Elected Officials and Communicating with Bargaining Units

By Diana Moffat

Under the Oregon Public Employees Collective Bargaining Act, it is bad faith bargaining to negotiate with other than the "exclusive representative" (union) or the employer designated bargaining team.

The union is the "exclusive representative" of the employees, just as the employer's labor representative is the exclusive representative of the employer. One of the topics that always creates lively interest when collective bargaining starts is the question of what can be discussed among other management personnel, elected officials and bargaining unit members regarding negotiations.

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It is not appropriate for either side to do or say anything, outside of the official bargaining process, that could be construed as negotiating on issues that are the subject of bargaining. For example, management is NOT permitted to tell employees what management thinks about the union proposals. It is NOT permitted for management to "float trial balloons" in such discussions, or to ask employees what they would like management or the union to put on the table as a contract proposal, or what should be withdrawn from the table in order to reach an agreement. Such conduct constitutes bad faith bargaining in violation of ORS 243.672(1) (e) because it bypasses the designated negotiators and undermines their authority. All of the above discussions must take place at "the bargaining table," between the exclusive representatives.

The Employment Relations Board (ERB) has found such unlawful conduct by an employer.[1] The ERB concluded that the employer in question failed to bargain with the union in good faith when it met directly with employees about bargaining subjects, revised its proposals in response to what the employees said in that meeting, and presented its revised proposals directly to employees before giving them to union negotiators.

Whether the union or management has "crossed the line" into bargaining during such discussions will depend on the facts of a particular case. Thus, care must be taken because it is not possible to control what a person thinks s/he is hearing in a conversation with a manager, and it is very possible for a union to make a case of "bad faith bargaining" even if the manager tries to be careful in what he or she says.

If the union believes that the employer has done an "end run," and gone directly to the employees, they can file an Unfair Labor Practice Complaint (ULP) with the ERB. If that happens the employer has to litigate the matter. The employer will be faced with legal representation fees (usually averaging $4,000 to $7,000), the cost of filing their Answer to the Complaint ($250), a full day of hearing (often held in Salem), the requirement to repay a portion of the union's legal fees if the union prevails, a civil penalty of up to $3,000 or more, and the requirement that they post a notice in the workplace admitting that they committed an unfair labor practice. None of the above is a pleasant prospect!

For this reason, once bargaining has started, it is the safest course for managers and elected officials to decline employee invitations to engage in discussions about bargaining issues, and to refer such employees to their own bargaining representatives and restrict workplace conversation to your usual and traditional topics. It is in the interest of both parties to conduct negotiations at the bargaining table through the designated representatives. Apart from the motivation of avoiding charges of bad faith bargaining, working with the designated representatives of the union expresses management's intent to develop and maintain a positive working relationship with represented employees. ■

Editor's Note: Diana Moffat is the executive director of the Local Government Personnel Institute.

1 ATU, Division 757 v. Rogue Valley Transportation District, 16 PECBR 559, order on reconsideration 16 PECBR 707 (1996).