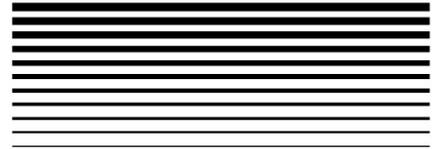


# NEGOTIATOR'S NOTEBOOK



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## PREPARATIONS FOR BARGAINING

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**P**reparing adequately for bargaining is a key to the success of your district's labor negotiations. Being well prepared allows the district to address management concerns and respond to union proposals more quickly and efficiently.

### **Analyzing your contract**

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The first step in preparing for negotiations is reviewing the current contract.

### **Board review of contract**

Board members should identify contract issues they want to address, including provisions that are vague or ambiguous, limit board action or might restrict future plans. In reviewing the agreement, the board should consider short- and long-term goals and board priorities.

In the area of goals, particular attention needs to be given to any contract provisions relating to student achievement or teacher accountability.

In addition, note any permissive language which could be eliminated. Any changes to current contract language regarding evaluation procedures must wait until those contracts expire.

Senate Bill 880 may require changes in existing contract language regarding personnel files, layoff procedures and grievance procedures. Other adjustments may be warranted, such as changes to discipline and evaluation procedures.

### **Administrative review of contract**

Administrators should identify articles in the contract that are causing difficulties. Articles that are unclear or unreasonably restrict management discretion should be noted. Some examples are provisions which restrict the assignment or transfer of staff, the scheduling of employee vacations (when relevant) and the selection of textbooks and supplies.

Administrators also should identify contract provisions that are the target of frequent employee complaints. Identifying these provisions will help identify potential issues the union may present at the bargaining table. Administrators also may have suggestions for changes based on their experiences in other school districts.

### **Professional review of contract**

Having an outside party, such as the district's attorney or another labor professional, review the contract prior to beginning negotiations is beneficial. A third party can provide a balanced perspective on areas of potential concern and can identify contract provisions that are vague and ambiguous or are contrary to state or federal law.

### **Auditing the *status quo***

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### **Existing policies**

Make sure current policies do not conflict with the collective bargaining agreement. If there is a conflict,



amend either the policy or contract. The same is true if the board wants to adopt a new policy that conflicts with the collective bargaining agreement.

School board members and superintendents do not want to overlook the public policy expressed through SB 880: that public schools should be accountable and cost-effective.

### **Changes in state and federal law**

Make sure the district is able to comply both with the law and the collective bargaining agreement. Occasionally, changes in state or federal law invalidate certain contract provisions. For example, it became illegal following the Nov. 8, 1994, election for employers to negotiate to *pick-up* employees' contributions to the Public Employees Retirement System. Contract provisions had to be changed to comply with the law. Other times, state and federal law creates a new obligation or standard that the employer must meet. Implementation of site councils, creating smoke-free buildings, drug and alcohol testing and fingerprinting for bus drivers are examples of changes under state and federal law that employers must bargain.

Conversely, changes in state or federal law may ease restrictions on employers. An example is the payment of daily overtime for hours worked beyond eight in a day. If the negotiated collective bargaining agreement contains a provision stipulating daily overtime payment, the district is bound by the negotiated provision.

School districts also should review any new or amended administrative rules to make sure the contract does not prohibit compliance.

### **Results of grievances or unfair labor practices during term of contract**

Consider changing or improving contract provisions that were subject to a grievance procedure or unfair labor practice. Also review any grievances or unfair labor practices that the union lost. This review could provide insight into issues the union may bring to the table.

### **Review district's past practices**

Review unwritten issues that are not directly addressed in the collective bargaining agreement. In some cases, unwritten practices are as binding on the parties as if they were written into the collective bargaining agreement. When these practices rise to a level where they become binding, they are referred to as a *past practice*.

A past practice occurs when:

- The practice is unequivocal;
- The practice is readily identifiable;
- The same treatment of an issue occurs over a reasonable period of time;
- The practice is established and accepted by both management and union.

Because these practices usually are not written down, they may vary from building to building or exist on a districtwide level. The district must bargain any change to a *past practice* if it affects a mandatory subject of bargaining.

Consequently, it is crucial that districts review everything that may be considered *past practice* prior to beginning negotiations. (See Appendix A.)

### **Reviewing comparables**

#### **Wages, benefits and working conditions of similar employers**

Review wage and benefit increases for the past two or three years granted by districts similar to yours. Comparisons usually are raised at the bargaining table. With comparative data you can put the union's claims and/or demands in perspective.

Review wage and benefit increases in other school districts, including districts in the local geographical area, districts statewide that are the same size as your district and other districts the union representative in your district serves.

In reviewing other districts' salaries and benefits, be sure to note back pay, teacher reimbursement, early retirement benefits and any other intangible benefits.

When comparing employee groups, review the entire compensation package: salary (base and step



increases), insurance, leave, holidays, early retirement, tuition reimbursement and other components.

Be aware of raises given to other employee groups in the district. What kind of raise did non-represented employees, administrators and the superintendent receive? What is proposed for these employee groups for the upcoming contract year?

### **Wages, benefits and working conditions of similar employees**

Compare salaries and benefits with other public sector employees, such as city, county and other municipal employees. What kind of raises are these groups getting? What is proposed for the future? What type of benefit packages do these employee groups have? How much leave time is available to these employee groups?

### **Rate of inflation (CPI)**

Be aware of the current inflation rate, which is reflected in the consumer price index (CPI). There are several different CPI standards. The CPI-W is the national index for Urban Wage Earners and Clerical Workers and often is used with classified staff. The CPI-U is the national index for All Urban Consumers and often is used with licensed staff. There also is a CPI that reflects the Portland area. The national CPI comes out monthly. The Portland CPI is released in August and February.

The CPI often is used to help determine a reasonable salary increase for an employee group. Be sure to specify which CPI the parties agree to use.

For a more complete discussion of the CPI, turn to "The CPI: An Explanation," September 1994, in the STATISTICS section of *Negotiator's Notebook*.

### **Building your information base**

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Have copies of your contract and those of surrounding districts. Often the union's proposals originate in other districts' contracts. By reviewing other contracts, you will recognize whether the union proposal is unique to your district or copied from another district.

Be familiar with the workings of the relevant salary schedule. Know the current placement of district staff and the anticipated placement for next year. Determine the number of staff eligible for step and column movements and then calculate the cost of step and column increases.

Be aware of other personnel expenses associated with each dollar of salary spent, such as PERS contributions, FICA, Workers' Compensation and unemployment insurance. If the district has a set amount of resources available for salary increases, be sure to calculate those expenses in costing out proposals.

Examine the insurance benefits program. Contact your insurance carrier for an idea of what increases are expected for the coming year.

Project your revenue for the next fiscal year. Will it be up, down or stay the same? Are there specific expenditures or projects that will impact the district's revenue picture for the next fiscal year?

Are any funds included in the budget "one-time-only" allocations, such as for capital expenditures?

Have copies of the budget document available as soon as the budget is put together. This will help provide a blueprint of program expenditures for the coming year.

Be aware of any program changes in the upcoming school year, such as new instructional programs, longer school year or modification of the school day. These changes could have bargaining implications. The implications should be determined early enough to allow the district to complete any required negotiations prior to implementation.

Gather relevant community data. Is a major company going out of business? Is a major company moving into town? Is the community experiencing a growth or decline in overall economic well-being? What is happening to enrollment?

### **Selecting the district's bargaining team**

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Collective bargaining in school districts often is an exercise in local politics and has a tendency to thrive on emotion and *political theater*. Therefore, barg-



aining sometimes becomes as much a public relations matter as it is a collective bargaining matter. The parties in school district negotiations must take into account this politically charged environment.

In setting parameters for bargaining, review the school board's role in school district negotiations. The school board's primary role is to:

- establish bargaining policies and goals;
- set parameters for the bargaining team;
- direct the bargaining team's approach;
- communicate with the public regarding the status and progress of negotiations;
- meet statutory and other legal obligations while providing effective service for patrons and students of the district.

Because personnel costs typically run 75 to 80 percent of the total budget, it is imperative that board members develop a basic understanding of the role, function and process of collective bargaining. Individual board members need to ask questions, offer ideas, consider options and, in conjunction with other board members, decide what is best for the district. This means the board must work as a team. Board members should share personal opinions only with fellow board members and should avoid secret discussions with union members. By deliberating internally and keeping the process confidential, a single voice is presented to employees. The lack of a single voice can make a board vulnerable. (See Appendix B.)

### **Board member participation**

One of the first tasks is to determine who will represent the board during negotiations. The composition of the bargaining team depends on several factors, including the history of bargaining, the size of the team, the designation of a spokesperson or chief negotiator, the bargaining model to be used, the negotiations style, team effectiveness characteristics and other stylistic themes.

### **The entire board negotiates**

One option is to have the entire board participate in negotiations. However, there are potential drawbacks to this option:

□ If the entire board participates in negotiations, the negotiations meetings then would fall under the requirements of the Public Meetings Law (ORS 192.610 – 192.690). House Bill 2444, from the 1997 Legislature, requires collective bargaining negotiations be conducted in open meetings unless both parties request closed or executive sessions.

□ If the entire board participates in negotiations, a quorum is present at negotiations sessions and tentative agreements could become binding. The Employment Relations Board and the Oregon Court of Appeals, as far back as 1987, have ruled that people authorized to act as agents in collective bargaining may reach an enforceable agreement, even though the agreement has not been ratified formally by the school board (*South Benton Education Association v. Monroe Union High School District*, 83 Or App 425 [1987]). Consequently, you may not be able to make an agreement conditional on ratification by the full school board at another meeting if the entire board already is at the table negotiating.

Making the situation more confusing is the fact that tentative agreements on specific articles typically are made in piecemeal fashion. The contract as a whole usually is not examined until negotiations are complete. So if there is *de facto* ratification of various tentative agreements, individual board members may not be able to change their minds when they look at issues in the context of the total contract.

□ Using the entire board for negotiations also is time consuming. Negotiations typically consume hundreds of hours, stretched over a six- to 12-month (or more) period of time.

□ Using the entire board also creates the potential for the union to play one board member off another, driving a wedge between board members.

We strongly suggest that fewer than a quorum of board members participate on the bargaining team. There are a number of considerations in deciding the specific number. Bargaining team members must be patient, be willing to make the time commitment, be knowledgeable and interested in the collective bargaining process and, preferably, have some experience



in the bargaining process.

Districts that are considering using the entire school board in negotiations should receive technical assistance from a professional negotiator.

### **Bargaining teams**

Regardless of who participates in at-the-table bargaining, final decisions must be made at the board level. Appropriate declarations should be made that the team only has authority to reach a tentative agreement, subject to board ratification in a subsequent public meeting.

Certainly, collective bargaining deals with major policy decisions of the board and participation by the board is essential. Some examples of major policy decisions that we see in union proposals:

- proposals to provide union control of site council functions;
- class size;
- control of administrative decisions and board actions through appeals to binding arbitration through the grievance procedure;
- selection of text books and curriculum materials;
- academic freedom rights for teachers independent of district curricular objectives and standards;
- limitations on access of parents to teachers;
- limitations on teacher accountability for student progress;
- teacher evaluations and disciplinary actions;
- salaries and benefits, which comprise about 60 percent of most school district budgets.

The continuity and stability of the negotiating team is crucial. Negotiations often extend beyond the expiration of the contract, and these issues must be considered in selecting both board members and other team members. A board member whose term expires before negotiations are expected to conclude probably is not the most appropriate person to assign to the team. Likewise, administrators or other personnel who may be leaving the district probably aren't the best choices.

Bargaining teams should include participants from all levels of management: a board member and perhaps the superintendent as well as principals and/or

other administrators from both the central office and the schools. That way, different levels of policy and operations expertise are brought to the table.

The role of the superintendent is crucial. The board may choose to shelter the superintendent from conflicts associated with negotiations and to preserve his/her role as the educational leader. Or the superintendent may be an active team member and/or the chief spokesperson. The board should make a deliberate decision about the superintendent's role.

The bargaining team must function within the board's set parameters for negotiations. The team should have authority to present written proposals and counterproposals to the employees' exclusive representative and to meet at reasonable times and places to bargain in good faith.

Individual team members' authority should be clearly defined so the bargaining team truly operates as a team. Individual team members have no individual authority to negotiate terms and conditions.

### **Individual negotiations style**

The board's goals for bargaining may determine which board members are the best choices for the bargaining team. Often there is a correlation between the board's goals and the bargaining styles of individual team members. For example, if the goals are to win major improvements in management rights and concessions in wages and salary benefits, a more assertive and aggressive style of bargaining probably is indicated.

On the other hand, if the overriding concern is the relationship between the parties and there are no overriding economic pressures, then a more collaborative approach may be best.

The dilemma in every negotiations is to decide which issues require a cooperative approach and which call for a more competitive strategy. Competitive negotiators usually view negotiations as a means to obtaining as large or as advantageous a settlement as possible. A competitive negotiator pursues the district's interests from an assumption that the items being bargained are a matter of how to divide the pie.

This type of bargaining has been called zero-sum



bargaining. In other words, whatever one side gains, the other side loses. Also known as distributive bargaining (distributing the value of the issue between the two parties), this style is successful in dealing with a distribution of economic matters in a single negotiations.

A more cooperative negotiations style works from the assumption that the negotiations should serve the parties' mutual interests in an atmosphere that maintains good relationships. Reducing conflict and creating trust is a desired outcome. A decided disadvantage to this approach is possible exploitation by a more competitive negotiator.

The Oregon School Boards Association has developed the Negotiations Style Inventory to help districts assess the negotiating styles that best suit individual team members. (See Appendix C.)

Most negotiations involve a mixture of styles. On some issues, the board may choose to be very competitive. On other issues, it may want to be more cooperative. A mix of both competitive and cooperative negotiators tends to enhance the overall effectiveness of the team.

The team's ability to engage in multiple strategies, depending upon specific issues, is critical to the negotiations' success. It also is important in determining what the bargaining mix will be and the positions (realistic, optimistic or pessimistic) the board takes on specific issues.

Consequently, the team must engage in strategic choices or situational tactics strategies, based upon the board's goals and the union's style.<sup>1</sup> Each negotiations style can be effective and provides another tool in the

tool box to achieve more desirable settlements.

### **Chief spokesperson/designated representative**

Selecting the team's chief spokesperson is a critical step. The chief spokesperson should have good communications skills, sensitivity to the nuances of language, a grounding in contract administration and a comprehensive background in school negotiations as well as labor relations. He or she should be personable and dynamic and have considerable patience and stamina. As the board's representative in crucial negotiations with employees, the spokesperson's knowledge of your particular district and the situations inherent to your negotiations is critical.

Selecting an in-district representative or a professional negotiator as the chief spokesperson is a key decision. Professional negotiators can be valuable because of their expertise in the process and because of their ability to act as a lightning rod to buffer the board and administration.

On the other hand, hiring a professional negotiator involves a significant commitment in time and money. It may be viewed by the union as an escalation of the level of conflict. (See Appendix D.)

### **Communications**

The board should designate a spokesperson to respond to public inquiries and to release information to the media on behalf of the board.

The first choice for this spokesperson is a board member. An elected board member usually has a high degree of credibility and status within the community, as well as the ability to personally speak for the board. The next best choice is the superintendent and/or administrator who can speak for the district but has an operational perspective. The third choice is a professional negotiator who has had experience in dealing with the media.

Communication during bargaining is an important component that is often overlooked. A comprehensive multi-level communications plan should include the following elements:

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<sup>1</sup>While beyond the scope of this paper, the strategic choice strategy consists of three components:

- a cooperative, problem-solving attitude towards issues, based upon meeting the needs of both the board and the employees;
- the ability to elicit a competitive response without appearing too thin-skinned. This allows some protection against a competitive style on the part of the union while protecting critical board interests;
- the ability to avoid escalating the competitive-competitive response pattern and return to a more cooperative default. However, this response should not be used too soon after a competitive tactic. In other words: forgive but remember.



- communications from the bargaining team to the board;
- communications with administrators;
- communications with key communicators in the community;
- communications to the media;
- communications to parents;
- communications to the general public.

*Regular communication* between the bargaining team and the board is essential in re-examining or redefining bargaining parameters. This also allows the board to identify additional areas for fall-back positions, alternate solutions or new positions on issues identified during the course of bargaining.

As the pressure increases and conflict between the board and the union becomes more intense, board members have a tendency to re-evaluate their positions on issues (particularly economic issues) and how the teachers' morale problems will affect children. The question most often asked is: "Does the cost of this bargaining activity and its relationship to children balance against the value of the district's positions?"

Once this process starts, there is a tendency to second-guess the board's positions. This is especially true with issues that have not had a significant amount of discussion. Consequently, thorough discussion of various issues at the board level is imperative. This discussion helps create ownership and solidarity among board members.

Communication with the board also allows the opportunity to reaffirm or reassess priorities. Other advantages include preparing the board for the nature of the settlement. This regular communication prevents surprises and allows the board to discuss new union proposals.

*Keep administrators informed every step of the way.* Use confidential memos after bargaining sessions or brief administrators at meetings. Keeping administrators in the *information loop* about negotiations makes them better prepared to support the board's positions with parents and other members of the public. They also can provide relevant data and offer

input on emerging issues.

*Use your community's informal communications network.* Every community has a number of individuals who might be designated as *key communicators*. Key communicators are individuals whose opinions others trust. They are part of a community network that can support the school district. You may want to consider establishing a special negotiations newsletter or bulletin to keep them informed about the district's bargaining goals and the collective bargaining process.

Examples of community opinion-makers who need to be informed about negotiations on an on-going basis are:

- elected public officials (mayor, council members, legislators, etc.);
  - business leaders;
  - labor leaders;
  - the media (newspapers, t.v., radio, etc.);
  - ethnic leaders;
  - priests, ministers, rabbis, religious lay leaders;
  - special interest groups (senior citizens, veterans, sports groups, women's groups, etc.);
  - home owner associations;
  - professionals (architects, engineers, lawyers, doctors, dentists, etc.);
  - business leaders (professionals who run major firms in the area);
  - civic organization leaders;
  - service organizations such as the Elks, Kiwanis, Rotarians, etc.;
  - human resource managers in local firms;
  - charitable organizations (board members and key staff people);
  - other political groups.
- (See Appendix E.)

## **Training**

Training team members is crucial to the success of bargaining. Because of the complexity of the rules and because rules often change, each team member must have a firm grounding in the Public Employees



Collective Bargaining Act and the most recent Employment Relations Board rulings.

Knowledge of the strategies and tactics used in negotiations also is important. The individual's negotiating style, in combination with legal requirements under the statutes and the bargaining goals and parameters established by the board, all interact at the bargaining table.

These complexities quickly can submerge inexperienced bargainers into a confusing sea of disadvantageous settlements.

There are a number of opportunities for negotiating team members to receive training. Individual training workshops can be arranged with OSBA's Labor Relations staff. Other possibilities include specialized regional workshops and training opportunities provided at OSBA's Fall Collective Bargaining Workshop.

### **Bargaining goals**

The board should establish bargaining goals and set board parameters before undertaking at-the-table negotiations. Two levels of goals and objectives are suggested:

1. Establish broadly based goals that are integrated with the district's mission statement and goals and objectives.
2. Establish specific guidelines and parameters for the bargaining team to propose in order to achieve those goals.

### **Broadly based goals**

Setting broadly based goals that are congruent with the district's mission and goals statement allows the district to make strategic plans and objectives regarding labor relations. This approach looks at labor relations from a multiple-contract viewpoint.

Typical activities include identifying forces that have the potential to impact the organization and its plans and then manage them to a strategic advantage. These forces include emerging trends, fiscal resource issues, school improvement issues, population growth,

magnet schools and other environmental influences that can affect the district.

Boards can begin to address these issues by asking the following questions:

- What is our preferred outcome?
- Who are our allies?
- Who are our opponents?
- What are the sequential steps to the best possible strategic advantage on this issue?

For example, a number of districts have used this goal-setting process to examine the need for cost-neutral settlements (putting a cap on the amount of expenditures for personnel services in relation to the proportion of the total budget), flexibility in retaining staff through layoff processes, flexibility in developing and implementing new programs, identifying training needs for improving the flexibility of staff to teach in different areas and programs, etc.

By establishing bargaining goals, the board provides a guide for entire negotiations. These goals should be made clear to teachers and classified staff, as well as to your public and the community. Individual board parameters should be congruent with these goals. (See examples of actual district collective bargaining goal statements, Appendix F.)

Public support is crucial during labor negotiations, and there are a number of ways to encourage it. A key is to involve the community as much as possible. For instance, in developing the overall goals and strategic objectives for the negotiations, schedule a work session for the entire board to discuss the district's future and the board's concern for collective bargaining. This provides an opportunity for the community to hear the board's debate.

Members of the negotiations team can take advantage of public board meetings to update other board members and the public about the bargaining progress.

### **Bargaining parameters**

After goals and objectives are set, specific bargaining parameters must be identified for the bargaining team. Three elements should be considered:

- examining operational imperatives;
- evaluating environmental influences;



- identifying programmatic directions.

A number of operational imperatives could affect bargaining, including any current problems identified from your audit of the *status quo*: existing policies, changes in state and federal law, results of grievances during the term of the contract and the district's past practices.

In looking at either a one-year or multiple-year contract, consider the implications on economic parameters and needed improvements in language. For instance, some districts are facing a considerable reduction in resources, so it's likely that layoffs will be necessary. An examination of layoff and recall (sometimes referred to as reduction in force) language would be reasonable.

An examination of environmental influences may provide additional information on short-term changes. This is a way to identify parental concerns, community perceptions and pressures, as well as statewide trends regarding overall financial resources and the impacts of ballot measures 8 and 47.

Finally, it's important to identify program directions or changes and how they impact employees. For instance, the movement to block-schedules in high school, intra-district school choice and magnet schools may have implications in your transfer and assignment articles, staff training needs, etc. All of these factors must be considered in providing management the flexibility necessary to implement programs.

In establishing bargaining parameters, there are a number of general considerations:

*Set clear objectives:*

Objectives should be as concrete, specific and as measurable as possible. Vague objectives like "reduce the compensation program" often are so ambiguous and subjective that they provide no guidelines for a bargaining team. A more precise objective might be: "Establish a cap on insurance at the previous year's contribution level and increase the cap no more than 5 percent during the course of a two-year contract."

*Realistic goals:*

Wish lists are not goals, they are just that – wish lists. There are limits to what realistic outcomes we

can expect during a single period of bargaining. It is naive to expect contract language that has taken years to accumulate to be overturned in a single negotiations session. Unfortunately, both parties often share this view during negotiations.

You must decide if a particular goal is so important that you should pursue it, despite negative consequences to the relationship between the parties. If the continuing relationship between the parties is important, then a more collaborative approach may be better.

Distinguishing between tangible and intangible goals (relationships, reputation, etc.) is also necessary. Negotiations are a continual sequence of opportunities to bargain. Make a realistic assessment of resistance points and the priorities of the other party and how those will impact your ability to achieve your goals.

*Ambiguous language:*

Identify and clarify any ambiguous language contained in the contract. Contracts are enforceable. They are business agreements. That means you will be held to the specific terms of those agreements. Arbitrary or vague terms can be fruitful material for additional conflicts and grievances. They also may provide openings for arbitrators to dictate conditions of employment that never were intended by the parties. Consequently, make sure the language means what it says and says what the parties intend.

*Correct ongoing problems:*

Identify areas in the contract that caused problems or were abused by employees or management. Typically, articles that are examined in this area are discipline, workday/work year, complaint procedures, transfer, etc.

*Restore managerial flexibility:*

A collective bargaining agreement's rigid nature requires thorough examination, especially in light of school improvement issues and taxpayers' expectations that school operations and student achievement will be conducted both efficiently and effectively.



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*Facts, data and documentation:*

Setting board parameters should be based on relevant facts, comparative data, costs, documentation of problems, etc. You will be challenged at the bargaining table to prove and justify the positions you take. Facts and figures to back up your assertions are essential to be persuasive.

*Develop fall-back positions:*

Identify a range of positions for each issue you bring to the bargaining table. Your initial position can be viewed as an optimistic goal or a goal that is taken from the management wish-list. However, initial positions cannot be so far out-of-bounds that they are off-handedly dismissed by the opposing party. Your initial position, like all positions, must have some data and documentation to back it up.

A second range of positions is your targeted, or preferred, position. This is a realistic assessment of what can be gained through the bargaining process.

The third level is your bottom line, your minimally acceptable level on the issue (or perhaps your pessimistic view of what you will be able to achieve).

*Cost benefit analysis:*

With each issue, you must determine its acceptability by the other party in terms of needs and priorities and make an assessment of their resistance points. Combine this assessment with the anticipated *price tag* for the proposal. These assessments can, in turn, lead to prioritized goals.

*Prioritize proposals:*

Proposals need to be ranked as high, medium and low priorities. High priority items should be stated as realistically as possible and identified as such to the bargaining team. These issues should be carefully selected and incorporated into the overall bargaining mix. The *bargaining mix* is the list of issues that define the negotiations. This list includes not only the board's list of issues, but also the anticipated union's list of issues.

The union has a tendency to put too much on the table at once and try to raise too many issues. If management also puts a large number of issues on the

table, negotiations will be prolonged. On the other hand, a longer list of issues provides opportunities for more combinations and trade-offs among issues.

The bargaining process also includes a number of *throw-away issues* which may be proposed and then withdrawn for strategic advantage as the negotiations proceed.

Deciding which issues proposed by the union are throw-away issues and which are of substance is a critical task for the bargaining team. That determination should be made on the basis of the facts, arguments and data that support the issues.<sup>2</sup> Determining which issues are connected or dependent upon one another and which are medium- and low-priority issues is important in deciding what trade-offs can be made and what packages can be obtained in the bargaining mix.

*Drawing a line in the sand:*

Boards should avoid drawing a line in the sand until it is time to do so. As negotiations proceed, there will be a tendency to take positions that have fewer options. As both sides *harden* their positions, the likelihood of conflict increases. The more rigid the position, the higher a priority it should be for the board.

At some point in the negotiations, inform the union which issues must be achieved. Then the discussion can focus on how those interests are going to be satisfied, rather than a discussion of the validity of those interests.

*By Ron Wilson, OSBA Director of Labor Relations,  
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Revised by Pam Unternaehrer,  
Labor Relations Specialist*

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<sup>2</sup>Administrators are often an important sounding board for the bargaining team in determining which issues are important to rank-and-file members. This is another reason communication with administrators during bargaining is critical and must be two-way.



## Appendix A

### Past Practice: What Is It?

“You can’t do that! It’s against past practice!”

Most board members and school administrators familiar with at-the-table bargaining or the grievance process have heard such claims at one time or another. Usually *past practice* claims come from the union in an attempt to block a change proposed by the district.

Before conceding that the change you proposed may be prohibited, it is important to understand the basis and relevance of past practice. It’s also critical to understand what proof arbitrators require for making a past practice binding.

Arbitrators have long held that it is almost impossible to include in a collective bargaining agreement language that addresses every conceivable issue which impacts the employment relationship. Arbitrators generally acknowledge that contractual relationships consist of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties. That’s especially true when these practices are not at odds with any written provision negotiated into the contract, when they are long-standing and were not changed during contract negotiations. In other words, it is not what is in your contract but what isn’t that may provide the basis for a binding past practice.

Under certain circumstances, an arbitrator may rule that the parties’ past practice on a particular issue is as enforceable as if it were expressly included in the written contract. The application of past practice acknowledges the parties’ entire agreement, both written and unwritten, in an effort to clearly define their respective rights and obligations.

Still, one might question the finality of a written agreement if it can be disregarded because of some unwritten custom or practice. The answer to this question lies in an understanding of the limited situations in which a binding past practice is relevant.

In their leading treatise on labor arbitration, authors Elkouri and Elkouri wrote, “Evidence of custom and practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement.”

In the first instance, where the existing contract language is silent on a particular topic, past practice may be explored to reveal the parties’ complete understanding. In the second situation, the arbitrator may examine the custom or past practice of the parties to give meaning to language which is otherwise vague or ambiguous.

Finally, an allegation that the contract language has been amended by mutual action or agreement is rarely successful. Most arbitrators will not give meaning to past practice in instances where the plain language of a provision is otherwise clear.

Not all unwritten practices are considered binding on the parties. In fact, in the absence of a written agreement, most arbitrators have held that a past practice can be considered binding only if it is:

- unequivocal;
- clearly enunciated and acted upon; and
- readily ascertainable over a reasonable period of time as a fixed practice accepted by both parties.

Clear and concise contract language almost always will prevail over a claim of past practice. With this in mind, it is important for districts to ensure that the language used throughout collective bargaining agreements clearly reflects their intent.

In addition, districts can effectively limit their past practice liability by:

- avoiding the inclusion of *past practice* or *maintenance of standards* language;
- negotiating a change in current binding practices where appropriate;
- negotiating a strong management rights provision;
- including a *zipper* clause which acknowledges the written contract represents the parties’ entire agreement and waives both parties’ right to bargain over issues not included in the contract.

*By Ed Tetreault, attorney,  
former Labor Relations Specialist*

Reprinted from *Negotiations Update*, May 3, 1994, Vol. XXVI No. 6



## Appendix B

### Basic Types of School Board Negotiating Teams

In general, the Board Negotiating Team will tend to fall into one of the following categories:

**The Unified Board** — This group will have a good interpersonal and working relationship. In terms of philosophy, most individuals will share a common consensus on most issues. It can readily be seen that the Chief Negotiator does in fact speak for everyone on his team. It will prove difficult to drive any kind of wedge into such a group, or to play upon individual egos to win a point. However, there is often a shared concern about unfavorable publicity or *community pressure*, and this sensitivity can sometimes be used to advantage during negotiations.

**Leaderless Board** — Either the board has been unable, for one reason or another, to select a negotiator in whom complete confidence can be reposed or, upon analyzing the situation, you will surmise that the real leader isn't at the table at all, but that he wields the real power from behind the scene. The negotiating team proceeds from instructions which are actually communicated from outside. When confronted by such a board, it will be desirable through the applied use of negotiating skills to force the board to find itself a leader if it doesn't really have one, or at least create conditions wherein the board team will be able to make practical decisions without constant outside consultation.

**The Board with a Strong Leader** — The strong leader may be open-minded and relatively easy to deal with, or he may be an argumentative and difficult personality. However, a strong leader of either type simplifies some of the problems the Teacher Negotiating team would otherwise face. Since the real power and capacity for action converge around him, your team will not be confronted with some of the subtle problems of analysis and diagnosis which is sometimes required in dealing with the other types of boards.

Board negotiating team might also reflect two other conditions or operating methods:

**The Board Team** — The board selects its own team composed of its members to represent its interest.

**The Proxy Team** — A professional negotiator is hired and brought in from outside to take the Chief Negotiator position.

No matter which of the conditions described here exist in your situation, a board team or chief negotiator without the authority to make a deal, or without the ability or stature to sell a deal, should not be tolerated.



**Appendix C**

**Negotiations Style Inventory**

The following is a forced-choice response inventory. For each of the 12 characteristics please choose either option a or b. Circle your choice under Col. 1 or Col. 2.

**An effective negotiator must/must be:**

	<b>a.</b>	<b>b.</b>	<b>Col. 1</b>	<b>Col. 2</b>
1	Objective	Aggressive	b	a
2	Courteous	Tough	b	a
3	Maximize settlement for the client	Get a fair settlement	a	b
4	Take realistic opening positions	Take high opening positions	b	a
5	Outmaneuver the opponent	Know opponent's needs	a	b
6	Willing to move from original position	Reluctantly move from original position	b	a
7	Reveal information gradually	Share information openly	a	b
8	Use threats	Not use threats	a	b
9	Be reasonable	Dominate the negotiations	b	a
10	Be honest and objective	Willing to stretch the facts	b	a
11	Probe the opponent's position	Be unconcerned about the opponent's position	b	a
12	Forceful	Friendly	a	b
<b>Totals</b>				

To score this inventory please assign one point for each circled letter and total Col. 1 and then Col. 2.

Col. 1 = Competitive or Distributive Negotiations Style  
 Col. 2 = Cooperative or Integrative Negotiations Style

**Range of Scores**  
 1 to 4 **Low**  
 5 to 8 **Medium**  
 9 to 12 **High**



## Appendix D

### Points to Ponder When Hiring a Negotiator

Boards pondering whether to use a professional negotiator during contract negotiations should consider these points:

- The process of collective bargaining is extremely time consuming. Just for one negotiated labor agreement, the research, preparation and at-the-table bargaining can consume more than 100 hours.

- Teacher and classified bargaining teams are usually represented by well-trained, professional union negotiators. Even when the union decides to negotiate without a professional chief negotiator, districts can be certain that the union will seek professional assistance to draft its bargaining proposals.

- Collective bargaining produces a binding agreement establishing compensation, benefits and numerous other terms and conditions of employment. Mistakes made during bargaining can prove devastating, both in the financial impact and administrative impact on the district's educational program.

- Precise language is critical in collective bargaining. The rights and obligations of both parties hinge on specific contract language which at first glance may appear innocuous, but in practice may result in a binding agreement which unreasonably restricts the board, administrators and the exercise of management's authority.

- Many collective bargaining agreements include binding arbitration as the final step in resolving contract disputes. This emphasizes the need for negotiators who are up-to-date on the interpretation and meaning of contract language as outlined in the decisions of leading professional arbitrators.

- Labor relations is becoming more technical and complex. Negotiators need to keep informed of court decisions, rulings of the state Employment Relations Board, legislative amendments and numerous state and federal laws and regulations which impact collective bargaining, as well as the current union agenda and background information on the hot topics at the bargaining table.

- The media's role in labor relations is becoming more important. Experienced management advocates know that an effective media campaign by the district can help mobilize community support and lead to quicker and more realistic settlements.

For districts that choose to go with a professional negotiator, it's important to look for certain criteria. A chief negotiator doesn't need to be an attorney, but to be effective the negotiator must have a thorough knowledge of labor relations and collective bargaining under the state's Public Employee Collective Bargaining Act. The knowledge and training of an experienced school district labor relations professional can be an asset in the negotiations process.

A working knowledge of public education is important. An understanding of school finance, budgetary procedures and revenue sources is important in analyzing the impact of bargaining proposals on school district operations.

Experience in negotiations with teacher, classified and wall-to-wall bargaining units is helpful. Also needed is an ability to develop and articulate district positions effectively and convincingly at the bargaining table. This also requires the use of conflict resolution skills.

Effective communicating skills are needed to deal with the media. This includes the ability to develop a strategy for using media to inform the public and mobilize community support.

It's also important to have someone who won't be intimidated. The chief negotiator must be articulate and able to say no firmly, yet politely. Other key qualities are trustworthiness, patience, intelligence, good organization skills, a positive attitude and the ability to be discrete.

It's critical that the chief negotiator be available for phone calls, meetings and preparation and bargaining sessions for the duration of the negotiations.

One benefit of using an outside negotiator is that person can be the *lightning rod* for absorbing much of the hostility generated during bargaining. The *hired gun* then leaves with the negativity at the end of the process, allowing the district to shield its personnel from permanent damage.

*By Ed Tetreault, attorney,  
former Labor Relations Specialist*

## Appendix E



## Sample Key Communicator Letter

[date]

Dear \_\_\_\_\_:

You are among a group of local citizens I have selected to receive a monthly letter with information about the \_\_\_\_\_ School District. If you know others who might be interested in being part of my *Key Communicators* group, please let me know, and I will add them to the list.

Each month, I will write a one- to two-page letter about a few important topics we are dealing with in our schools. Please call if you have questions about the information in my letter or have other questions about the schools.

Occasionally, I will direct questions to you about negotiations or other issues, and I hope you will take the time to respond. I hope we can engage in a continual dialogue about the improvement of schools in our community. This month, I would like to tell you about two topics.

- *[Something happening in the area of student learning.]*
- New contract negotiations with the teachers' union. *[Insert information about first topic.]*

Because the negotiations process with the teachers' union starts soon, I want to make you aware of the school board's goals in this process. *[Explain the process for the development of goals.]*

With this information in hand, the board sat down last week and created these goals. *[List goals.]*

I will keep you informed as the negotiating process continues. I know how important our schools are to you. I hope these monthly letters help you keep abreast of what we're doing to make the community's schools the best they can be.

In the meantime, what advice would you give the board regarding bargaining? Our staff is what make our district work so well. How can we show staff that we value and appreciate them in this era of declining resources?

Thank you for your help.

Sincerely,

*[Superintendent]*



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## Appendix F

### Collective Bargaining Goals

*Example #1*

The [Name] School District adopted goals at its [date] meeting for its upcoming negotiations with its teachers' union and support staff union.

Contracts with both unions will expire this summer and negotiations for new contracts are expected to get underway shortly.

"Our district is going to face some tough times with tight budgets under ballot measures 5 and 47," said [board chair's name], chairperson of the board licensed negotiations team. "We want these negotiations to be fair to our staff, our community and most importantly, to our students."

The board and the teachers' union will be exchanging written proposals in July in preparation for the first bargaining session with the teachers' union in August. Negotiations with the support staff (consisting of secretaries, custodians, food service workers and instructional assistants) should also start sometime in July.

"The board and the unions are going to have some tough decisions ahead," [name] said. "We want to keep our public informed about what's happening and are encouraging anyone who would like to attend the bargaining sessions to do so."

The district's goals are as follows:

1. The district will be efficient, cooperative and timely in negotiations with all employee groups.
2. The district will negotiate a labor contract that does not jeopardize programs, class size or service to the children of the community.
3. The district will negotiate a labor contract that is supportive of efficiency in government as well as the accountability of public employees.
4. The district will negotiate a labor contract that balances the employees' realistic proposals for salaries and fringe benefits with the public's ability to pay, realizing the school funding crisis in Oregon.
5. The district will keep the public informed of the negotiations process through regular press releases. It is the wish of the district to have the public attend any bargaining sessions.
6. The district understands that these negotiations for a new labor contract may require tough decisions. Therefore, all decisions will be based upon what the district believes to be in the best interests of the children, the patrons and the school family.

Contact: [name, title, phone number]



## **Collective Bargaining Goal Statement**

*Example #2*

The District will:

1. Participate as an equal in these negotiations and will devote the time and resources necessary to secure a labor contract that is responsive to the public's immediate and long-term interests;
2. Negotiate a labor contract that preserves service to the community's children. As in all of the District's concerns, students must come first;
3. Negotiate a labor contract that addresses legitimate employee concerns and balances the employee's realistic proposals with the public's ability to pay;
4. Negotiate a labor contract that demonstrates to the general public efficiency in District operations and accountability of public employees.

The District understands that the negotiations of a new labor contract may require tough decisions. Therefore, all decisions will be based on what the District believes to be good educational and fiscal management.



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## Collective Bargaining Goal Statement

*Example #3*

1. The District will participate as an equal in these bilateral and complex negotiations. Given the importance of this new labor contract and the overall impact of labor costs to the District's budget, the District will devote the time and resources necessary to secure a labor contract which is responsive to the public's immediate and long-term interests.
2. The District will negotiate a labor contract which does not jeopardize service to the community's children. As in all of the District's concerns, kids must come first.
3. The District will negotiate a labor contract which addresses legitimate employee concerns and seeks to establish and maintain good labor relations.
4. The District will negotiate a labor contract which is supportive of efficiency in government as well as the accountability of public employees.
5. The District will negotiate a labor contract which balances the employees' realistic proposals for salaries and fringe benefits with the public's ability to pay.
6. The District will keep the public informed of the negotiations's progress through a regular community newsletter, as well as releases to the local media.
7. The District understands that the negotiations of a new labor contract may require tough decisions. Therefore, all decisions will be based on what the District believes to be good government. Decisions in negotiations will not be based on personalities or emotions.



## Collective Bargaining Goal Statement

*Example #4*

1. That bargaining representatives and their respective constituencies will have acquired a clear understanding of the interests and perspectives each party brings to the issues being negotiated.
2. That a stronger sense of trust will emerge between the parties, fostering greater commitment to work jointly to meet the educational needs of students.
3. That the negotiated agreement will better enable the District and individual schools to pursue and expand their educational visions.
4. That the bargaining process will address current and anticipated concerns in contract language in order to minimize subsequent time spent by both parties in contract management.
5. That the new contract take into consideration changes impacting subjects of bargaining which have arisen because of legislative, TSPC or state board action.
6. That the economic and working conditions provisions will enable the district to better attract and retain highly competent personnel.
7. That the negotiated agreement will serve to enhance the professional status of teachers.
8. That the agreement reflect the funding realities created by ballot measures 5 and 47 and the increased control exercised at the state level governing local District resources.



## Goals For Collective Bargaining

Example #5

With the passage of Measure 5 in 1990, which resulted in a state controlled school finance system, the \_\_\_\_\_ School District faces unique challenges. The District reduced the budget for 1996–97 by \$\_\_\_\_. Because the actual staff costs for 1996–97 were higher than budgeted, and enrollments for 1997–98 increased, the District must again make program cuts totaling nearly \$\_\_\_\_ for 1998–99. Under the funding formula for 1997–98, following the full impact of ballot measures 5 and 47, the District will reduce the budget by another \$\_\_\_\_\_.

The financial situation increases the urgency of bringing about changes that will maintain the quality of education that the citizens of our community have so greatly valued. Over the past two (2) years, the Board of Directors of the \_\_\_\_\_ School District has charted a new course for the District which includes:

1. Reaffirming the District’s Mission: “We nourish the joy of learning, the uniqueness of learners and the development of knowledge and skills necessary to engage in the future.”
2. Adopting a strategic plan that will enable all students to attain the District’s Graduation Outcomes. Our graduates will be: knowledgeable, capable thinkers; effective communicators; responsible citizens; self-directed learner; collaborative workers; and quality producers.
3. Adopting a Vision for the start of the 1999–2000 school year, that will lead to more effective *partnerships* with our families and the whole community, enhanced *technology* for learning, significant progress toward meeting the provisions of the *Oregon Education Act for the 21st Century* and the implementation of a *Personalized Education Plan* for all students beginning with the class that will graduate in 2005.

The Board has taken these actions because the Mission, the Graduation Outcomes and the Vision for 1998–99 will best serve the needs and aspirations of our students and their parents as well as the future of our community. The following goals for collective bargaining reflect this commitment.

1. The negotiated agreements will be congruent with the District’s Mission, Graduation Outcomes and the Vision for 1998–99.
2. The Board’s goal is to commit the time and resources necessary to ratify new agreements before the current agreements expire.
3. The new agreements will provide flexibility in assembling and retaining staff members who will best meet the future needs of the District.



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4. The new agreements will provide maximum flexibility in developing and implementing the programs necessary for the future needs of the District.
  5. In light of the dramatic impact of recent ballot measures, the Board's goal is to attain cost neutral settlements.

During the collective bargaining process, the Board will communicate regularly with the public about the progress of the negotiations. The Board will negotiate in a way that demonstrates its high regard for our employees and deep commitment to our students, parents and community.