State Engaged In Lawful Hard Bargaining With Prison Guards, Not Surface Bargaining

Key Reminders About “Effects Bargaining” From Academy 7

By William F. Kay
CALPELRA Labor Relations Academy Co-Director

In a recent decision involving the distinction between hard bargaining and surface bargaining, PERB determined that the State of California properly maintained a firm position and refused to counter-propose when bargaining with the California Correctional Police Officers Association (CCPOA) over changes to a protective vest policy.

Background

The issue began when the California Department of Corrections & Rehabilitation (CDCR) changed its protective vest policy to require non-uniformed personnel (counselors) to wear their protective vests in a concealed fashion, as required for uniformed personnel. The change in protective vest policy was made after the CDCR unilaterally adopted its last, best, and final offer and was living without a current MOU.

During the first day of negotiations over the policy change, the CCPOA made 14 different proposals. The CDCR either rejected the proposals or responded with a statement that the proposals did not relate to any identifiable impact of the policy’s change on mandatory
subjects. The CCPOA’s proposals ranged from increased pay for all unit members to changing the inspection schedules for the protective vests. The CCPOA also initiated seven information requests to which the CDCR quickly responded, even though it did not believe the requests related to mandatory subjects.

During the second day of negotiations, the CDCR team eventually walked out of negotiations after repeatedly asking the CCPOA to identify items the management team had not addressed, or items that were within the scope of representation upon which the parties could reach agreement.

The CCPOA filed a refusal to bargain charge, claiming that the CDCR engaged in unlawful surface bargaining. The PERB Regional Attorney dismissed the CCPOA’s claim, and on appeal PERB adopted the Regional Attorney’s decision.

**The Decision**

The decision dealt with three factors involved in the CCPOA’s charge of surface bargaining: (1) the CDCR refused to make any counterproposals; (2) the CDCR refused to speak directly to one of the CCPOA’s representatives during the bargaining process; and (3) the CDCR team walked out of negotiations prior to impasse. The question: Did any of these factors constitute one of the established indicia of “bad faith” bargaining constituting surface bargaining – a “take-it-or-leave-it” attitude coupled with going-through-the-motions of negotiating?

**Refusal To Make Counterproposals**

The decision noted that a failure to make counterproposals, if coupled with an inflexible position, might constitute unlawful behavior. But the decision then reconfirmed a long line of PERB decisions regarding lawful hard bargaining, stating that:

“Insistence on a firm position is not necessarily evidence of bad faith because the law merely requires the parties to maintain a sincere interest in reaching an agreement, and even if the reasons for insisting on a particular position or contract term are questionable, if the belief is sincerely held, it may be maintained even if it produces a stalemate. (Citations) The obligation to bargain in good faith merely requires the parties to explain the reasons for a particular bargaining position with sufficient detail to ‘permit the negotiating process to proceed on the basis of mutual understanding.’” (Citation)
The decision noted that if the CDCR flatly refused to negotiate, the outcome could have been different. But in this case, the CDCR did not preemptively announce that it would not deviate from its position under any circumstances. Instead the CDCR maintained an openness to consider any proposals that the CCPOA could identify within the scope of bargaining, while maintaining a firm position.

**Refusal To Look At Union Representative**

The PERB agent noted that the CCPOA’s claim that the CDCR negotiators refused to look at a CCPOA negotiator during the bargaining did not allege specifics about the incident, but added that:

“...the Dills Act does not require the parties to negotiation to look at each other or to make eye contact. In addition, there are no applicable standards under other PERB-administered collective bargaining statutes that might obligate [the CDCR] to follow such etiquette during bargaining.”

**Walking Out Of Bargaining**

Finally, the decision addressed whether walking out of bargaining constitutes unlawful surface bargaining. While acknowledging that walking out of negotiations for irrelevant reasons may be an indicia of surface bargaining, the decision noted that indicia by itself will not constitute a finding of surface bargaining.

**Key Reminders From Academy 7 Regarding Differences Between Lawful Hard Bargaining And Unlawful Surface Bargaining**

As this case points out, there is a thin line between lawful hard bargaining and unlawful surface bargaining. Both involve insistence on a firm negotiating stance. The difference turns on whether the hard bargainer maintains an open position and clearly articulates the reasons for the firm stance so that the parties can proceed in mutual understanding.

In CALPELRA’s Academy 7 we actually practice “threading the needle” between lawful hard bargaining and unlawful surface bargaining, and between lawful hard bargaining and unlawful premature impasse declaration.
2010 Annual Training Conference

Put on your platform shoes and get ready to hustle back to 1975 as we celebrate CALPELRA’s 35th anniversary this November 16-19. Together we’re looking back, moving forward, and stayin’ alive!

The 2010 Annual Conference Program Committee has finalized the 2010 Annual Conference program. Program sessions will include…

- Health Care Reform: Practical Implications For Public Sector Plans
- Partnering With Chief Executives In Times Of Economic Meltdown
- Furloughs: Fact Or Fiction?
- Using Early Retirement/Separation Incentives To Save Dollars
- Plans For A Better Day: Preparing For Impasse, Implementation, And Strikes
- Improving Benefits In Difficult Economic Times

Watch for more details about the 2010 Conference program in the coming weeks. Registration Now Open

Key Reminders From Academy 6 And Academy 7 Regarding Scope Of Bargaining And Negotiating The Effects Of A Non-Negotiable Decision

This case highlights what we emphasize in both Academy 6 and Academy 7 – making the distinction between “decision” and “effects” bargaining when dealing with a scope of bargaining question. We also emphasize that a party (in this case the union) can waive its right to negotiate the effects by failing to properly identify the effects of a change on mandatory subjects.

1 State of California (Department of Corrections & Rehabilitation) (2010) PERB Dec. No. 2108-S.
2 The standard indicia for bad faith bargaining are: Dilatory tactics; conditioning agreement on economic items upon non-economic items; lack of negotiator’s authority; reneging on tentative agreements; insisting on procedural groundrules before engaging in substantive negotiations; bypassing the negotiating representative; and failure to make counterproposals. See discussion of this issue in Chapter 2, Legal Trends 2009.
3 State of California (State Department of Corrections & Rehabilitation, supra; see PERB Agent Warning Letter dated November 4, 2008, adopted as part of PERB decision.
4 Ibid.
Current Academy Schedule

June 22, 2010
Labor Relations Academy 1
The Foundation Of Labor Relations
CarrAmerica Conference Center,
4400 Rosewood Drive
Pleasanton, California 94588

September 14, 2010
Labor Relations Academy 2
The Arbitration Process
Centre at Sycamore Plaza
5000 Clark Avenue
Lakewood, California 90712

November 15, 2010
NEW! Labor Relations Academy 6
Bargaining Your Way Through Economic Crisis
Portola Hotel & Spa
2 Portola Plaza
Monterey, California 93940

November 16, 2010
NEW! Labor Relations Academy 7
Impasse And Unilateral Adoption During Economic Crisis
Portola Hotel & Spa
2 Portola Plaza
Monterey, California 93940

Learn more about all of CALPELRA’s Academies and register on-line at CALPELRA’s Web site.