Torrance Professionals & Supervisors Association

January 2019 News

WHAT TO DO ABOUT CONTRACTING OUT

The good news is that, these days, most agencies are hiring permanent public employees to fill vacancies and new positions. Last month's article discussed what to do to ensure your agency fills jobs fairly. But what if your agency decides not to backfill the work, and to contract out the services to someone who claims to be able to do it at a lower cost? This is called "contracting out." Here's a blueprint of what to do.

History on Contracting-Out: Contracting out was common during the recession. It hollowed out the workforce and is still used in some agencies today. Contracting out is when a public agency hires either an outside private company or another public agency to perform the work of regular, permanent, public employees. Contracting out almost always means job displacement, less income, reduced benefits, loss of seniority, and a lower standard of living for those who are impacted. Agencies almost always contract out because they think it will save them money, particularly in the form of lower labor costs, at least in the short term.

But those lowered labor costs are often also bad for residents. Services are usually diminished, and residents lose control over how those services are delivered. In California, private companies have already taken over huge portions of what used to be public services: trash collection, parks, street maintenance, custodial, information services, even jails. Often this does not work out very well for the taxpayer. Residents discover that contracting out often means diminished services and loss of control over the quality of services their tax dollars still pay for, at least indirectly. What's more, once the services are gone and the Agency loses the expertise and equipment it used to deliver them, they're much more difficult to get back.

The tide of contracting out, therefore, isn't nearly as high today as it was in the '80s, '90s, and during the recession. But the lure of tax-payer savings persists and is often too much for elected officials to resist. Many times, public agencies that are considering contracting out don't investigate thoroughly and, even in the face of disturbing feedback, still move quickly to contract out agency jobs. Estimates of just a few thousand dollars in savings might be used to justify getting rid of services even though we all know that most savings estimates turn out to be too optimistic. On the other hand, the good news is that public agencies that take the trouble to investigate the impact of contracting out often decide not to contract out the work. Frequently, knowledge is power.

Association's Legal Rights: When Agencies move quickly to contract out, this can mean not consulting with the affected employee organization, which is an error on the employer's part. At a minimum, the agency must notify the employee organization and allow for a good faith meet and confer over the impact of the decision to contract out, including exhausting any impasse process. Impact negotiations can cover topics such as severance pay, the order and timing of lay-offs, bumping rights, assistance with outplacement training, and even the transfer of current employees to the contracting entity. Your organization's ability to delay implementation can sometimes prevent the contracting out altogether.

Many union contracts (MOUs) include a Management Rights clause. These clauses often give the agency the right to contract or sub-contract out work. Sometimes there's a separate section that governs contracting out. Bottom line, if there is language in your MOU, the agency must comply with those provisions. If the MOU is silent, check the agency's local rules (i.e. the personnel rules, employee handbook, ordinances, etc.). You'll sometimes find contracting out language there.

If you can't find any language giving the agency the right to contract out, then you probably have the legal right to block the proposal altogether. The unique work performed by your Association's bargaining unit belongs to the Association. Your contract establishes the terms and conditions for performing that work. The agency can't take the jobs out of the unit without violating the contract.

If the agency moves to contract out your jobs without any legal authority, you can file either an internal grievance or an unfair practice charge with the Public Employment Relations Board (PERB). Unless the agency can show a very long-standing past practice of contracting out jobs, you stand a good shot at having PERB rule in your favor.

If there's no language allowing the agency to contract out, it can always request to bargain with your organization to establish this right. If you're in the middle of an MOU, you can just say no. If the contract has expired, or is about to expire, management can insist on this topic at the bargaining table. If you can't get the agency to drop their proposal, try and negotiate a good process, including lengthy timelines, before the agency can implement any contracting out proposal. You might even include language that requires the contracting entity to hire staff if they can't be absorbed elsewhere by the agency or require the agency to pay severance to any members laid off due to contracting out.

In some cases, even the decision to contract out is subject to bargaining. For example, if the agency's proposal is to contract out the entire bargaining unit, even if the employer has the legal authority to contract out, the union still can negotiate over the decision.

Charter Cities v. General Law Cities: If you work for a city, you'll also want to check to see if it's a charter city or a general law city. There is a very old law in California which says that general law cities cannot contract out non-specialized public services unless (1) these services are taken over by another public agency or (2) there is no significant adverse impact on public employees. Government Code sections 37103 and 53060 limit a public entity's authority to contract out work unless these are special services, and the contractors are specially trained, experienced, and competent to perform such services. These special services include financial, economic, accounting, engineering, legal, administrative, medical, therapeutic, architectural, airport or building security, and laundry. General law cities can't contract out non-specialized services based solely on cost savings. Bottom line, if you work for a general law city, your job can't be contracted out unless there's local language that allows for contracting out, and either you provide a special service, or the contracting entity is another public agency.

Charter cities, though, have successfully argued that the Constitution grants them much broader authority to contract out public services. Courts have generally agreed, holding that autonomy regarding the expenditure of public funds lies at the heart of what it means to be an independent entity. Simply put, it's much harder to block contracting out if you work in a charter city. Until very recently, only a handful of larger cities in California were considered charter cities. A charter can be conferred upon a city after a vote of the residents. The theory is that a charter city is a self-enclosed government, immune from certain laws. But even charter cities must comply with state bargaining law allowing for negotiation over the impact of any proposal to contract out bargaining unit work.

Conclusion: If you are faced with the threat of contracting out, your Board should contact professional staff to learn about your organization's legal rights and strategize a response. If the agency initiates a contract that would result in the loss of bargaining unit positions or layoffs, or significant changes in job duties, your organization should at least demand to meet and confer. It's up to your organization to decide how much to cooperate with the agency's proposal. It may be wise to meet with elected officials to explain the downside of any proposed contracting out. It's typically best to discuss this privately and strategically before raising any concerns at the bargaining table or with elected officials.

Legal Update

Unions, Not Just Employees, Can Use the Agency's Email System

In a recent case, the California Public Employment Relations Board ("PERB") decided that *unions* must be allowed access to the Agency's email system for union activities on non-work time. An earlier PERB had held that *employees* have the right to use e-mail for union activities on nonworking time. *Napa Valley CCD* (2018) PERB Decision No. 2563-E (adopting *Purple Communications, Inc*. (2014) 361 NLRB No. 126). This recent case extended that holding to public employee organizations, not just employees. The case is *Los Angeles Unified School District* (2018) PERB Decision No. 22588-E.

The case involved an interpretation of the EERA, a state bargaining law covering educational employees. That law says employee organizations have "the right to use institutional bulletin boards, mailboxes, and other means of communication." Gov't Code section 3543.1. The Board said "other means of communication" includes modern-day email. The decision stopped short of requiring that the agency send the email to members on the union's behalf. The Board held that the union can send emails directly to bargaining unit members without the need for assistance from the agency, and that agency email addresses of bargaining unit members are generally available through information requests or under the Public Records Act.

Although the case falls under the EERA, it's important because it shows PERB gives wide latitude for unions and employees to use agency email for union business. Federal law allows for this in the private sector, and PERB has now adopted this reasoning for state

bargaining laws. Many agencies already permit this, but others try to exclude access, especially for distribution of union notices or literature (*e.g.* the monthly newsletter).

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics publishes monthly consumer price index figures. The data looks back over a rolling 12-month period at how much goods and services have increased from a year ago. Here's this month's figures:

2.2% - CPI for All Urban Consumers (CPI-U) Nationally

3.3% - CPI-U for the West Region

3.6% - CPI-U for the Los Angeles Area

4.4% - CPI-U for San Francisco Bay Area

2.8% - CPI-U for San Diego Area (6 months through December 2017)

These numbers are important! They're a rough measure of inflation, and elected officials and agency management often look to these numbers to determine Cost of Living raises.

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If <u>you</u> have a specific problem, talk to your professional staff.

Question: My manager left employment and now our Agency is filling his position with a contractor, at least on a temporary basis. I was told contractors cannot supervise public employees. Is that true? The contractor is qualified to do the manager's work, but he doesn't know much about what I do specifically and has no experience conducting performance evaluations, directing staff, and authorizing personnel action changes. I think I should only have to report to another agency employee. Is this something we can object to? How do I approach this?

Answer: Agencies using contractors to fill a need while they conduct a search for a new permanent employee is not that uncommon and is not illegal. It's not without its problems, however, and you have identified many them. On top of the ones you've mentioned, sometimes these contractors have never worked in a

union workplace and are not used to interacting with an empowered staff. Whoever you ultimately report to, they must comply with all the provisions of your MOU, the City's protocols, and work rules. If they don't, contact professional staff to help you figure out how to respond. It is important to document any occasions where the rules aren't followed. For example, a meeting can be set up with HR to discuss a performance evaluation that is not consistent with the standards long established within your department. Other violations may be subject to the grievance procedure.

Question: President Trump declared December 5 a federal holiday as a day of mourning in observance of the memorial for the late President George H.W. Bush (i.e. Bush 41). Our MOU lists the recognized holidays but also includes "Every day designated by Congress or the City Council as a special holiday in commemoration or in memoriam of an extraordinary occurrence." Does this mean the Agency owes us 8 hours of holiday pay? They didn't give us the day off. I heard other agencies got the day off and I'm pretty sure the postal service, banks, and Wall Street were all closed. Personally, I think the Agency owes us the holiday under our MOU. What do you think?

Answer: Professional staff can help the Association file a grievance but be forewarned this is not a slam dunk case. It was President Trump, not Congress, as the contract seems to require, who authorized the federal holiday. Usually when contract language is that specific, the contract language will control. In this case, the City will argue that Congress did not designate the holiday, so it doesn't have to recognize it. However, a reasonable argument can be made that the intent of the parties was to observe any federal holiday created for a "….memoriam or extraordinary occurrence." In other words, the use of the word "Congress" was not meant to restrict the language's application.

Question: I work in finance and requested a week off in June as vacation. My supervisor said my request was premature to advise on, I must resubmit it within 60 days of my scheduled vacation. He specifically cited short staffing (which I admit we are) and requested that I be patient with leave requests until we're fully staffed. He referred me to a section of our MOU. It's a generic management rights clause. It doesn't say anything about vacation or their right to insist on a 60-day window. Our section on annual leave (vacation) does not specify a protocol for submission and approval, much less a 60-day requirement. This is inconvenient. I want to book flights, hotels, etc, and prices go up significantly if I wait until 60 days before my trip. What should I do?

Answer: Management can adopt reasonable rules for the allocation of vacations "slots" among the employees of a department. Temporary periods of short staffing can result in the modification of those reasonable rules. However, these can't be done unilaterally unless the contract specifically allows management to do so, which is not the case here. And Management can't make those rules up – they've got to meet and confer with your Association before implementing a rule as drastic as this. Contact your professional staff, who can help you set up a meeting with management to discuss a more reasonable plan for scheduling vacations.

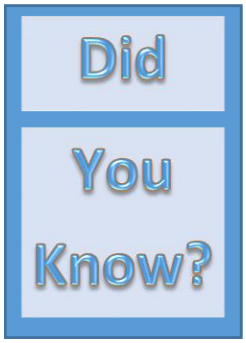
Question: I want some sort of representation regarding my "administrative leave" status. My supervisor wants to "interview" me in a couple days. I have been completely in the dark and have not received an update from anyone since my interview with HR. I really do not know where this stands and what direction they are looking to go. Don't they have to do something? I don't understand how they can just keep me on admin leave indefinitely and not tell me what the "interview" is about. I haven't done anything wrong and have never been given a hearing. Is there anything I can do to put a stop to this nonsense?

Answer: Unfortunately, the law doesn't consider being on administrative leave as punishment because you're still getting paid your usual rate. When they do interview you, you have a right to know what the subject of the interview will be prior to going into the meeting with your supervisor and you have a right to have a representative of your choosing to be there with you. During the interview you can request to consult with your representative, though you may have to answer any pending question first and clarify it after the break. You are required to answer truthfully any questions presented to you. The uncomfortable news is that they can keep you on indefinite administrative leave to conduct the investigation. Contact your professional staff, who can call HR to make sure everyone is on the same page about the progress (or lack thereof) of the investigation.

Question: I was just informed that a returning intern of ours will be limited to 19 hours a week and that goes for our current intern too. They have previously and currently been working up to 30 hours a week and no more than 130 hours a month. Has something changed on the laws? It's new to me, and my supervisor. HR says they shall work no more than 19 hours a week as recently advised by CalPERS. Does CalPERS limit interns to 19 hours a week?

Answer: Your agency does not want to have to enroll your interns into CalPERS or pay a penalty for not doing so. This is not a new rule, but it sounds like your Agency got lax about following it. The Government Code sets out the various thresholds that must be reached before a part-time employee shall be enrolled as a member in CalPERS. In short, if your intern works more than 20 hours a week, or 1,000 hours per fiscal year, they may have to be enrolled in CalPERS. Once a part-time employee is enrolled, they must remain enrolled. Therefore, many agencies will try to manage part-time employees' hours to avoid reaching the 1,000-hour rule. 20 hours a week is a good guideline, but some seasonal employees will work more than this during some months and not at all in others. This is legal, but your agency will want to manage this carefully to avoid the added costs.

Labor Management Committees – or LMCs – are a useful tool for public employee organizations to maintain lines of communication with management, address issues outside of contract bargaining periods, and to resolve problems outside the more adversarial grievance process. Handled with care, LMC's can be a long-term method for resolving most union/management conflicts. The theory behind LMCs is that unions and employers have a mutual desire to see the workplace succeed and should work together to identify and solve problems.



Starting in the 1970's, the subject of cooperative labor relations became a big one in academia. Several long-term studies showed that even when people have strong differing interests, their ability to talk these over, civilly and with mutual concern, almost always results in a better outcome and better relationships afterward. They found that employers who foster systems for ongoing communication and problem-solving also foster greater productivity. Employees – and their unions – are less angry, which causes everyone to be more positive, even in adversarial settings, such as grievances or contract negotiations.

LMCs are regularly scheduled meetings between labor leaders (typically the Association's officers or board of directors) and management representatives (such as the HR or Personnel Director, Department Heads, or other Agency top management). Both sides raise various issues or concerns, with a commitment to working out cooperative solutions. LMCs can meet as often as once a week or once a month, or less frequent, such as once a quarter, once a year, or even just on an as-needed bases.

There is no law that governs LMCs, but they are frequently mentioned specifically in the parties' labor contracts, or MOUs. For example, the contract may specify how many representatives are allowed to participate, how frequent the meetings will occur, what topcis are open for discussion, etc. Topics that are routinely discussed at LMCs include:

- Work hours, such as feasability of a 4/10 schedule
- Uniforms and Departmental Dress Code Policies
- Standby, On-Call, or Shift Bidding protocols
- Pay equity, such as compaction between supervisors, leads, and general staff
- Health benefits, including Wellness Programs
- Flex time or telecommuting arrangements
- Performance Evaluations and Merit Rating systems
- Classification studies, Desk Audits, and Reclassification procedures

Both parties might consider discussing and agreeing to ground rules before discussing the first substantive topic. This can include release time for union members, who sets the agenda for each meeting, and how long each meeting will last. Both sides should also be clear that, although any issue may be raised, doing so does not constitute a waiver of access to the grievance process. Finally, if the discussions do lead to a joint recommendation to modify terms and conditions of employment, any recommendation must be reduced to writing – for example, a proposed side letter agreement.

There are some obvious pitfalls with LMCs. They can be used by management to undermine union leadership or bargaining power; they can address issues which only one side is interested in; they can delay, co-opt, or muddle legitimate grievances; they can focus on minor issues giving the appearance of productive labor relations, while major problems continue to fester; and finally, they can be a complete waste of time.

The most optimistic outcome for an effective LMC is an evolution into "win-win" bargaining: a method of negotiating where the two sides work actively to solve mutual problems, and to turn these solutions into a contract. People who have worked out patterns of cooperative communications, who are able to compromise, and genuinely agree that the new Contract must meet the needs of both sides, are far more likely to be able to come up with one. If you would like more information about how to initiate an effective LMC in your workplace, feel free to contact your Board or professional Staff. Here are some guidelines:

- Both parties should select a small number of representatives;
- The topics should be genuine issues of common concern;
- Meetings should be regularly attended by the same people;
- Attendees should be leaders with decision-making authority;
- Participants should be prepared to listen and to compromise (not just vent);
- Management cannot have a vote in the selection of employee representatives;
- Meetings should be frequent enough to allow for actual solutions;
- Either side may do research, explore options, or propose constructive solutions;
- If the solution is within management's ability to implement, it can do so;
- If it's a change to wages, hours, or terms of employment, the union must vote;
- Neither side can be compelled to open contract negotiations on any subject;
- The grievance and MOU bargaining process are independent of the LMC;
- No grievance can be put on hold except by mutual agreement;
- No grievance can be resolved without agreement of all affected parties.