

## LEGAL COUNSEL

# Preparing for Contract Negotiations and Arbitration

It's that time of year again. Spring is here, which always brings a long awaited and welcome relief from winter's gloom. But with spring, unfortunately comes the not so welcome reality that many of you have collective bargaining agreements with an impending expiration date and are consequently preparing for contract negotiations. In reviewing my files I realized that it has been more than a few years since I last wrote in this magazine about the importance of preparation for your union to be successful at the bargaining table and ultimately at a 312 hearing, if forced to that end, and therefore believe it is timely to once again address this issue. For our seasoned veterans out there, I apologize for reiterating topics that so many of you know inside and out. However, I am reminded after speaking with numerous newer union officers, that it is always beneficial to go to the table well prepared and with as much information as possible about not only your issues, but the process as well. The more prepared your bargaining team is, the better it will likely fare in negotiations and/or 312 arbitration.

The goal of collective bargaining is to reach a mutually satisfactory contract. An Act 312 arbitration award is necessary only in the relatively small number of cases in which the parties cannot reach agreement. However, because Act 312 arbitration is the possible final step in all negotiations, preparation for the Act 312 process should begin early in negotiations. A union which discovers, on the eve of arbitration, that its "must have" proposals are indefensible under the criteria in Act 312 receives a very unwelcome surprise. Conversely, a union which is well-prepared for the Act 312 process, and can demonstrate to the employer its likelihood of succeeding in arbitration, can often reach settlement before arbitration begins.

While going over my files in preparation for this article, I came across an item, an old memo a former associate of mine had written after her—perhaps somewhat covert—attendance at a Michigan Municipal League Management Act 312 Seminar, titled "Winning in Act 312 Arbitration", excerpts of which I will share here with you. While I must admit, much of it gave me a good chuckle—namely the attacks on me and the methods I have utilized throughout the years—I am reminded that many of the players in attendance at that seminar are still actively involved in assisting, coaching and contributing resources and strategies to the people that will be sitting across from you at that negotiation and/or arbitration table. While a few of you are fortunate to have a respectful and mutually beneficial relationship with your em-

ployer and the people you will be dealing with in negotiations, there are many of you that must deal with rigid and adversarial opponents instructed through seminars such as the one mentioned above. *Italicized items are the excerpts from the previously mentioned memo along with comments to same.*

A management attorney speaking at the seminar offered the following advice:

*Try to develop someone in city management to serve as an Act 312 witness. Teach that person firefighter jargon and be sure that he or she understands the unique operation of the fire department. This person must be able to effectively counter the drama of the firefighters' movie by explaining to the arbitrator that the typical workday of a firefighter is spent playing sports, drinking coffee and preparing extravagant meals.*

This attorney was further quoted :

*"[he] hates the fire fighters...hates their movie...and [he] hates Ron Helveston's road show"*

The best strategy for countering this uninformed and negative mentality is to be as well equipped and prepared as possible. Below is an outline intended for readying your team to best represent your union in contract negotiations and/or arbitration.

### **Bargaining Team:**

First, the union must select a bargaining team, headed by a chief negotiator who is familiar with the bargaining unit, the employer and the negotiation process. The chief negotiator should act as spokesperson for the team. It is also important to designate one person as recording secretary. This person should keep meticulous notes during each bargaining session. Finally, it is beneficial if the bargaining team contains members who have participated in prior negotiations. Many issues have a history which the current bargaining team should know. Also, experience with the other side's negotiating style or preferences may assist in forming negotiating strategy, and avoiding misunderstandings.

### **Contract Demands:**

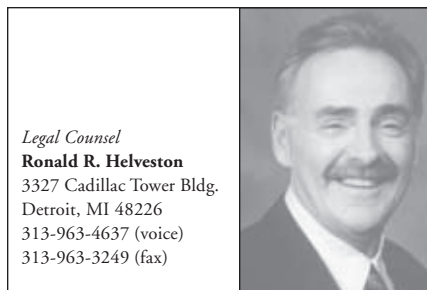
Once a bargaining team is in place the union should conduct a thorough review of the current agreement, including both economic and non-economic issues which might be presented in negotiations. Many unions find it helpful to send a questionnaire to all bargaining unit members, inviting them to list in order of importance the issues they wish to resolve. The negotiating team can develop a master list of the most important issues from these questionnaires to guide it in bargaining. The union should also review the grievances filed dur-

ing the term of the previous contract to discover problems which might be solved through negotiations. Once the union has examined its contract, surveyed the membership and reviewed its grievances, it is in a position to draft its contract demands. Should the union have pension issues on the table, you will also need to obtain a copy of the most recent actuarial valuation of the pension system. In addition, it will also be necessary to obtain an actuarial costing for any amendments proposed to the plan. This costing is not necessarily required in the beginning of negotiations, but it is essential should you go to arbitration.

### **Background/Financial Data:**

One factor in Act 312 which receives some attention is "[t]he interests and welfare of the public and the financial ability of the unit of government to meet those costs." (PA. 312, Sec. 9 (c)). Almost every municipality argues this factor, usually labeled "ability to pay," as part of its case. In addressing this argument, the union must make clear that "ability to pay" is only one of the Section 9 factors, and is granted no special weight in comparison to the other factors. Indeed, it shares a single factor with the "interests and welfare of the public." The union should also note that governments have an obligation to provide basic services to their citizens. In providing those services, governments must pay market prices for goods and services—for water, electricity, cars and trucks, concrete, etc. The government must likewise pay the market price—as determined by comparable communities—for its employees' labor.

Gather the last five years of financial data from your city. The IAFF provides an excellent service performing an audit of the financial reports and budgets of your municipality. This service is supplied free of charge and is very useful in initially measuring the financial resources available to the city. Should your union actually end up in arbitration, you may find it beneficial to have an outside expert, such as an accountant who has performed audits for government units, examine the budgets and audits for the five years prior to the arbitration. Such a comparison between how the government predicts expenditures as compared to revenues will often reveal accounting practices that undermine the employer's claims. For example, many governments as a matter of course underestimate revenues and over-estimate expenditures, so that their budgets warn of insolvency, but their subsequent audits reveal surpluses. An employer may consistently over-budget certain departments or ac-



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counts. Also, an employer may fund accounts for specific purposes (like capitol improvements) which the city has no intention of actually completing or even starting for years. Proof of any of these, or other accounting practices, will cast doubt on a government's predictions of financial difficulty.

In addition, government officials are also inclined to parade their successful financial stewardship during elections, only to turn their pockets out in negotiations. Every Union should maintain an ongoing file of "State of The City" addresses, campaign literature, council minutes or tapes of council meetings, and newspaper interviews to provide an arbitrator with a view of the government's finances not colored by arbitration. Similarly, official bond prospectuses and other financial documents often present a more reliable and optimistic summary of municipal finances.

### **Comparables:**

Act 312 requires that the arbitration panel base its award upon the eight so-called "Section 9" factors. In practice, the most important and complex of these factors is usually "comparability"—"the wages, hours and conditions of employment of other employees performing similar services...[i]n public employment in comparable communities." After the bargaining team has finalized its list of demands, a review of the comparables, both internal and external, should give you a fairly good picture of where your bargaining unit stands in relation to others. With respect to the use of "internal" comparables, it has always been my position that the only units worthy of comparison within a municipality are the police units. These employees are the only other group with access to Act 312 and consequently are not subjected to "collective begging" as are the other employee groups. In reality, the weight afforded to internal employee groups, whether it is a 312 group or not, is oftentimes dependent upon the individual arbitrator. With respect to the "external" comparables, unless you are thoroughly satisfied with a group of comparables mutually agreed upon and/or historically uti-

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alized by the parties, be cautious in the data you share with the employer regarding your research on comparables or the acceptance of information from employer submitted "comparables". Should you end up in an Act 312 arbitration, either side can, if successfully proven, use the argument that the parties had, *de facto*, already consented to a list of municipalities to be viewed as comparable. It should not be surprising to anyone that the employer will most often try to utilize a group of comparables that show your unit in the best possible light. As an example, the same management attorney quoted earlier in this article offered this recommendation on the selection and use of "comparables":

*If you represent a small municipality near Detroit, use small out-state municipalities (with lower wages) as comparables.*

Another seminar participant, an economist with considerable experience as an expert witness for management, focused his presentation on how to select comparables—a task which he likened to "playing a game" and utilizing demographic data which "lends the appearance of objectivity." He suggested "compiling a large sample and narrowing it down to retain only the most favorable cities."

## Preparation of Exhibits:

To prepare exhibits, the union will need copies of collective bargaining agreements from comparable communities. In many instances, wages and benefits of a com-

parable community's employees can be determined from the collective bargaining agreements alone. However, some benefits may be subject to unwritten practices, and other benefits (e.g., insurance and pensions) may be described in documents other than the collective bargaining agreement. Thus, the union should always double-check its exhibits with union officers in comparable communities to ensure accuracy. Though exhibits are not usually generated until it is determined that the parties are proceeding to arbitration, it is never too early to begin gathering the needed information. Oftentimes it will help both the employer and the union get a clearer picture of where each side stands with their respective issues.

It is also essential to gather information that will be needed to address any of the employer's issues. For example, it is very common to see the employer propose cost shifting mechanisms with regard to health insurance for current employees and future retirees. The employer claims that the cost of providing health insurance has gone to extremes and therefore the employees must shoulder the burden for the ballooning costs. It is very helpful to know, exactly, what the increases have been over the last few years and how that figure compares to other employers in the same market. This information is readily available (with regard to your municipality) from your insurance representative. FOIA requests can provide the needed information from other municipalities.

## Negotiations/Mediation:

If the parties are unable to reach a mutually acceptable contract during negotiations, a mediator is called in to assist. Depending on the positions of the parties—how close both sides are to a settlement—one or more mediation sessions will be required. If the parties are still unable to reach an agreement, the mediator will "certify" the participants for 312 arbitration. A petition will be filed with the Michigan Employment Relations Commission listing the unresolved issues and a list of three arbitrators will be issued. Each side has the ability to strike one name from the list of three and from the remaining name[s] MERC will appoint an arbitrator. A pre-hearing conference will be scheduled where all of the preliminary matters are decided such as exchange of comparables and exhibits, hearing dates, location of hearing and the respective panel delegates.

## 312 Hearing:

The arbitration panel will hear and consider evidence on all of the Section 9 factors. This evidence will be presented to the panel largely as documentary exhibits or as testimony. Exhibits are usually presented by a witness. Most often that witness is the individual who has first-hand knowledge of the facts contained in the exhibit, or who has prepared the exhibit from other, recognized sources of information. In addition, oral testimony should be provided to educate the panel about the background of the department, the bargaining unit and the circumstances which necessitate the change presented by a proposal. The union should usually rely upon its own members to supply this testimony.

## Last Best Offers:

At the conclusion of proofs, the parties will present "last best offers" to the panel on each arbitrated issue. Where the panel determines that an issue is "economic," the

panel must choose one or the other "last best offer"—there can be no compromise. Thus, parties must be careful to draft last best offers on economic issues which are defensible in light of the proofs presented. Where the panel determines that an issue is non-economic, the panel has the discretion to grant an award different from either party's last best offer. The parties' panel delegates can be valuable in assisting the arbitrator to craft a compromise award on non-economic issues.

## Employer Act 312 Strategy:

*Attempt to intimidate unions by pledging to devote all resources necessary...*

*Assert unreasonable positions in negotiations ... remind the unions that wages and benefits can be reduced by an arbitrator...*

*[Cities] need to use their natural advantage—personnel and ready budget—to outwork and defeat the unions ...*

*Form an "Act 312" team - work closely with the Michigan Municipal League throughout the arbitration process...*

Those statements came from the Michigan Municipal League's speaker from the previously referred seminar. Again, it is with these types of reminders that I urge all unions preparing for negotiations to arrive at the bargaining table armed with as much knowledge as possible. It is almost always in the best interest of the union to be able to settle a contract without the time consuming and expensive effort of arbitration. However, if your union does end up in arbitration, either in an offensive or defensive mode, be prepared to deal with opponents who may have been schooled by the speaker quoted above. GOOD LUCK! ■



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The Administration and Staff of The Fire Training Institute and Oakland Community College would like to take this opportunity to thank the Michigan Professional Fire Fighters Union for their endorsement and brick purchase in support of the CREST program. The Fire Training Institute will be hosting the nationally recognized program:

### **THE PRINCIPLES OF FIRE PROTECTION ENGINEERING**

The International Fire Marshals Association and The Society of Fire Protection Engineers sponsor this program. The seminar will be conducted June 10-13, 2002 on the Auburn Hills campus of Oakland Community College.

Live-fire training evolutions teaching flashover recognition and firefighter escape techniques in the Swedish Flashover unit can now be scheduled. For additional information or to register for classes please contact the Fire Training Institute.

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