BINDING INTEREST ARBITRATION: THE IMPACT ON NEGOTIATIONS,
PARTICULARLY WHAT TO DO WITH “BLENDED” BARGAINING UNITS

By
Sarah Franco, Senior Human Resources Analyst
Riverside County Human Resources

**Background:**

During the 1999-2000 legislative sessions Senate Bill 402 (SB402) was passed, amending the Code of Civil Procedure to provide “binding arbitration of economic issues that arise during negotiations with unions representing law enforcement officers.”¹ This legislation required local public agencies, at the request of labor unions representing certain public safety officers, to submit to binding interest arbitration the unresolved economic contract terms for wages and benefits following an impasse in labor negotiations. Under this law, the arbitrator’s determination of the economic issues was final and binding.

In May of 2001, the Riverside Sheriff’s Association (RSA) demanded arbitration under this new provision for the Probation Officers it represented. The County of Riverside refused to grant the request and RSA sought a Writ of Mandate from the Courts. Ultimately the matter made its way to the California Supreme Court. The Court determined that SB402 was unconstitutional², because it violated Section 1(b) and 11(a) of the California Constitution.

Undaunted by this failure the proponents of this measure introduced, and ultimately passed, Senate Bill 440³ (SB440), which was signed into law by Governor Davis as one of his final acts. The substantive effect of SB440 was the same as SB402, with the exception that a governing body could, but only by unanimous vote, override the determination of the labor arbitrator.

---

¹ County of Riverside v. Superior Court (Riverside Sheriff’s Assn.), supra
² infra
³ Code of Civil Procedure §1299-1299.9
In December 2005, a trial court addressed the question of whether this single modification passed constitutional muster. The San Bernardino Superior Court found that it did not, relying on the rationale in the Supreme Court decision cited above. Perhaps that lower court ruling will result in the death of SB440, but for now its future is unclear.  

While we await further clarification as to the constitutionality of SB440, public agencies should be aware of the impact of the current legislation because, even if SB440 does not survive, the lobby behind this legislation is powerful and will likely keep trying until they succeed.

*The Impact on the Bargaining Process*

SB440 requires a fundamental change in the way public sector agencies bargain with peace officers and firefighters for the simple fact that the “end game” is so different. Under the traditional negotiation model, the parties negotiate towards a mutually acceptable agreement but both sides know that, in the end, the public agency has the power to unilaterally implement its “last, best, and final” offer. Bargaining is conducted so that the agency moves progressively closer to its final position, either reaching agreement on the way or ultimately imposing its terms. However, with unilateral implementation being both a short term and a less than optimal result, there is pressure on the agency to move right to its “bottom line” in the negotiation process.

Conversely, under the interest arbitration model contained in SB440 the “end point” is not the Agency’s typical “last, best, and final offer.” Instead, the agency’s last offer need only be slightly more “reasonable” on the whole than the union’s final offer. As long as the scale tips in the agency’s favor, there is no incentive to make any movement towards a settlement. The result being that the economic package offered as the “last, best, and final” under the interest arbitration model may be substantially less

---

4 Adelanto Community Correctional Facilities Employees Association v. City of Adelanto
than one offered through bargaining conducted using the traditional bargaining model. Simply put, under the interest arbitration model the “end point” is arbitration and all strategy decisions have to be made with that in mind. That means every proposal, every concession; every bargaining strategy must take into account the possibility of arbitration as a settlement mechanism.

In addition, SB440 sets out eight factors that an arbitrator must take into account when issuing an award:

1. The stipulations of the parties.
2. The interest and welfare of the public.
3. The financial condition of the employer and its ability to meet the costs of the award.
4. The availability and sources of funds to defray the costs of any changes in matters within the scope of arbitration.
5. Comparison of matters within the scope of arbitration to other employees performing similar services in corresponding fire or law enforcement employment.
6. The average consumer prices for goods and service, commonly known as the Consumer Price Index.
7. The peculiarity of requirements of employment, including, but not limited to, mental, physical, and educational qualifications; job training and skills; and hazards of employment.
8. Changes in any of the foregoing that are traditionally taken into consideration in the determination of matters within the scope of arbitration.

The mandatory nature of this list means that factors some agencies may not typically consider, such as “ability to pay” or “comparable agencies,” now become central considerations in formulating proposals. The parties may lessen the focus on
negotiations and instead spend significant time in researching and collecting evidence in support of these factors.

Particularly troubling is the “ability to pay” factor, which requires an agency to open its finances to scrutiny. This could lead bargaining off in an unproductive direction because “ability to pay” may not have been historically linked to “prepared to pay.” Just because one is able to pay doesn’t mean one is willing to pay; in part because the economic packages offered to other bargaining units within the agency are critical factors in order to maintain stable labor relations. Binding arbitration can remove the agency’s ability to insist upon appropriate increases for the eligible bargaining unit and essentially authorizes an arbitrator to provide increases to law enforcement and firefighters that may fail to take into account an agency-wide perspective.

To compound the problem, under the MMBA an imposed “last, best, and final offer” cannot exceed one fiscal year; yet under SB440 the party’s last position submitted to the arbitrator could be for multiple years.

Additionally, SB440 may prevent the parties from adopting non-economic terms they agreed upon during bargaining. Once the arbitration panel settles on either party’s economic package, an MOU is concluded. It is unclear what happens to the non-economic items the parties have tentatively agreed to during bargaining. There is no mechanism to include those as part of the newly adopted MOU.

**Blended Bargaining Units**

While the issues associated with interest arbitration are difficult for eligible bargaining units, they become virtually unworkable for blended bargaining units. For example, the County of Riverside has two blended bargaining units: the “Law Enforcement Unit” (“LEU”) and the Public Safety Unit (“PSU”). The LEU consists of Sheriff Corporals, Sheriff Investigators, District Attorney Investigators, Deputy Sheriffs, Correctional Corporals, Correctional Deputies, and Deputy Coroners. The PSU consists
of Probation Officers, Group Counselors, and Group Supervisors. They both contain employees covered by SB440 and employees not covered by SB440.

The Public Safety Unit is split roughly 50/50 between eligible Probation Officers and ineligible Group Counselors. If the eligible group is able to pursue interest arbitration it would eventually result in a binding MOU for the unit because there cannot be two MOU’s for one unit. That leaves a big question: what happens to the other half of the unit?

In July of 2004, Riverside County attempted to modify the bargaining units so they would no longer be blended units. The unit modification proposal went before an arbitrator and in February of 2006, the decision of the arbitrator, in part, was as follows, “The statutory modifications arising from the passage of ...SB440 do not justify the proposed modifications of the LEU (Law Enforcement Unit) and the PSU (Public Safety Unit).” The units remain mixed.

While the above mentioned unit modification proposal was unsuccessful, should SB440 remain on the books, or similar legislation come forward related to binding arbitration for police and firefighters, public sector agencies should consider redefining bargaining units that are “mixed units” in order to avoid the inevitable conflicts which binding arbitration creates in a “mixed unit.”

The interest arbitration law was simply not designed to accommodate a mixed unit. For example, an impasse must exist before the application for interest arbitration. What happens in the agency continues to bargain with the ineligible group? A valid impasse cannot exist when negotiations are ongoing. In this situation, the union would suspend negotiations for the ineligible group. The practical effect in a mixed unit is that the ineligible group will, at a minimum, have to wait for the eligible group to settle its dispute. However, when the arbitrator’s award is issued, by law a new MOU is created.
That means the agency doesn’t have to continue bargaining and the ineligible group may be left without a remedy.

There is no incentive for the agency to settle with the ineligible group because any concession made to settle an agreement with that group will compromise the agency’s position at arbitration. This leaves the ineligible group in the unenviable position of being without a contract while the other portion of the bargaining unit pursues the arbitration option. This can take months or years and the only reason their issues are not being addressed is that neither side wants to prejudice its position at arbitration.

Lastly, when bargaining for a mixed unit, the strategies of the parties may conflict. For example, the union may be following the traditional model because it does not believe it can do better at arbitration. However, the agency is always prudent to proceed as if arbitration were the settlement device and avoid making significant movement towards settlement in order to protect its interests at arbitration. So while settlement may have been a possibility, the threat of interest arbitration can affect strategy to the point where negotiations proceed on a different path and may end up at impasse when that was not really necessary.

Bargaining with Blended Units

1. Strategy - From the outset, determine what percentage of the bargaining unit is eligible and what percentage is ineligible for interest arbitration. Simply put, count the votes. If there are more ineligible employees than eligible you may be able to accomplish a settlement by satisfying the demands of that majority because ratification only requires 50% + 1. On the other hand, if the ineligible group is relatively small, it is difficult to conceive that their interests will carry the day. The real difficulty, for both sides, will be when the groups are relatively equal in size. The union is in the tough political position of having to choose sides and the agency will not be sure which strategy is likely to be followed.
Since only the eligible group can apply for interest arbitration, as discussed above, a decision will need to be made about what to do with the ineligible group. The strategy could be for the agency to position itself for interest arbitration and ignore the demands of the ineligible group, or in the alternative, using the traditional bargaining method, bargain with the ineligible group hoping to reach agreement and avoid impasse altogether. This decision will be highly political in most cases as either strategy will likely have a negative impact on a portion of the group.

If the strategy of the agency is to position itself for interest arbitration, the bargaining team should spend a considerable amount of time researching and collecting data to support its position. Instead of focusing on what the agency is willing to offer in an economic package, the focus should be on what is a reasonable economic package as compared to similar jurisdictions.

2. Drafting Proposals - If it is clear that the “end point” is binding arbitration for all of some of the employees in the unit, your agency’s proposals should be careful to limit, as far as possible, those that are economic in nature. Under SB440, only issues within the “scope of arbitration” may be submitted to arbitration which includes salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and all other forms of remuneration. Careful consideration should be given as to what economic items the agency proposes because each outstanding proposal will be subject to arbitration.

3. The Bargaining Process - Pay close attention at the bargaining table to the opposing parties’ proposals. If there is little or no movement towards settlement from proposal to proposal, then that may signal that the union is positioning for binding arbitration. At this point, each proposal should be carefully considered in order to put the agency in a favorable position for binding arbitration.
Also carefully read the union’s proposals relating to the ineligible group. By attempting to determine the union’s strategy for that portion of the unit, one may be able to discover its overall strategy.

Be prepared to change strategy based on what happens at the table. You may go into negotiations believing that you are headed for interest arbitration and position yourself accordingly. However, once at the bargaining table you may find that the will of the majority is to get a deal.

In addition, ensure that multiple members of the bargaining team are taking detailed notes during negotiations and, in particular, the proposals of the parties. Once an application has been made for binding arbitration and the arbitrator is selected, the notes become critical to the process. Since the stipulations of the parties must be considered by the arbitrator, it is important detailed notes kept by the bargaining team’s members reflect the events that preceded the declaration of impasse and the application for binding arbitration.

**Conclusion**

Binding arbitration or similar legislation may be a cold, hard fact that public agencies will have to face eventually. It is an imperfect model, especially when dealing with “mixed” bargaining units. However, it may become a reality and agencies will have to adapt their strategy, preparation, and tactics accordingly.

Sarah Franco  
Senior Human Resources Analyst  
Riverside County Human Resources  
4080 Lemon Street  
Riverside, CA 92501  
(951) 955-3432  
smfranco@co.riverside.ca.us