A BASIC GUIDE TO IMPACT BARGAINING:  
THE LAYOFF

By Thom Harpole, SPHR, IPMA-CP

The execution of management rights decisions may impact mandatory subjects of bargaining. When this occurs, a duty to bargain called impact bargaining arises. Impact bargaining is distinguished from decision bargaining (when the decision is in the scope of representation) in that only the impacts of the decision on mandatory subjects of bargaining are negotiable; the decision itself is not.

The recent case of the Claremont Police Officers Association v. the City of Claremont¹ concerns the concept of impact bargaining and is demonstrative of the complexity of this issue. In this case it was clear the City’s decision to implement a study regarding vehicle stops was a management right. What was less clear was whether implementation of the study impacted mandatory subjects. In deciding this case (in the City’s favor) the courts established a useful test for determining when the implementation of a management rights decisions falls within the scope of representation, and thus necessitates impact bargaining. This test is useful in evaluating impact bargaining issues under the Meyers Milias Brown Act (MMBA).

The Scope of Representation (Mandatory Subjects of Bargaining)

Under the MMBA, the scope of representation includes:

…all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment…²

Employers and employee organizations are required to meet and confer in good faith regarding mandatory subjects of bargaining.³ To meet this requirement, an employer must provide reasonable written notice to affected employee organizations of decisions relating to matters within the scope of representation.⁴ Upon the request of the employee organization, there is a mutual obligation to meet and confer promptly for a reasonable period of time and endeavor to reach agreement on issues within the scope of representation.⁵ The scope of representation is broad and the labor relations practitioner must think broadly when determining whether a subject under consideration is a mandatory subject of bargaining. Legal resources should be consulted. The body of law upon which

² California Government Code section 3504.
³ California Government Code section 3505.
⁴ California Government Code section 3504.5.
⁵ California Government Code section 3505.
MMBA interpretations are made includes judicial decisions⁶, applicable National Labor Relations Act precedents⁷, and decisions regarding other California labor relations statues with parallel provisions⁸.

Management Rights

The MMBA qualifies the scope of representation to provide management exclusive rights:

…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.⁹

Certain decisions are exclusively management decisions which are exempted from the scope of representation in order to preserve an employer’s ability to manage and avoid limiting managerial prerogative. The Public Employment Relations Board (PERB) has determined management rights to include: decisions regarding services to be offered¹⁰, assignment of duties (if reasonably related to existing duties)¹¹, decisions to create new classifications (to perform functions not previously performed) or decisions to abolish classifications (and cease to engage in activities performed)¹², and layoffs¹³.

Layoffs and the Duty to Bargain

The layoff serves as an excellent example of a decision requiring impact bargaining. A primary reason for this is the guidance provided by PERB regarding layoffs and the scope of representation. Additionally, in the past few years many public employers have become all too familiar with layoffs. The general principals at play in bargaining the impacts of a layoff are at play in bargaining the impacts of other management rights decisions. It is for these reasons that the example of a layoff was selected to provide a guide for impact bargaining.

The decision to layoff employees is a management right. “[T]he determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the workforce, is a matter of fundamental managerial concern which requires that such decisions be left to the employer’s prerogative.”¹⁴ However, there are multiple mandatory subjects that may be

---

⁶ California Government Code section 3510 (a).
⁹ California Government Code section 3504.
¹¹ City & County of San Francisco (2004) PERB Dec. No. 1608-M.
impacted by a layoff. These include safety and workload issues\textsuperscript{15}, timing of the layoff\textsuperscript{16} and layoff rules\textsuperscript{17}.

**Duty to Notice**

The duty to provide notice and an opportunity to negotiate any impacts effectuated by a decision to layoff is triggered once a firm decision is made\textsuperscript{18}. The MMBA requires that the notice be in writing\textsuperscript{19}. The notice should clearly articulate the employer’s decision and differentiate the management rights decision from any negotiable issues. As it may not be fruitful to forecast which mandatory subjects would be of interest to the employee organization, it is recommended that the notice simply state the management rights decision and provide the employee organization an opportunity to request negotiations on any changes to mandatory subjects of bargaining effectuated by the decision. Some labor relations practitioners may be tempted to proactively identify and even address issues that may be of interest to the employee organization. Such attempts may prove counterproductive as they could lead the employee organization to issues which otherwise would not have been identified, or they may be viewed by the employee organization as an attempt to circumvent or limit the bargaining process. It is recommended that the notice include a reasonable response deadline for the employee organization to request bargaining.

An example of notice of layoff follows:

```
Dear [Employee Organization Official]:

The City has decided to reduce 50 positions which fall within your organization’s bargaining units. A listing of the positions to be reduced on June 30, 2007 is attached. The reduction of positions will result in a layoff of employees which will be conducted pursuant to the procedures captured in the current Memorandum of Understanding.

If your organization desires to meet and confer on identified impacts of this layoff that fall within the scope of representation, please contact me no later than May 31, 2007.

Sincerely,

[Labor Relations Practitioner]
```

\textsuperscript{15} Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608.
\textsuperscript{16} Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608.
\textsuperscript{17} Los Angeles County Civil Service Commission v. Superior Court of Los Angeles County (1978) 23 Cal.3d 55.
\textsuperscript{19} California Government Code Section 3504.5.
After the written notice has been provided, the labor relations practitioner may follow-up with the employee organization to ensure the notice was received and to shepherd the process. Such action helps strengthen professional relationships with employee organization officials and is demonstrative of the employer’s good faith effort to meet its noticings obligation.

**Demand to Bargain**

The notice provided by the employer does not initiate or invite bargaining; rather, it provides the employee organization an opportunity to request (demand) bargaining. Once the employer provides adequate written notice to the employee organization the burden shifts to the employee organization. The employee organization must then make a valid request for bargaining in order to trigger the employer's duty to bargain. The employee organization’s request does not need to be in writing but should identify the subjects the employee organization wants to address. These subjects should be within the scope of representation. A request to bargain a non-negotiable decision or a request for information regarding its impacts will not be interpreted as a demand to negotiate over the effects of the decision. The labor relations practitioner should analyze the employee organization’s request to determine if the duty to bargain has been triggered. The employer’s philosophy concerning the labor-management relations will play a critical role in determining its response to the employee organization’s request.

If the employee organization fails to respond to the notice within a reasonable period of time, it waives its right to meet and confer. In Stockton Police Officers’ Association v. the City of Stockton, the courts determined that the City met its duty to provide notice of a proposed change in working conditions, and that the Police Officers’ Association failed to invoke the meet and confer requirements by not making a timely request to bargain; thus, waiving its right to meet and confer. In this case, the City provided reasonable written notice of a change in working conditions in June of 1986. The notice was received by the Police Officers’ Association after the requested response date stated in the notice, and the Association did not respond or request an extension of the requested response date. In September, the change was addressed in a public meeting, and while the Association stated they felt the change was a meet and confer issue, a request for bargaining was not made. The change was implemented a few days later. That December, the Association formally requested to meet and confer. It was determined that this request was not reasonable given that the Association was provided notice of the change and had ample opportunity to request bargaining prior to the change being made. If an employee organization fails to respond to sufficient notice within a reasonable period of time, the employer may move forward with the execution or implementation of its decision.

---

20 City of Richmond (2004) PERB Dec. No. 1720-M.
With the example of the layoff, we will assume the employee organization wants to negotiate regarding the redistribution of workload that will result from the layoff. In some form, whether written or verbal, the employee organization will need to communicate this request. Redistribution of workload following layoff is within the scope of representation and request stated above identifies a negotiable subject impacted by the management rights decision. Thus, the employer’s duty to bargain would be triggered.

**Providing Information**

Prior to implementing a decision, management has the duty to provide the employee organization with information necessary and relevant to bargaining.22 Unless compelling reasons exist, this information must be provided prior to commencement of the meet and confer process.

Situations may arise where the employee organization does not request bargaining on the impact of layoff, but instead requests information regarding the layoff. Such requests may precede a request to bargain. If the information requested is relevant to subjects within the scope of representation, such requests should be granted in as timely a manner as possible.

**Bargaining**

An important aspect of bargaining is preparation. Once the duty to bargain is triggered by the employee organization’s request, the labor relations practitioner should fully analyze the employee organization’s request. It is critical to review the current Memorandum of Understanding (MOU) to determine if there are any provisions in the agreement applicable to the request. If any such provisions exist, they should be incorporated into the employer’s analysis. Provisions included in the MOU need not be re-bargained as the parties have already come to agreement as to how these matters are handled. Anticipating the employee organization’s concerns will serve the labor relations practitioner well in preparing for bargaining.

Once the employer has gathered and analyzed all relevant information, and has assembled a negotiating team able to address the issues, the employer is ready to commence the bargaining process. A first step in this process is to establish the schedule. Meeting schedules should be set to ensure there is adequate time to reach agreement or impasse. If there is an impasse procedure, time must be allocated for it.

At the beginning of the meet and confer process, the parties should establish ground rules and define the issues to be negotiated. A significant aspect of the bargaining process involves sharing and exchanging information. The labor relations practitioner should be sensitive to the limits of the employer’s

---

informational obligations, keeping in mind that too much information, unnecessary information, or a lack of information, can move the parties away from agreement.

The labor relations practitioner should be aware of impact bargaining “creep” or the extent to which impact bargaining discussions creep into matters relating to management rights. Such “creep” has the potential of moving the negotiations into inappropriate areas. Although, in some circumstances this “creep” could be appropriate and in the employer’s best interest (provided the labor relations practitioner guards the employer’s management rights). An example of impact bargaining “creep” is a discussion regarding the redistribution of workload that drifts into a discussion concerning the merits of the employer’s decision to layoff employees.

As with any negotiations process, the parties will be best served by seeking to understand the other party’s interest and working toward a mutually acceptable agreement. Where there are no overriding operational concerns or other limitations, the employer’s negotiating team should have the flexibility to address the issues in a manner which will bring about agreement.

Prior to executing a management rights decision, the parties will need to either reach agreement or impasse on the impacts to mandatory subjects. Once a reasonable amount of time has passed and if it is clear that agreement is not likely, the parties are at impasse. If the agency has an impasse procedure, the MMBA requires that it be exhausted.23 As management rights decisions are not within the scope of representation, they would not be subject to the impasse procedure.

With the example of the request to bargain over the redistribution of workload following layoff, the employer should prepare for negotiations by developing proposals which consider the applicable provisions of the MOU, other policies and procedures, and the interests of the employee organization. The proposals should contain enough detail to facilitate meaningful discussion. Data and information relevant to the redistribution of workload should be made available. The negotiating team should include experts able to participate in the negotiations because of their knowledge of the issue(s) at hand. In addition to the labor relations practitioner, the negotiating team may include an operating manager from the unit being reduced and a human resources representative. As the impact of a layoff is being bargained, the negotiating team should be sensitive to the employee organization’s difficult position. Much of the information provided, including management’s positions and rationales may be met with resistance because of the nature of the decision. Layoffs are difficult for employees and their representatives, and the employer’s bargaining team should be patient, flexible and receptive to employee organization concerns.

23 California Government Code section 3505.4
Documenting Agreement

Remember to document issues as they are agreed upon. It is recommended that tentative agreements be formalized as they are reached. Once agreement is reached on all mandatory subjects of bargaining, a formal written agreement should be prepared which incorporates all tentative agreements. The document should use clear and unambiguous language, and both parties should have a clear understanding of its meaning. Once agreement is reached, management may execute its management rights decision, taking care to monitor the agreement to ensure that covered issues are properly implemented and administered.

Conclusion

There is no duty to bargain a management right; however, the exercise of management rights may impact mandatory subjects of bargaining. To meet its obligations, an employer must provide the employee organization with written notice of the decision which may effectuate changes to mandatory subjects of bargaining. At the employee organization’s valid request, the employer must bargain the issues that fall within the scope of representation. To successfully approach impact bargaining one must understand the scope of representation, management rights and the interplay between the two areas. Beyond this, impact bargaining is much like any other bargaining. To be successful one must be anticipatory, prepared, insightful and flexible.

Thom Harpole, SPHR, IPMA-CP
Labor Relations Officer
City of San Diego
1200 Third Avenue, Suite 1316, MS-56L
San Diego, CA 92101
(619) 236-5586
tharpole@sandiego.gov

July 2007