willing to discuss the matter. This position on your part should be reduced to writing and sent to the Union immediately after the bargaining meeting at which it comes up. For example, the Union may want input into the selection of the pension actuary. You say that selection of the pension actuary is not a mandatory subject for bargaining but that you are willing to listen to what the Union has to say. After the meeting you confirm that you are willing to meet and discuss the matter of the appropriate pension actuary, but you are not willing to bargain over the issue because it is not a mandatory subject for collective bargaining.

10. **Do not fall for the argument that the Union has a more difficult situation in bargaining because the Union has to submit any settlement to its membership for a vote.** The fact is that the field on this aspect of bargaining is level. The Union has to get approval from its membership and the employer has to get a majority vote on the settlement from the

legislative body. In fact approval by a majority of the legislative body is required by Act 111 of 1968. (This is also why the employer should not take a majority of the legislative body to the table, if it takes any.) A variation on this theme is “It looks okay,” or, “We are not sure.” “We will take it back to the membership.” This is a dodge. If they are not willing to recommend the deal to the membership, the chances are slim to none that the deal will be approved. One should rarely, if ever, agree to a settlement unless all of the bargaining team members on both sides have agreed to recommend the settlement.