"Celebrating the Past, Shaping the Future"
Montana Arbitration & Labor Relations Conference
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ASK THE EXPERTS

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Today's presenters have been asked to address several questions based on feedback from previous conference attendees. The questions and answers are presented here.

1. **In negotiations, do proposals have to be written down?**

   Initial proposals (such as discussion proposals) do not need to be written down; however, it would be practically impossible to have a final adopted proposal that is enforceable in the Collective Bargaining Agreement (CBA) without putting the language in writing. Best practice is to put all proposals in writing or at least reduce verbal proposals to writing as soon as possible for consideration**.** Further, the refusal to put a verbal agreement reached by the parties into writing would constitute an unfair labor practice.

2. **Are public employers required to open negotiations to the public? If so, is there a law specifying such? If not, can the employer allow the public to watch?**

   Mont. Code Ann.§ 2-3-303 requires meetings of public agencies and certain associations of public agencies to be open to public and lists any exceptions that may apply. No exception is listed regarding collective bargaining negotiations. This question is analogous to the facts in *Great Falls Tribune Co. v. Great Falls Pub. Sch.*, 225 Mont. 125, 841 P.2d 502 (1992). In *Great Falls Tribune Co.*, the town school board closed a meeting to discuss their strategy for the upcoming collective bargaining sessions with school employees. The Great Falls Tribune sued to make the school board open their meetings under Article II § 9, claiming that Mont. Code Ann 2-3-303(4) (1991) violated the right of citizens to attend the meeting. The Court sided with The Tribune, finding that "meetings may be closed only when the need

for individual privacy exceeds the merits of public disclosure. The collective bargaining strategy exception is an impermissible attempt by the Legislature to extend the grounds upon which a meeting may be closed." *Great Falls Tribune Co.*, 225 at 131.

3. When does the Collective Barging Agreement become official? Does it have to be signed to be valid? Once the parties have ratified the agreement and notified the other party of its acceptance does it have to be signed before it is official? What are the recourses if one party changes their mind?

The CBA becomes effective upon ratification of the written agreement by the parties. The Written agreement remains in effect after expiration of the agreement and during negotiations for a successor agreement, to preserve the *status quo*. *Delta Sandblasting Co. v. NLRB,* 969 F.3d 957, 968-69 (9th Cir. 2020). The refusal of one party to sign the CBA after it has been agreed to by the parties would constitute a ULP for refusal to bargain pursuant to section 8(a)(5) of the NLRA. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26 (1941); *NLRB v. Ralph Printing & Lithography Co.*, 433 F.2d 1058, 1062 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971). *See also*, Mont. Code Ann. §§ 39-31-401(5); 39-31-402(2) (refusal to bargain under the Montana Act). If one party refuses to ratify or sign a CBA that it has agreed to without valid reason, the other party may file an unfair labor practice to compel signing the agreement. *See* Mont. Code Ann. §§ 39-31-401 through 406. Both the NLRB and MBOPA have authority to issue an order to compel a party to bargain, which would include an order to cease and desist from refusing to sign a previously agreed to CBA, upon a finding a party has violated the Act.

4. If one party at negotiations asks for copies of the other party's notes, do they have to share the information? What about in a grievance setting? Arbitration? What is the recourse if one party refuses?

As a general rule, a party's notes are their personal notes and need not be provided to the other side without the consent of the party. However, if the notes become relevant evidence in an arbitration or litigation (based on issues raised by one or more parties), negotiation notes could be discoverable in response to a proper information request in arbitration or in response to a proper discovery request in litigation.

For public employers, there is a requirement that minutes be taken at all meetings subject to the open meeting law, so the official "notes" of the meeting are a public record.

5. **Is there such a thing as Silence Gives Consent? If a party sends an email stating their position and the other party doesn't respond yes or no, does silence give consent you agreed?**

   A general principle of interpretation regarding one party's silence to another party's statement does exist but application of this can be complex and depends on the facts and circumstances in each case. Applying this argument is not a given.

   In the *Matter of Arbitration Between: Pine Oak Resources Oak Grove Mine*, 2007 BNA LA Supp 118945, when a grievant asked to leave for the day, management remained silent, which the grievant believed was consent to leave. In the case, the arbitrator found that the company provided consent when they refused to answer the grievant.

   In re *Alltel Pennsylvania, Inc. and Communications Workers of America, Local 13000*, 108 BNA LA 872, the union and the company never agreed that temporary workers gained seniority. The company then assumed temporary workers did gain seniority. The arbitrator found that the silence did not provide consent on the issue.

   In *Labor Arbitration Decision*, 149175-AAA, 2012 BNA LA Supp. 149175, the arbitrator found that when the education association sent the school committee a letter saying they had 24 hours to respond and if they did not, the association would assume their silence as acceptance, it did not mean that the committee consented to the contents of the letter.

6. **I received a Last, Best, Final Offer? What does that mean? Is there any Criteria that has to be met? If so, by who? How many meetings do we need to have? What if one party insists they want to keep bargaining?**

   Last, Best and Final Offer is a labor negotiation term to describe the final terms that an employer is willing to give a bargaining unit. It is thrown around frequently to make a point, but it should only come up when an employer has negotiated in good faith fully, and irreconcilable differences remain between the parties' bargaining positions.

   Employers are required to bargain with the union in good faith, but "such obligation does not compel either party to agree to a proposal or require the making of a concession." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). There are no established criteria, but there are the NLRB will consider many factors if an employer has attempted to declare impasse:

   1. The good faith of the parties at and away from the bargaining table;
   2. The number and length of meetings;
   3. The importance of the issues subject to disagreement;

4. The contemporaneous understanding of the parties as to the state of the negotiations and impasse;
5. Whether a strike has occurred or is threatened;
6. Whether a final offer has been made and the union's response;
7. The nature and level of movement or suggested movement by either side in the weeks, days, etc. preceding a declaration of impasse;
8. Whether mediation has been proposed and/or used;
9. Union animus evidenced by prior or current events; and
10. Other actions inconsistent with impasse.

If one party wants to keep negotiating, usually you keep negotiating unless the parties have declared impasse, which suspends the duty to bargain. Most employer representatives will suggest that the parties keep negotiating unless impasse is clear and undisputed.

7. One party claims Impasse; the other party wants to keep meeting. Can the other party quit bargaining and give a Last, Best, Final?

Questions 6 and 7 are closely related. A party may label an offer as their "last best and final offer," which conveys it is an offer that it does not intend to move beyond for good faith reasons. However, that does not necessarily mean that there is an impasse, which is a term of legal art that if disputed will be decided by the Board. Such an offer may be strong evidence of an impasse, but it is not the same as an impasse. Impasse, while often expressed as an opinion of one party, is not something a party can unilaterally declare. Impasse occurs when there is nothing left to discuss and there is no reasonable prospect of the parties reaching an agreement; neither party will move from their positions. The ramifications of an actual impasse could include the employer implementation of a final offer, a strike vote, a strike, a lock out, factfinding, further mediation, interest arbitration depending on the type of local and the CBA, or unfair labor practice charges that will be litigated.

In some cases, after discussion or questions, a party may modify a last, best, and final offer (as that does not equate to impasse). If one party wants to continue bargaining or has questions that have not been answered, it may request that in good faith. The refusing party could be subject to a ULP for failure to bargain in good faith, if the refusing party does not have legitimate reasons and support for the declaration of impasse. Any party has the right to declare an impasse and quit bargaining but it risks a ULP charge, and if there is evidence of surface bargaining or other bad faith, could face an adverse ruling from the Board and be ordered to continue bargaining, or other remedies related to strikes or the illegal implementation of an offer. In general, parties should avoid titling

offers as “final” unless they truly intend in good faith to hold to that position regardless of any other facts.

8. Med-Arb is a growing area. Where do you see the future of Med-Arb?

With arbitration being the end game in most collective bargaining agreements, it isn’t uncommon for one or both parties to be concerned about the binding nature of that process. Med-arb is a hybrid process that looks at bringing together positive attributes of mediation and arbitration to help resolve disputes.

Both traditional mediation and arbitration have drawbacks. With mediation, the parties can work toward a solution and end up at impasse with nothing to show for the time and effort put into mediation. Arbitration renders a binding, non-appealable decision that neither party may enjoy.

Med-arb is an interesting attempt to mesh the process of mediation with arbitration to give the parties an attempt to resolve their disputes before heading to an actual hearing. First, the parties have to agree to this approach and agree on the process itself. Second, the parties work with a mediator to try and reach a resolution prior a hearing. If the parties do not reach an agreement, the mediator can then begin the arbitration process if he or she is qualified, or the parties can move to an arbitrator.

The process has been successful for a few reasons. It can be substantially cheaper than going through the traditional arbitration process, and having a third party tell you how the case will likely turn out before you commit to a hearing is very motivating for most people!

Are there downfalls? Of course. It can be strategically challenging to share “confidential” information in a mediation with the person who may end up being your arbitrator. It can also be more expensive if the mediator cannot arbitrate and you incur both costs.

9. I heard the DLI can provide Grievance Mediation. Does it have to be in the CBA? If it isn’t, can one party insist on doing Grievance Mediation?

The Montana Department of Labor and Industry offers mediation services to parties to help facilitate the consensus process for grievances and negotiations. Mediation is always voluntary unless you have negotiated provisions in your CBA requiring it or unless you are in the contested case process at DLI, when it is mandatory.

Grievance mediation offers one very clear benefit – try to resolve your grievance before you take the costly step of binding arbitration. It is non-binding, and frequently results in the parties being able to compromise and reach and agreement.

10. What are the key components or attributes of an efficient and effective expedited arbitration process?

Expedited arbitration is designed to offer a cheaper, more streamlined approach to traditional arbitration. In traditional arbitration, you have a process that includes some discovery, motions, a lengthy evidentiary hearing, and a decision timeline of at least 30 days from the submission of final briefs or findings of fact/conclusions of law. Expedited arbitration cuts that WAY down. Generally there is no discovery or motions, except for a basic exchange of information, a one day evidentiary hearing and 14 day timeline to turn around a decision. *See* American Arbitration Association Expedited Procedures E1-E10.

Why use an expedited process? If the cost of litigation exceeds the amount of money at stake, the parties have all the information already and you want a quick decision, expedited is the way to go.

11. What are the best resources for statewide occupational ++++wage information by county or city for use in fact finding and arbitration?

Public employee pay is public information and this includes pay rates of private sector contractors working on public projects. A general practice for many bargaining parties is to survey the existing CBA wage scales in each county or city, as they are now generally accessible online or by request.

One resource for wage information is the Montana 2023 Occupation Employment and Wage Statistics (OEWS). However, this does not break down information by county or city; the information is compiled by Montana zones. It also provides only general mean data, not exact numbers. I would also be cautionary about using it because it states, "[t]he wage rates published here are considered 'informational,' meaning they cannot be used for Montana Prevailing Wage or Foreign Labor Certification purposes." These statistics can be found on the U.S. Bureau of Labor Statistics website. https://www.bls.gov/oes/current/oes_mt.htm; the Montana Gov website: https://lmi.mt.gov/_docs/Publications/LMI-Pubs/OEWS-2023-Pub.pdf

The Montana Association of Counties publishes elected officials' pay data:

https://www.mtcounties.org/counties/surveys/

The Montana Department of Labor and Industry site:

https://erd.dli.mt.gov/labor-standards/state-prevailing-wage-rates/

The Montana Statue Human Resources Division:

https://hr.mt.gov/HR-Portal/Pay-Plans (also go to the HR Portal on this site for more information)

The Montana Transparency in Government site:

https://dataportal.mt.gov/t/DOASITSDDataPortalPub/views/SABHRSStateEmployeeData/EmployeeDataDashboard?%3Aembed=y&%3AshowAppBanner=false&%3AshowShareOptions=true&%3Adisplay_count=no&%3AshowVizHome=no

The US Department of Labor site:

https://www.dol.gov/agencies/eta/foreign-labor/wages#:~:text=The%20prevailing%20wage%20rate%20is,the%20area%20of%20intended%20employment.

https://www.dol.gov/agencies/eta/foreign-labor/wages

https://www.dol.gov/agencies/whd/flsa (Wages and the Fair Labor Standards Act)

The Office of Personnel Management site:

https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/

12. Given the change in the workforce, where it is becoming increasingly harder to fill positions with qualified employees and then also retain them, what has changed in your bargaining goals or expectations?

From the employer's perspective, it is necessary to look at language with the understanding that concessions will need to be made to retain employees. For public employers, there are things that cannot be altered, like sick and vacation leave, but the discretionary items that employers used to hold firm on are less firm, like more personal days.

Bargaining can be cyclical, and right now, the employees hold the power with regard to compensation and benefits. That being said, we also have a Legislature in Montana that seems to enjoy taking a whack at employees, so now is good time for both employees and employers to work together to find mutually beneficial terms that take third parties out of their relationship.

13. How have employers dealt with the affordable housing crisis in Montana in negotiations?

Not well. School districts in the cities are struggling to fill positions because no one can afford to live there on school wages, and building district housing as stalled due to the high price of construction and property in general.

Some employers are getting creative – housing stipends, renting property and offering at a discount for employees, etc. – but those are few and far between.

14. What methods have been effective in rebuilding relationships between unions and employers?

There are several individuals in Montana who offer conciliation type services to employers and their unions to try and rebuild relationships. It's a bit like marriage counseling in the sense that both parties need to be willing to try and repair the relationship, and to let go of the stuff they are angry about to move forward.

Meeting and discussing "past wrongs" without a facilitator of some sort usually ends up in worse hurt feelings, so I would not suggest that approach, but using a trained facilitator to identify issues and help propose solutions is usually effective.

15. If an employee is going to be pulled in for questioning does the employer have to disclose what the meeting is about? Once the union finds out, can the union request the meeting to be rescheduled so they may consult with the member? What if the employee refuses to answer any questions?

If the purpose of the questioning is to investigate the employee being interviewed for potential discipline, the employer must at minimum advise the employee that the questioning may lead to discipline. This puts the employee on notice that they may choose to request union representation (*Weingarten Rights*). When *Weingarten* applies and the employee is not informed of potential discipline, or when a proper request for *Weingarten* rights is denied, this may constitute an Unfair Labor Practice (ULP), which could result in notice penalties, cease and desist, or other relief from the Board. Violations of *Weingarten* could potentially lead to overturning the discipline or result in having any evidence collected be excluded form a hearing on the matter.

An employee may not refuse to answer questions and the union representative may not advise an employee to not answer questions or otherwise interfere with the investigation. If an employee refuses to answer questions that can be grounds for further discipline.

A representative can request that the meeting be rescheduled, but the employer does not have to agree to that request.