The Importance of Understanding Management and Employee Rights in a Collective Bargaining Agreement

By

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Understanding the basic rights of management and employees is the starting point for effective bargaining. When a union is initially recognized by the employer, both management and employees should receive education to understand their rights. However, this understanding can fade over time, bringing grievances and conflicts. Careful, precise wording of “management rights” and “employee rights” clauses, along with regular discussions about what those rights are, are important steps in creating an effective relationship between the parties.

The Starting Point

Management begins the employment relationship with all the authority and rights associated with ownership except that which has been taken away by government regulations or that which has been given away by management by policy or contract to restrict the exercise of rights.

The employees and union start with nothing more than those rights provided by government regulation or previously given to them by management. Employees retain the wages, hours, and working conditions in existence at the time the union is recognized as the designated collective bargaining agent. The slate is not wiped clean, and employees do not start from scratch.

The primary right possessed by unionized employees is the qualified right to strike. The right to strike is a great equalizer, and can become an important part of the collective bargaining process. None of the California bargaining statutes expressly prohibit the right to strike and the California Supreme Court held that public employee strikes are not per se illegal unless expressly forbidden by statute or pose an imminent threat to public health and safety. The Court has also held that a strike, even if legal, may constitute an unfair practice.

In addition to the qualified right to strike, the employees have “union rights.” These rights are guaranteed by the three PERB-administered statutes. They will be addressed later in this paper.
Rights Flow from Management to Employees

It is important to note that employees have no significant right to surrender to management in the bargaining process other than their qualified right to strike. Collective bargaining does not result in employees agreeing to work at a certain level or exert a particular effort in their jobs. Instead, if the employee comes to work and performs the job, he or she will receive the prescribed wages and benefits negotiated by the parties and documented in the Agreement or Memorandum of Understanding (MOU).

Any management rights that are not surrendered to the employees during negotiations remain with management. This is referred to as the reserved rights doctrine. Thus, when an employee wishes to grieve the interpretation of a provision of the Agreement, the employee should show that a duty guaranteed by the agreement has been breached. The employer does not draw its authority to direct the work force from the agreement.

An example of this follows: If management holds all the straws at the beginning of the relationship, and over time gives some straws to the employees; then the straws that remain with management belong to management, and only those straws that the employees hold are theirs. The employee’s straws are defined in the Agreement, and any straw that is not there belongs to management.

When employees do not understand this, they sometimes assume that “Management can’t do this because it’s not in the Agreement” causing grievances to be filed. When faced with this type of challenge from employees, management should ask, “Show me where in the Agreement it says I can’t do this” and refer to the management rights clause.

It is incorrect to assume that the employer and employees/union are equal partners in the exercise of management’s traditional authority to operate the organization; both parties do not participate equally in financial gains and losses. When this assumption arises, it should be clarified by referring to the rights of each party in the Agreement.

Management Rights Clause

The “management rights” clause serves an important function and should be carefully considered and worded because it allows management to:

- Act unilaterally with regard to terms and conditions covered by the clause, and
- In grievances, mediation, and arbitration, it can provide evidence that allows management to prevail.
Management rights that are addressed in the “management rights clause” are generally not within the scope of bargaining because they are intrinsic to the employer’s right to manage. While management is not required to bargain on these matters, it is still must bargain on the effects or impact that these matters may have on wages, hours and working conditions.

Drafting a Management Rights Clause

The clause may be short or long depending on the employer’s philosophy. A short clause states that unless given to the employees in the Agreement, management retains all remaining rights. A sample of this type of short clause is:

“Except as specifically restricted by an express provision of this Agreement, the Agency retains and may exercise all management rights and prerogatives in its discretion.”

A long clause will include an exhaustive list of specific managerial rights that are retained by the Agency. The following long clause is often used by public agencies:

“It is the exclusive right of the Agency to determine its mission, to set standards of services to be offered to the public, to exercise control and discretion over its organization and operations, to direct its employees, to determine the methods, means and personnel by which Agency operations are to be conducted, and to determine the merits, necessity or organization of any service or activity provided by law or executive order. In addition, the Agency retains all the authority and rights conferred on it by law, or other legal source, except to the extent that such authority is explicitly waived by the express terms of this agreement. The Agency’s exercise of its management rights hereunder shall not be subject to appeal or meeting and conferring, provided however, that the exercise of such rights does not preclude recognized employee organizations from appealing or meeting and conferring on the practical consequences or impacts that Agency decisions have on wages, hours, and other terms and conditions of employment.”

Within the Agreements negotiated by the Northern California Power Agency, we have successfully used the following management rights clause:

“Subject to state law and the provisions of the Agency's Employer-Employee Relations Policy, the rights of the Agency through its Commission and management include, but are not limited to: The exclusive right to determine the mission of its constituent departments; set standards of work or service; determine the procedures and standards of selection for employment and promotion; direct its employees; take
disciplinary action in accordance with law and the rules and procedures of
the Agency; relieve its employees from duty because of lack of work or
other lawful reasons; maintain the efficiency of Agency operations;
determine the method, means and numbers and kinds of personnel by
which Agency operations are to be conducted; determine the content and
intent of job classifications; determine methods of financing; take all
necessary actions to carry out its mission in emergencies; and exercise
control and discretion over its organization and the technology of
performing its work.”

This language has helped the Agency clarify the role and rights of
management, and defend actions it has taken that gave rise to grievances and
mediation. The Northern California Power Agency found that holding regular
training sessions for management on topics such as Management Rights has
reduced the number of misunderstandings that Managers have regarding their
ability to supervise and direct the workforce. In addition, by training managers on
employee rights and helping them to understand the “bargaining chip” held by
employees, managers are able to more effectively withstand challenges brought
by employees.

Employee Rights

In addition to the qualified right to strike, other employee organization rights
exist, such as:

- The right to represent organization members;
- To gain access to the employer’s property and communication systems to
  contact employees at reasonable times;
- To receive information from the employer necessary to discharge its duty
to represent employees;
- To have a reasonable number of employees given time off from their jobs
  without loss of compensation, to act as union representatives when
  participating in negotiations and processing grievances.

These rights are typically included in an Agreement under headings such as:
Employee Rights, Union Rights, Association Rights, Agency Shop, Use of
Bulletin Boards, etc.

The current Northern California Power Agency Agreements or MOUs
contain the following general statement of employee rights:

“Employee Rights as provided in state law and the Agency's Employer-
Employee Relations Policy- employees of the Agency shall have the right to
form, join and participate in the activities of an employee organization of their
own choosing for the purpose of representation on matters of employer-
employee relations, including but not limited to wages, hours, and other terms
and conditions of employment. Employees of the Agency shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the Agency."

The current Northern California Power Agency Agreement includes a provision to allow recognition of an Agency Shop. The following recognition statement acknowledges the pending change to an Agency Shop:

“The Agency formally recognizes the Union as the exclusive representative of those employees occupying the job classifications set forth in Appendix A to this Agreement. An Agency shop arrangement between the Agency and IBEW Local 1245, shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30% of the employees in the applicable bargaining unit requesting an Agency shop agreement and an election to implement an Agency fee arrangement and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the Agency shop agreement. All other provisions of an Agency shop arrangement shall be administered as indicated in the Meyers Milius Brown Act, section 3502.5. If there is approval of a majority of employees, the IBEW and NCPA will meet and confer on Agency shop implementation language."

Other more specific union rights are also detailed in Agreements, and these are crafted with the involvement of the employees. Careful wording of employee rights clauses including the recognition clause can help prevent misunderstandings. If a misunderstanding arises in the workplace and the Agreement is silent on the issue being disputed, management may claim that since the Agreement doesn’t cover the issue, the union has no basis for a grievance; and that the management rights clause gives them discretion to act. (Keep in mind that the effect of a change in working conditions requires bargaining.)

The perspective of employees on their rights often differs from management’s. It is not unusual for a steward to challenge the interpretation of the recognition and management rights clauses in order to process a grievance or require a meet and confer on an issue not addressed in the Agreement. Employees will try to use these clauses to demand the greatest rights for employees and the union, or, in other words, "to push the envelope".

It is common for employees to demand that management bargain over any proposed change, no matter what the management rights clause states under the theory that, “We won’t win every one, but by sticking to our rights and having an active membership behind us, we can "train" management to bargain over almost all working conditions".
In *The Legal Rights of Union Stewards*, author Robert Schwartz has the following recommendation for unions:

“a union that is concerned that its contractual management rights clause may be construed as a bargaining waiver should try to obtain new contract language, perhaps by adding a sentence affirming that the union is not waiving its rights to bargain. If this is not practicable, consider submitting a letter to management during contract negotiations stating that the union does not view the existing management rights clause as a waiver of its bargaining rights.”

Summary

The Meyers Milias Brown Act’s scope of bargaining language has been broadly interpreted to require negotiations on any topic relating to wages, hours, and working conditions, so long as a negotiated agreement would not *infringe on management’s policy decisions regarding the necessity or organization of any service of the Agency*. Preserving management rights and clarifying employee rights should be at the top of management’s list of priorities in preparing a clear and understandable Agreement.

The management rights clause preserves the right of management to act unilaterally on issues that are covered by the clause. It protects the employer’s right to exercise its managerial prerogatives. Knowing the importance of the language covering management rights and employee rights in an Agreement; and taking the time to prepare and educate the members of the negotiation team and the managers charged with administering the Agreement, leads to clear communication, better understanding among the parties, and can assist in developing a better relationship with the employees.

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September 2005

References: