Torrance

Professionals & Supervisors Association

March 2019 News

What "Leverage" Do We Really Have in Negotiating with the Agency?

Collective bargaining can be frustrating. Rarely does either side get everything they want in a negotiation. The process is long, the back and forth is emotionally draining, and the level of detail is tedious. It is especially hard to maintain perspective when negotiating with a public agency. Elected officials are disinterested or focused on their own political projects or ambitions, and management may be absorbed in costing, budgets, or operational challenges. It's no wonder employees feel like their objectives get lost in the shuffle. It's common to question - what leverage do we really have in bargaining?

The short answer is more than you might think. It's true that the balance of power is not equal. It rarely is. The Agency, as the employer, has most of the power in negotiations. This has long been the case in employment. But when employees join forces and bargain collectively, they really can drive up wages and enhance benefits for everyone. By using the leverage that you do have, you can shift the balance closer to an even playing field.

Just because negotiations went a certain way before, it doesn't mean they'll go the same way next time. Each negotiation is different, and each takes on a life of its own. It's best to approach each round of bargaining holistically, thinking about it not from a single point of leverage, but rather in terms of a variety of pressure points or levers that can be pushed or pulled, at different times, in different settings, in order to achieve the best outcome.

Recruitment and Retention: A great starting point is recruitment and retention. In a strong labor market, employees have options. Are employees leaving for better jobs at

other agencies? Is the Agency having a hard time recruiting and filling job openings? Can the Agency keep new employees or is there constant turnover? Is there a "glass ceiling" where employees are not promoted? If recruitment and retention issues are rampant, or even if they are more concentrated to certain job classes, odds are good that the Agency may agree to fix it. Do your research and find out what challenges exist and compile detailed information about the problem to make the best argument. The solution may be higher wages for all, or extra increases to those positions that are hard to fill.

Labor Market Data: This includes how much wages increase on average. It's frequently expressed as a percentage – *e.g.*, 3% average annual wage growth. It also includes the consumer price index (CPI), which is designed to measure inflation, or how far the dollars you earn will go in the marketplace. The CPI is a good starting point for negotiations over a reasonable cost of living adjustment. It's also specifically written in to the "fact-finding" law as a factor to consider. If some positions are paid close to the minimum wage, labor market data can include how much the minimum wage is increasing and what kind of compaction that's causing for positions on the lower end of the wage scale.

Comparable Agencies: Speaking of market data, you might want to survey what other agencies in the same geographic area offer in terms of pay increases. If employees are paid better in a nearby agency, employees have a market alternative to the wages offered by your Agency. The concern over losing talent to a nearby agency is often a factor in determining how much your Agency is willing to pay. It's also specifically written in to the "fact-finding" law as a factor to consider. A list of which agencies are considered "comparable" may even be written in your labor agreement or your Agency's local personnel rules. Look into how much those comparable agencies are providing in pay and benefit increases, and how much they currently pay for positions like yours.

General Economic/Financial Data: This includes both macro and micro economic data. For example, is the economy generally growing or contracting? Does a recession seem to be around the corner? It also includes the Agency's financial data. Are local revenues coming in higher or lower than projected? Are there any revenue increases or new sources of revenue that can be used to support ongoing pay or benefit increases? If the data is in your favor, be sure to share it at the bargaining table. Odds are good that the Agency will tell you there is no money in their budget to pay for your proposals, so having some counterarguments can be useful.

Morale: It might not always seem intuitive; public service can be bureaucratic, but the work of the public is still performed by real people. Especially in smaller agencies, management knows employees and their lives outside of work. They often want to see you succeed. Human nature says most people really do want to get along. This is true, from entry level jobs to top management. Everyone still must work together. Is it a nice place to come to work every day? Management does not want to work in a toxic environment any more than you do. If the elected officials or management want the Agency to be an attractive place to work, offering a competitive salary and benefits package will help keep or maintain positive morale. Once morale is lost, it can be difficult to get it back. It may even cost the Agency more money to get it back than it would have cost to have simply maintained good morale in the first place. If you think morale will suffer because the Agency's offer is not good enough, raise this point in bargaining.

PERB: Gov't Code § 3505 requires the Agency to meet and confer *in good faith* regarding wages, hours, and terms and conditions of employment with representatives of employee organizations and to *consider fully* such presentations *prior to* arriving at a determination of policy or course of action. Gov't Code §3505 further defines "meet and confer in good faith" as the mutual obligation *to personally and promptly* meet and confer upon request and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and *to endeavor to reach agreement* on matters within the scope of representation prior to the adoption by the public agency. This includes adequate time for the resolution of impasses. The legal standard for proving "bad faith" is high, but not insurmountable. PERB has already found that certain management tactics – such as repeatedly delaying or cancelling meetings or refusing to provide responses to your information requests – violate the law. If the Agency does not bargain in good faith, you can file an unfair practice charge with PERB, who may order the Agency back to the table, this time to bargain in good faith. PERB does not have the authority to order the Agency to accept your proposals, but they can ensure the integrity of the process is maintained.

Mediation & Fact Finding: Under Gov't Code § 3505.4, an employee organization has the right to file for "fact-finding" with the State if the parties are at an impasse. The Agency's local rules may allow for an impasse meeting with top management, and/or involve a state mediator. Generally, the goal is to avoid impasse. But if both sides hit a wall on moving toward any agreement, involving an outside party in the process can be useful, especially if the other side's position is unreasonable. If mediation or fact-finding do not resolve the impasse, under the MMBA, the fact-finding panel must issue an advisory

recommendation to be put on the public agenda. It must be considered by your Agency's elected officials in open session. The fact that the details of the labor dispute will be aired publicly can encourage the parties to make concessions to reach agreement. Although you shouldn't expect major movement in the Agency's proposals during impasse, it's possible they will move enough to secure an agreement.

Outreach to Elected Officials: Elected officials usually want to stay out of the bargaining process. Management may tell them to avoid all communications with union members during bargaining, but it's still a free country. You have a First Amendment right to communicate with your elected officials over any matters that concern you – including your pay, benefits, and working conditions. If you believe management is running interference, that your positions are not being communicated to the elected officials, or that the Agency's positions in bargaining are not in the best interests of the residents, it's wise to share this with your individual elected officials. Be sure to communicate privately first, outside of the public meetings. You want to give them the chance to fix the problems behind closed doors before airing the dispute during an open session with the public and perhaps even with the media present in the room. It's also wise to ensure that the community in general supports the organization's bargaining position, and that your members are united behind a common message, before taking the dispute public.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

Here's a look at this month's figures:

1.6% - CPI for All Urban Consumers (CPI-U) Nationally

2.7% - CPI-U for the West Region

3.2% - CPI-U for the Los Angeles Area

3.0% - CPI-U for the Riverside Area

2.6% - CPI-U for San Diego Area

4.5% - CPI-U for San Francisco Bay Area (12 months through December 2018)

Retired Public Employees Association News

The 2019 legislative session is in full swing and it is shaping up to be a busy year. So far, a total of 850 bills have been introduced. As with every year, RPEA is focused on legislation that will impact retirees and active employees. At the present time, there are a few important bills that RPEA is tracking.

AB 33 (Assemblymember Rob Bonta - D): This bill would prohibit the boards of the Public Employees' Retirement System and the State Teachers' Retirement System from making new investments or renewing existing investments of public employee retirement funds in a private prison company. It would require the boards to liquidate investments in private prison companies on or before July 1, 2020, and it would require the boards—in deciding to liquidate investments—to constructively engage with private prison companies to establish whether the companies are transitioning their business models to another industry.

AB 287 (Assemblymember Randy Voepel - R): Current law requires each state and local public pension or retirement system, on and after the 90th day following the completion of the annual audit of the system, to provide a concise annual report on the investments and earnings of the system to any member who makes a request and pays a fee for the costs incurred in preparation and dissemination of that report. This bill would also require each state and local pension or retirement system to post a concise annual audit of the information described above on that system's internet website no later than the 90th day following the audit's completion.

At this time both bills have been referred to the Assembly Committee of Public Employment and Retirement and are awaiting a hearing date. RPEA will continue to watch the progression of these bills, while also monitoring new bills that will impact retirees and active employees.

Since the beginning, RPEA has been actively involved in enhancing the lives of retirees. We are the only statewide association representing all PERS retirees. RPEA works tirelessly to safeguard and promote the retiree benefits of California's public employees. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California, check out our website [www.rpea.com.](http://www.rpea.com)

GOVERNOR APPOINTS NEW MEMBER TO CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD

Last month, Governor Gavin Newsom appointed Lou Paulson to the Public Employment Relations Board (PERB). Mr. Paulson is a former President of the California Professional Fire Fighters Association, the officially chartered state council for the International Association of Fire Fighters (IAFF). He has previously served on the Executive Board of the California Federation of Labor and the Advisory Board for the University of California Labor Center. He is considered a union-side appointee.

Mr. Paulson is one of four members of the PERB Board. He joins Eric Banks, Arthur Krantz, and Erich Shiners. The fifth Board seat is currently vacant. Mr. Banks and Mr. Krantz are also seen as fellow union-side appointees. Mr. Shiners is considered a management-side appointee, though he did work for PERB previously before representing management. Observers expect that Governor Newsom will appoint another union-side appointee to the open fifth seat sometime soon.

The composition of the PERB Board has changed dramatically over the last decade. The Board during Governor Schwarzenegger's term in office was considered more "management friendly," but the tide has recently shifted. Last year, the Board issued many cases that strengthened the rights of public sector employees and their unions.

It is likely that, going forward, Associations and their members will prevail more often before the PERB than they have in the past. It's also likely that public agencies will be more likely to settle labor issues short of the Association having to file an unfair practice charge. If a charge does become necessary, public agencies are likely to settle the charge at an earlier stage of the proceedings, resulting in faster legal relief for the Association.

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: I was asked to attend a training to learn skills to perform duties of a higher-level class. The training is not for my specific job. We have a policy that says time spent training in a higher class is not subject to out-of-class pay, but time spent performing the work is. I think I should get out-of-class pay for the time spent at this training. Do I have a winnable grievance?

Answer: A grievance is a violation of the MOU or other policies and procedures. It's not clear there's an actual violation of the policy here. Typically, premium pay is for performing the duties of the higher-level job, in a way that benefits the employer. For example, many "out-of-class" provisions require that higher level work be performed for a time-period before premium pay applies. In this case, you're not actually performing the work. You are learning how to perform it. You may even perform it later. When you do, the Agency should provide the premium pay at that time. But until then, no, it's not likely to be a winnable grievance.

Ideally, this training will lead to a future promotional opportunity. You could inform your Association board, who can raise this topic at the next negotiations. It's a bargainable subject, and it's not unreasonable to ask for premium pay in this situation. You could also ask H.R. for their interpretation of the policy or ask if there is any room to resolve the issue to your satisfaction. Contact staff for help.

Question: I have a question about vision coverage. I think I'm being taxed twice when I receive vision services. I pay taxes at the optometrist for the goods and services. When the Agency reimburses me, it is taxed again because they reimburse us on our paycheck and not a separate check. Can you shed light on this?

Answer: We all pay income taxes on our salary, and again sales taxes on the goods and services we purchase with that income. There's really no way around this. But certain reimbursements – for example mileage reimbursement – may be paid in a way that is not subject to income tax. Ask your HR Department about their payroll and reimbursement processes and if there's a way that it can be paid out separately, without adding it to your base pay. There's often a payroll code for this. For those expenses that aren't reimbursed, you can set up a Flex Spending Account (FSA) if your cafeteria plan allows for it. An FSA allows you to use pre-tax dollars to pay for eligible medical expenses, including vision.

Question: I worked for the Agency, was fired illegally, and ultimately reinstated. This included back pay, back seniority, back retirement service credit, etc. I've now reached my 10-year anniversary since the date I was originally hired. In our MOU, our vacation accrual increases upon 10 years of service. The Agency is refusing to increase the accrual, saying that I haven't worked the full 10 years, even though all my paperwork and benefits go back to my original date of hire. Is the Agency violating my rights? Can I challenge this?

Answer: You can certainly challenge it. A successful challenge will depend on the wording in any return to work agreement and the vacation accrual language in your

MOU. Specifically, does the return to work agreement list specific items that must be restored, or does it include a more general "make whole" remedy. If the list of corrective actions the Agency must take are not limited to specific items, you're more likely to have success challenging this.

On the other hand, the MOU language might hurt your case. If the higher vacation accrual is for "years of service," instead of based on "date of hire," the Agency may have an argument that you shouldn't get the higher accrual until you've worked 10 years cumulatively. It would also be helpful to know if the Agency has interpreted this language consistently. For example, have they given other employees the higher accrual on their anniversary, even if they have been out on an extended leave of absence? If they've interpreted the language previously to mean "date of hire," this will help your case.

Question: My boss said I must register for an outside exam related to my position. The test is very stressful and not required for my position. We tried to negotiate for compensation for added certifications, but the Agency did not agree. I now have zero incentive to take the test. I've told my boss that I don't want to, but he says I must take it because it's already budgeted. The testing is costly, but the Agency is paying for it. What should I do?

Answer: In short, you should take the test, especially if they ask you to take it on work time. The normal rule is "obey-first, grieve later." You don't want to be disciplined for refusing a work order from your boss.

But if the certification is not required for your job, then you have a legitimate complaint. Contact professional staff if you need help with this. One thing you might want to address is the cost for study materials and when you should study. They shouldn't ask you to study on non-work time. It's reasonable in this instance to ask for paid time away from your duties to allow you to study. This may also help reduce your stress. Furthermore, just because an item is budgeted doesn't mean the money has to be spent. If you don't feel confident in your ability to pass the test, you could convince the Agency it's not worth all the time and effort. You may also be able to ensure that, whatever the test results, it doesn't negatively impact your job.

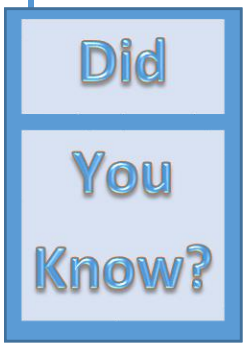
Question: Our Agency has electric vehicle charging stations. The policy used to be that any employee with an electric vehicle or plug-in hybrid could use the stations while at work. As part of the Agency's "go-green" initiative, the Agency now wants to change the policy and limit use of the charging stations to just electric vehicles. I have a plug-in hybrid and use the station. Full electric vehicles are more expensive, and I don't feel I should have to upgrade

to a full electric vehicle to use the charging station. Can I prevent the Agency from implementing this change?

Answer: The Agency does have the right to change the policy, so you probably can't prevent them from ultimately implementing the change. But this does sound like a deviation from the current practice. You first need to establish whether access to the charging stations is a term and condition of employment. It probably is. There is a fair amount of case law establishing that parking, for example, is a matter within the scope of representation. By extension, you can argue that access to charging stations should be as well, though it's obviously a newer technological development and there isn't a case directly on point.

Assuming it's a topic subject to negotiation, your Association can demand to meet and confer over the proposed policy prior to the agency implementing the change (i.e. who is eligible). If the Agency makes the change unilaterally without negotiating, and you can show the old practice was clearly established, you can file an unfair practice charge with PERB if they don't rescind the change until the bargaining process is completed. Contact professional staff if you need assistance.

Under state bargaining laws, public agencies may designate certain positions as "confidential." But what exactly does this mean? Which positions can be labeled confidential? What impact does this have for the employees who fill those positions?



Let's start with the definitions. The Meyers-Milias Brown Act (MMBA) actually does not define "confidential" employee. Gov't Code §3507.5 allows public agencies to designate employees as "management" or "confidential." It says that public agencies "may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization."

In short, the Agency may adopt rules that designate certain positions as "confidential," but they cannot prevent employees who fill confidential positions from being part of an employee association. Confidential employees may still belong to an employee

organization (they can be with general employees or with management employees), and they can form their own bargaining unit or a separate association. If confidential employees are included in a broader bargaining unit, the Agency may prevent them from holding office or serving on the bargaining team. But merely labeling a position as "confidential" does not necessarily make the employee "unrepresented." Keep in mind, although the Agency may adopt rules designating positions as confidential, they must still negotiate these rules or any changes with the affected employee organizations.

So who exactly is "confidential?" The Educational Employment Relations Act (EERA) defines "confidential employee" as "an employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions." Gov't Code §3540.1(c). See also the Dills Act for state employees, Gov't Code §3513(f)(same definition). The Higher Education Employer-Employee Relations Act (HEERA) definition is "any employee who is required to develop or present management positions *with respect to meeting and conferring* or whose duties normally require access to confidential information which contributes significantly to the development of those management positions." Gov't Code §3562(d). The key word in all of these definitions is "significantly."

Under the EERA definition, PERB said an "employer should be allowed a 'small nucleus' of loyal individuals to assist the employer in developing the employer's positions in matters of employer-employee relations, and that nucleus of individuals must maintain the confidentiality of those matters because if they are made public, it would jeopardize the employer's ability to negotiate from an equivalent position." *Burlingame Elementary School District* (2006) PERB Decision No. 1847, at 10. But designating an employee as confidential "is not done lightly." Due to the "serious impact of such a determination, an exclusion from a broad grant of rights under the EERA must be strictly construed." *Id.*

PERB has defined employer-employee relations as negotiations and processing employee grievances. *Id.* The Board has also said that the employee must have access to or possess confidential information *in the regular course of duties performed and be more than a happenstance* (*i.e.* more than a fraction of the employee's time). *Id.* The Board has applied the same test to the HEERA. *Id.* at 11 (citing cases). In *Burlingame* case, the Board held that a benefits payroll specialist was not "confidential." According to the Board, "[t]he fact that the management team is overworked and an additional confidential position is needed does not, no matter how compelling the argument, warrant a finding that this classification should be designated as confidential." *Id.* at 13.