PURPOSE

This paper presents guidelines on management rights clauses, which are important provisions in Collective Bargaining Agreements (CBA), Memoranda of Understanding (MOU) and Memoranda of Agreement (MOA) collectively referred to herein as CBA. The clauses can have a negative impact on the best interests of an organization. Because of deference given to legal decisions regarding management rights and general reliance on “inherent” rights, this paper posits the case that an enumerated management rights clause with clear, specific and unambiguous language, is preferred, and will prevail, over past practices and disputes over the intent of the parties. Management rights clauses are necessary, yet remain a neglected provision when bargaining agreements are being constructed. This paper suggests approaches that will regain bargained-away management rights.

MANAGEMENT RIGHTS CLAUSE

Management rights clauses reserve certain rights and responsibilities to management and specify that the exercise of these rights and responsibilities shall not be the subject of negotiations, grievances, or arbitrations.

Collective Bargaining Agreements generally start with a “Recognition” clause which formally acknowledges the union as the exclusive bargaining representative. However, I found few contracts that include a “City” or “Management” Rights clause. CBA’s do not exist solely to memorialize the rights of represented employees and their union. CBA’s should also clearly articulate what management can do, as well.

Views of Management Rights

There are two views on the rights of management. The first is the residual (reserved) view that asserts that management retains the right to decide all issues not explicitly relinquished in the CBA. Second is the enumerated or shared rights (explicit) view that states management only has the rights that are explicitly listed in CBA.

Residual/Reserved Rights Clause

Standard management rights clauses generally reserve for management all rights and authority to direct, manage and control the governance and operation of the agency to the full extent of the law. Following are two examples of residual/reserved clauses:

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.

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

1 CALPELRA, Labor Relations Academy II: The Arbitration Process
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.

Excluding legalese, these clauses say, in essence, that one should think of collective bargaining rights as those which flow from management to employees. Hence, under residual clauses those management rights that are not surrendered to the employees during negotiations remain with management. In her Calpelra CLRM paper, HR Director Lynn Bianchi-Rossi, Northern California Power Agency, provided a clear explanation of such rights:

*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.*

Management clauses based on a reserved rights theory may appear unnecessary as many think of these rights in terms of being inherent. Unfortunately, what is believed to be “inherent” in many CBAs must now be regained due to changes in precedent (including misguided reliance or readings of dicta), arbitration awards and past practices by organizations that have given

---


3 Dictum in Rialto Police Benefit Ass’n v. City of Rialto, 155 Cal.App.4th 1295, 66 Cal.Rptr.3d 714 (2007) has been misinterpreted as an indication that management rights may be unenforceable and subject to Meyers-Millas-Brown Act (“MMBA”) unless these rights are specifically outlined and agreed to in the MOU. The court does not reach a discussion of residual or explicit clauses however, the holding does provide clarity on when parties must meet and confer under MMBA in holding, the language of the MMBA requires the City and the Union to meet and confer over matters within the scope of representation, including, among other things, “wages, hours, and other terms and conditions of employment.” However, the MMBA also exempts from that requirement the “merits, necessity or organization of any service or activity provided by law or executive order.” Citing the *Building Material* balancing test, the court concluded that the City’s action was within the scope of representation, and therefore subject to the meet and confer requirement, “only if the employer’s need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.”

4 An arbitrator reviewing the meet and confer provisions of an MOU found that the Agency should have considered the Union’s proposal to waive the layoff provisions in order for an employee to bump into a position that she had not previously held. Citing that the Agency should recognize that circumstances may justify an alternative not expressly addressed in the layoff article. The arbitrator ordered the employee be placed in a position she was not entitled to under the CBA. On a motion to vacate the arbitration award the court in *San Francisco Housing Authority v. SEIU Local 790*, (Mar. 9, 2010, First District, Div. Two), __ Cal. Rptr. 3d __, 2010 WL 779241 confirmed that arbitrators have extremely broad authority to construe and interpret the meaning of labor contracts. The court acknowledged that arbitrators draw their power from the text of the parties’ agreement, but that in absence of a limiting clause, an arbitrator does not violate the contract if the remedy selected “bears a rational relationship to the underlying contract.” The court made clear that arbitration awards are entitled to “deferential review.” With respect to a CBA, so far as the arbitrator’s decision concerns construction of the contract, the courts “have no business overruling him because their interpretation of the contract is different from his.” Moreover, “arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find that the relief granted was authorized by a specific term of the contract.” The dispositive question, said the court, is where the remedy imposed by the arbitrator was arguably based on the contract or, stated otherwise, whether the award conflicts with express terms of the contract.
away too many straws. Arbitrators are frequently confronted with disputes over whether certain managerial rights have been negotiated away. Some arbitrators rule that rights not covered by specific contract provisions are retained by the employer while others rule that certain unspecified rights implied in the recognition of a union have been contracted away.\(^5\) When terms are not explicitly outlined in agreements organizations open themselves to the possibility of grievances on grounds that management actions are both unenforceable and subject to the Meyers-Milias-Brown Act (MMBA).\(^6\)

**Shared Rights/Enumerated Rights Clause**

Considering the two stated purposes of the MMBA is (1) “to promote full communication between public employers and their employees,” and (2) “to promote the improvement of personnel management and employer-employee relations”\(^7\) ambiguity in the CBA only furthers an agency from achieving these goals. As such, enumerating the rights of management allows management to act unilaterally with regard to terms and conditions covered by the clause while also defining an employee’s respective rights and limitations.\(^8\)

Management Rights clauses should be approached under a shared rights view. Under collective bargaining both sides forego rights so that the organization can be successful. Clear and concise management provisions strengthen management’s position in arbitrations, grievances and mediations because the terms were agreed upon by both parties in negotiations. These clauses should clearly state what can be done, as contrasted with an agreement which is silent on a subject of contention where interpretations of other contract provisions can become relevant.\(^9\)

The City of Emeryville Management of Emeryville Services Authority (MESA) MOU with SEIU, Local 1021 (effective July 1, 2007 - June 30, 2010) locates the rights retained by management ten pages into the agreement. The agreement concentrates mainly on the rights of the union rather than representing the shared rights and duties of both parties. The following examples of strong management clauses address the issues in specific terms with clarity. In particular, see text in bold:

**IAEP Local 167: Article 1 Management Rights**

Except as specifically limited by the expressed written provisions of this Agreement, the management of employees and the direction of the working forces shall be vested solely and exclusively in management. The Union recognizes that the Employer is not required to meet and negotiate on matters of inherent management rights. This Article is not intended to limit the employer’s obligation to bargain with the Union over mandatory subjects of bargaining.

This provision shall include, but is not limited to, the right to determine the quality and quantity of work performed, to determine the number of employees to be employed, to determine work locations. To determine the number of employees at each work location, to lay off employees, to


\(^6\) California Government Code §§3500, et seq.

\(^7\) Id. at §3500(a)

\(^8\) In addition to enumerating, always include language stating that the list is not all-inclusive; reserve to the employer all rights not specifically restricted by the express terms and those subjects waived by the union.

\(^9\) For this reason, Sheryl Duran in *A Labor of Language or The Importance of Writing Concise, Unambiguous Contracts* suggest that multiple parties review contract language for interpretations and attempt to take into account various applications of the language.
assign and delegate work, to respond to changes in demand and employment to maintain and improve efficiency, to require observance of Employer rules, regulations, and other policies, to determine the methods and equipment to be utilized and the type of service to be provided, and to change, modify, or discontinue existing methods of service and equipment to be used or provided. The foregoing illustrations of the Employer’s inherent management rights will not be deemed to exclude other inherent management rights and functions not expressly stated herein.

City of Oakland, Section 4 of Employee Relations Rules Resolution No. 55881

City Responsibilities and Rights. It is the exclusive right and responsibility of the City to determine the organization of its activities, to determine the mission of each of its organizational units, to set standards of service, to determine and enforce the required levels of employee skill and performance, and to exercise control and discretion over its organization and operations. It is also the exclusive right and responsibility of the City to assign, reassign and direct its employees and the use of its equipment and vehicles, to take disciplinary action for proper cause, to terminate employees for lack of funds or work or other legitimate reasons, and to determine the means, number and kind of personnel by which the City's operations are to be conducted. It is also within the City's exclusive right and responsibility to contract any work or operation permitted under the City Charter and to take all necessary actions in emergencies to carry out its functions. The City will 'meet and confer' to the extent required by law on the practical consequences of contracting any such work or operation permitted under the City Charter."

The City shall not be required to meet and confer in good faith on City responsibilities and rights or on employee rights as defined in Section 4 and 5 respectively. Proposed amendments to this Resolution are excluded from the scope of the meet and confer process, but are subject to consultation.

City of Oakland, Agreement with Represented Deputy City Attorney & Special Counsel Assoc.: Article 3 Management Rights

The City's rights are stated in Section 4 of Employee Relations Rules Resolution No. 55881.

The Union agrees that the City has the right to unilaterally make decisions on all subjects that are outside the scope of bargaining, including determining and modifying levels of service to the public; determining and modifying job qualifications; determining work to be performed by equipment and technology; promulgating and enforcing standards of performance and deciding to layoff employees. The City's exercise of its management rights is not subject to challenge through the grievance procedure or in any other forum, except where otherwise in conflict with a specific term of this collective bargaining agreement.

The drafting of management rights clauses, as is true for all provisions of collective bargaining agreements, should be carefully scrutinized as part of the pre-negotiation process. Several proactive techniques are available to avoid poorly written and ambiguous provisions

---

10 Oakland’s clause is similar to the federal labor statute on management rights found in 5 U.S.C. §7106. Permissive rights under Section 7106(b)(1) are those rights that management may bargain, but is not statutorily required to do so (i.e. the numbers, and types of employee's or positions assigned to any subdivision, project and the technology, methods, and means of performing.) Even with respect to nonnegotiable “mandatory” management rights, management must bargain, upon request, over the procedures it will use in exercising these rights and on appropriate arrangements for employees adversely affected. For example, in a reduction-in-force (RIF), the decision to reduce is a management right, but how that RIF is conducted and outplacement for displaced employees is negotiable. Incidentally, California courts rely heavily on federal labor relations statutes and interpretations, where such as here the provisions of federal statutes are analogous to the MMBA, considering that the National Labor Relations Act was the model for California collective bargaining laws.
such as, organizing a contract checklist based upon your organization’s goals of service, reviewing the history of grievances that have arisen and uncovering loose interpretations of contract provisions. Each clause of the existing agreement should be reevaluated and revised, if necessary, to provide well-crafted alternative language. Every contract provision should be written to stand on its own as a complete expression of the parties’ intent. Never accept any wording simply because the language “sounds good.” The contract provision should be able to withstand any test. Whether an organization chooses a residual or enumerated management rights clause, it is essential that the drafters understand which items require bargaining in order to craft an enforceable clause.

When is Bargaining Required?

Bargaining is required where actions substantially affect/impact employees unless the Union has specifically waived its right to bargain or grieve on a particular issue by clear and unmistakable waiver (i.e. in writing via zipper clause with documented history of actual negotiations demonstrating that the parties intended waiver) or inactivity. Following is a brief overview of typical mandatory as compared to permissive bargaining subjects and relevant legal parameters when drafting a CBA.

The Meyers-Milias-Brown Act defines the scope of representation for local public employee organizations in California Government Code §3504 as:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

The court in Claremont Police Officers Ass’n v. City of Claremont, 39 Cal. 4th 623, 631 (2006) noted, “[t]he definition of scope of representation and its exceptions are arguably vague and overlapping.” “[W]ages, hours and working conditions,” . . . broadly read could encompass practically any conceivable bargaining proposal; and “merits, necessity or organization of any service” . . . expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city’s discretion.” Since the ruling in Claremont Police Officers Ass’n case law has expounded the scope of bargaining to actions with a “significant and adverse effect” on wages, hours, or working conditions of the bargaining-unit employees.


14 Note William F. Kay has prepared a mandatory subject of bargaining list in the publication for the CALPELRA, Labor Relations Academy I: The Foundations of Labor Relations class.

15 Building Material & Construction Teamsters’ Union v. Farrell, 41 Cal.3d 651, 660 (1986) setting forth a three prong balancing test for determining whether the MMBA meet and confer requirement applies to management decision.
In *Building Material & Construction Teamsters’ Union v. Farrell*, 41 Cal.3d 651, 660 (1986) the Court went on to explain that the scope of bargaining may further be limited as

> [t]he employer may . . . be excepted from the duty to bargain under the ‘merits, necessity, or organization’ language of §3504. If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.

Mandatory subjects of bargaining are nondiscretionary obligations of employers to bargain until all impasse procedures are exhausted before taking unilateral action. Unilateral changes prior to completing the impasse procedure on a subject constitutes bad faith bargaining.

Examples of mandatory subjects are:


Permissive subjects are those that impose no legal obligation to meet and confer because the obligation under MMBA does not extend to insubstantial items that only indirectly affect the employment relationship. For instance, the decision to reduce the size of the entire workforce with no concurrent transferring of the same duties to others is a purely managerial prerogative. However, the effects deriving from a layoff is a mandatory subject of bargaining.

Permissive subjects are as follows:

- **Actuary Calculations on County Retirement Contributions.** Mendocino County Employees Ass’n v. Mendocino, 3 Cal. App. 4th 1472, 1479 (1992).
- **Deviation from Promotion Policy was Exempt because it Furthered Goal of Federal Consent Decree Designed to Racially Integrate Fire Department.** San Francisco Fire Fighters Local 798 v. Board of Supervisors, 3 Cal. App. 4th 1482, 1494 (1992).

---

16 Examples of matters relating to merits, necessity or organization of service or activity include investigation and processing of citizen’s complaints - Berkeley Police Ass’n v. City of Berkeley, 76 Cal. App 3d 931, 937 (1977), use of deadly force by police officers - San Jose POA v. City of San Jose, 78 Cal. App 3d 935, 945-946 (1978) and specific staffing assignments regarding implementation of consent decree concerning employment discrimination - San Francisco Firefighters Local 798 v. Board of Supervisors, 3 Cal. App 4th 1482, 1494 (1992).


SUMMARY

The certification of a union as the exclusive bargaining agent erodes the unilateral power the organization once had over its employees. While the strengthening of management rights clauses may allow organizations to retain/regain limited autonomy, whether via residual clauses or as enumerated in the agreement, particular attention should be paid to the effects of the implementation of such rights. The truth of the matter is that there are no inherent rights, considering that actions by employers to exercise its rights that also impact the terms and conditions of employment of represented employees require, at minimum, notice and an offer to bargain. Organizations, however, should not feel helpless in redistributing power or be stuck with recycled unproductive contract provisions. Creating clear, unambiguous language in CBA along with consistent implementation will assist in developing better communications between employees and employers as well as reducing cost from grievances and arbitrations.

While the efforts to draft or revise language are time consuming if not arduous; the result is worth the effort. It is in the best interest of the organization that, as management, you still retain tools to improve your organization through careful, precise wording which is essential in creating an effective relationship between the parties.

Dominique B. Burton, Paralegal & ADA Coordinator
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608
510.596.4380
dburton@emeryville.org
db_burton@yahoo.com

August 2010