

13 WAYS TO LOSE A LABOR CASE

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In dealing with public employees, chiefs must keep in mind all of their state's applicable collective bargaining law's bargaining requirements. There are few changes involving or affecting working conditions that a public employer can make without giving notice to, and if requested, discussing the matter first with the employees' elected representative, through either impact or decisional bargaining. Gone are the days of saying, "effective immediately."

1. DEALING DIRECTLY WITH EMPLOYEES

An employer may not bypass the union and deal directly with an employee on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. Such an action would violate the employer's duty to bargain in good faith and would constitute an "unfair labor practice" otherwise known as a "prohibited practice" under some states' laws.

An employer's direct dealing with employees in the bargaining unit violates the employee organizations statutory right to speak exclusively for the employees who have selected it to serve as their sole representative. Dealing directly also undermines the employees' belief that the union actually possesses the power of exclusive representation to which it is entitled by statute. Thus, a chief must give notice and an opportunity to bargain to the union whenever the chief wants to implement a change involving or affecting an employee's wages, hours, and other terms and conditions of employment.

2. HIRING AND CREATING A NEW POSITION

Conditions imposed on applicants for a job, i.e., “conditions for hire”, are not subject to a bargaining obligation, because mere applicants for hire, who have had no prior employment within the bargaining unit in question, are not employees in the unit within the meaning of most states’ collective bargaining laws. Requiring a certain level of education or experience of applicants is normally an exclusive managerial prerogative. Similarly, requiring drug and alcohol tests of all applicants is generally outside the scope of bargaining.

Nevertheless, when an employer’s hiring decisions impact the terms and conditions of employment of future or existing bargaining unit members, the applicable collective bargaining law generally allows the unions to challenge the practice. Challenges to an employer’s hiring practices typically involve two types of disputes: 1) transfer of bargaining unit work to non-bargaining unit members, and 2) imposing new obligations on applicants which carry over into employment.

3. NEW RULES & PRACTICES

An employer may impose and enforce a variety of workplace rules and regulations, ranging from dress codes to job procedures, as long as the union has notice and the opportunity to bargain. Only material changes (not merely procedural ones) require notice and bargaining. The following issues are but a few examples of mandatory subjects of bargaining:

- hours that an employee is required to work;
- implementing a new work schedule;
- changing job descriptions;
- changing promotion criteria;
- performance evaluation systems;
- dress and grooming regulations; and
- implementing a new sexual harassment policy.

4. CHANGING SCHEDULES TO AVOID O.T.

While it is rarely done in municipal police agencies, in the absence of any restriction in the collective bargaining agreement, a municipal employer may change employees’ schedules in an effort to reduce overtime costs. Even where no contractual constraints are present, the employer must provide advance notice to the union of the intention to change the schedule and, if requested, bargain in good faith to either

agreement or impasse over the impact of such change on mandatory subjects of bargaining.

Compensation, including such things as wages, pensions, severance pay, insurance, and educational incentives, is a mandatory subject of bargaining. Rest periods, such as coffee or snack breaks, require compensation. Employers must bargain before changing a past practice or contract provision regarding holidays, vacation, leaves of absence, or take-home vehicle policies.

5. NEW PERFORMANCE EVALUATIONS

Because performance evaluations have a direct impact on job security and professional advancement, they are usually deemed to be a mandatory subject of bargaining. An employer must bargain over the decision to implement or change the performance evaluation method, in addition to the impact of the decision. Testing, including drug and psychological tests, may be used on employment applicants. However, if used in the course of employment, such tests may only be instituted after notice and bargaining.

Prior bargaining is not ordinarily required for tests administered to an employee in the course of a criminal investigation. The establishment or unilateral change of discipline procedures is a mandatory subject of bargaining. Whenever disciplining an employee, the employer must be cautious to avoid infringing on the employee's exercise of Constitutional as well as collective bargaining rights. Discipline must be commensurate both with the nature or severity of the violation and with the discipline given to other similarly situated employees.

6. NEW PROMOTION PROCEDURES

A municipal employer must provide the union (or other bargaining representative) with notice of any proposed change in the procedures to be used in making promotions to positions within the bargaining unit and to certain "non-unionized" positions outside the bargaining unit. If the union makes a timely demand to bargain, the employer must engage in good faith negotiations until either agreement or impasse before implementing the proposed changes.

7. APPOINTING AT DIFFERENT RATES

An employer is free to determine non-discriminatory qualifications for job vacancies. Ordinarily, hiring decisions and qualification standards

are not subject to bargaining. However, establishing wages for entry-level employees is usually a mandatory subject of bargaining. If a municipal employer wants to hire someone at a rate or step different from that set by a collective bargaining agreement, it must so notify the union.

It is not necessary to secure the union's consent, so long as the municipal employer provides notice and opportunity to bargain. While the cases are not always clear on this issue, it is likely that bargaining in good faith to the point of agreement or impasse is all that is required.

8. CONTRACTING-OUT UNIT WORK

Often, to save money or improve efficiency, municipal employers want to contract-out certain tasks, currently being performed by bargaining unit personnel, to the private sector or other non-unit employees. Whether an employer is restricted from contracting-out work depends on whether it is expressly barred from doing so in the collective bargaining agreement. In the absence of a contractual prohibition, an employer is free to contract out bargaining unit work so long as it fulfills its mid-term bargaining obligations. Because "contract-out" and "non-contract out" clauses constitute a waiver of a party's respective rights, they will only be enforced if they are clear and unambiguous.

Many collective bargaining laws require an employer to give the exclusive bargaining representative prior notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel. To prove that an employer unilaterally transferred bargaining unit work to non-unit personnel, the charging party must show that: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of work had an adverse impact on either individual employees or on the bargaining unit itself; and 3) the employer did not provide the exclusive bargaining representative with prior notice or an opportunity to bargain over the decision to transfer the work.

9. HIRING CIVILIAN DISPATCHERS

Police departments may utilize civilian dispatchers in place of sworn personnel. If dispatching is bargaining unit work, assigning it to persons outside the bargaining unit is subject to mandatory bargaining to agreement or impasse. In order to prevail in a charge of prohibited

(unfair labor) practice, the union must prove that the work assigned constituted bargaining unit work and that the change had a substantially detrimental effect on the bargaining unit.

10. NEW SICK AND INJURY LEAVE RULES

Chiefs may make rules concerning eligibility for sick or injury leave, so long as they do not conflict with the terms of the collective bargaining agreement. Notice to the union and bargaining upon demand to the point of agreement or impasse is generally required.

11. ESTABLISHING LIGHT DUTY

A department may require injured police officers to perform modified or *light duty* rather than allowing such individual to remain out of work with pay on either sick or injured on duty status. If a department has traditionally allowed injured employees to remain on injury leave until able to perform all their duties, notice and an opportunity to bargain will be required before such injury leave eligibility criteria are changed, or more properly, before assigning such partially disabled employees to a light duty position.

12. DEMANDING DOCTOR'S CERTIFICATES

Under certain circumstances, a municipal employer may require a doctor's certificate as a condition of an injured employee being placed on sick or injury leave, and/or returning to work in either a light or full-duty capacity. In the absence of any controlling provision in the collective bargaining agreement, an employer is free to provide the union with notice and opportunity to bargain regarding its intention to require a doctor's certificate as a condition for sick leave eligibility.

13. REFUSING TO FURNISH INFORMATION

As part of its requirement to conduct good faith bargaining, a public employer often has an obligation under a state's collective bargaining law to furnish information in its possession which is requested by the union – so long as the requested information is relevant and reasonably necessary to the union's duties as a collective bargaining representative. The obligation to provide information arises both in the context of contract negotiations and contract administration. An employer may not refuse to provide the requested information simply because it is otherwise available to the union through the same source, e.g. public records request.

A public employer may lawfully refuse to furnish a union with information it has requested if the employer has met its burden of demonstrating that its concerns about disclosure are legitimate and substantial when weighed against the union's need for the information. The union has a reciprocal duty to furnish management with information, but this rarely becomes an issue.