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Public School Negotiations: After the Gold Rush

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REMEMBER how negotiations used to be? We were:

- Debating whether to pass through the entire cost-of-living adjustment, as the union demanded, or hold something back to account for increased business costs, such as rising energy prices;
- Assessing the cost of step and column movement to determine if it should be subtracted from the salary raise;
- Attempting to contain the increased cost of health and welfare benefits, and asserting that it had to be seen as part of the total compensation increase; and
- Dissecting the district's budget to determine if it had the "ability to pay" a little bit more than its last, best offer.

Who would have thought we would look back and say, "Those were the good old days!"

California became a state after gold was discovered at Sutter's Mill, and we have prospered for over 150 years, assuming that the gold would never run out, whether it be through precious stone, property, a fruit basket that feeds the world, or miraculous silicone chips. We believed we would always be the "Golden State." Now, we exist in a new world of "after the gold rush."

We've experienced economic crises before. Proposition 13 decimated school district funding, and we have never recovered fully. In the 1990s, we experienced the "un-cola years," for which we were finally made whole a few years ago.

But now things are different:

- The current crisis reveals the fundamental defects and weaknesses in the structure of state finances, including the funding system for public schools. California cannot remain the "Golden State" if it contributes less money to schools than 95 percent of the other states, even while 1 of every 7 or 8 K-12 students in the nation attends a California school.

- Our current funding structure, which is based on the erratic ebb and flow of tax revenue, cannot support a stable and consistent commitment to public education.
- It is not just the schools that are suffering; the entire safety net of social services is being threatened. And, if that net is hauled in, educators will be increasingly challenged to teach pupils who are homeless, hungry, and ill.
- The crisis is national, not just local. All told, 40 states report an estimated \$150 billion in budget shortfalls. California represents 28 percent of that, \$41.5 billion; and New York, like us, faces a gap of about 25 percent of its entire budget.

It is no exaggeration to say the financial upheaval is global in scale. But, even if we think globally, we can only act locally — at the bargaining table in each of our 1,000 school districts. Because times are so different, the job as negotiator has changed and will continue to evolve after the gold rush.

Crisis: An Opportunity for Change?

President Obama was elected on a platform of change. He views the crippled economy as an opportunity for change, the only question being how deep and fundamental it will be. Should we approach negotiations as an opportunity to seek unprecedented changes? Maybe and maybe not.

One union representative recently told me: “Success at the bargaining table right now is a constructive defense of the status quo.” From labor’s point of view, victory may be just preserving benefits, salaries, and working conditions. Management, on the other hand, may see this as an opportunity to finally cap health benefit contributions, increase class size, or shorten the work year.

If these actions are vital to the district’s solvency, they should be put on the table and pursued in good faith. The

danger, however, is in overreaching. Management cannot fall prey to the temptation to “go after the contract” by using the economy as an excuse. Labor, likewise, must not retreat to the old saw of “if there’s no money, then get language that management has always opposed.”

Labor and management both must critically assess what is *needed* as opposed to what they *wanted*.

Can We Satisfy Our Constituents?

Negotiations break down when constituents have unrealistic expectations; this happens more frequently in times of crisis.

School boards face the possibility of bankruptcy and deeper cuts than they ever imagined. Districts need help from all stakeholders, but sometimes mistakenly assume that employees and their unions will compromise core needs and beliefs. This is unlikely, however, and management should not accuse labor of not appreciating the gravity of the situation or being selfish. History teaches us that in difficult times, labor will agree to difficult concessions through *negotiations*, not by abdicating its role.

Individual unions may take a “NIMBY” attitude: “There will be no cuts to my bargaining unit — ‘not in my backyard’ — but I demand that you cut everywhere else to solve the problem.” If either party takes unrealistic positions, it will increase the likelihood that management will take unilateral actions and decrease the chances for bilateral agreements.

I see increasing demands that negotiations move at a faster pace. Everyone wants “the fix” done *now!* Raise class sizes. Cap health benefit costs. Win a job protection clause. Guarantee no reduction in salaries or benefits. These demands would affect huge changes that would directly threaten or protect individual security. Because of this, the pace of change — and the pace of negotiations — will be slower than usual.

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Neither the collective bargaining statutes nor the agency that enforces them considers how quickly to implement change or how long the negotiation and impasse processes may take. The Educational Employment Relations Act and the Public Employment Relations Board care only that the process is followed.

The Law and the Contract Are Not by Crisis Transformed

The phrase “business necessity” is being bandied about more often these days. These words represent a legal defense to a unilateral action that, by law, must be negotiated. To my knowledge, this defense has *never* been successful in over 30 years of PERB decisions. Maybe unprecedented mid-year budget cuts and draconian reductions in ongoing funding will, for the first time, justify unilateral action based on business necessity. But until then, hard times still do not justify acting alone on negotiable matters.

Clients are asking questions I have not heard for 20 years: Can we unilaterally freeze salaries? Can we suspend step and column movement? Can we impose furlough days? Can we close the district office and force people to use vacation? The answers to these questions are the same as they were two decades ago: Absent enabling contract language or clearly established practice, these changes are negotiable. Conversely, if a union demands to negotiate the decision to lay off, reassign, or transfer personnel, the answer is still that these matters are not negotiable, assuming in the latter two cases that existing contract language is followed.

Since existing contract language was forged before the current economic crisis could be imagined, one cannot argue it was “the intent of the parties” to apply this language in a certain way. The crisis was never discussed back when the language was negotiated. Nonetheless, management and labor are reinterpreting and reconstruing contractual language to create new rights and protections in response to our fiscal predicament.

Despite the creativity involved, these efforts to revise history threaten the integrity of the negotiated bargain and the stability of the relationship. The contract always will be applied to unforeseen situations, but the underlying meaning and the plain words of the agreement are not magically transformed as a grant of more management authority or greater worker protections simply because times have changed.

The same phenomenon is true for past practice. Both parties would like to turn a single example of conduct into binding past practice if that isolated instance favors their interest. If 10 years ago, the employer once let a worker facing layoff bump into a position in which he or she never served, the union asserts this is a binding past practice that confers the same right to all employees. If the union once let management reduce a worker’s hours without negotiating, the employer claims a right to do so based on binding past practice.

This distorts the utility of past practice as an interpretive aid that helps the parties to enforce the contract and maintain universal definitions of workplace rules. This approach will encourage management to try anything once and force labor to oppose anything that has never been tried. Just when the parties need more flexibility, we will create more rigidity.

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Good Faith Negotiations Are Threatened

The duty to negotiate in good faith requires behavior that demonstrates a sincere desire to reach an agreement.

In part, this means giving the union relevant and accurate information in a timely manner. Responding to union RFIs — requests for information — is usually not a problem unless the union is really issuing RFHs — requests for harassment — those endless requests for volumes of paper made for the sole purpose of keeping the employer busy. These boxes of documents never affect the outcome of negotiations.

Normally, the parties wait for the proposed state budget in January, the May revise, and passage of the final

budget between July and August before exchanging serious economic proposals. Some even wait for the first interim report to get a clearer picture of district finances. If a district insists on waiting longer — for example, until the second interim report — the union may see it as unreasonable delay and bad faith bargaining.

Now, however, we are forced to rely on an endless stream of bad information. Since the governor's declaration of a fiscal crisis over a year ago, we have learned that *no* information is the most accurate. The governor's January 2008 budget proposed no mid-year cuts — and it was wrong. The May revise improved the education budget — and it was wrong. The budget enacted in September 2008 was based on May revise data — and it was wrong.

How can we bargain effectively in an environment of delayed information, changed information, and bad information? Neither side is bargaining in bad faith, but dysfunction at the state level prevents negotiations in which the parties have faith when it comes to economic issues.

This is not healthy for our labor-management relationship. As both sides get more frustrated, emotions rise, someone to blame is sought, and the process erodes. Do not let this happen. Confront the frustration and complain about it together. If you can afford to wait, call off negotiations until there is something real to talk about.

The Human Element of Negotiations Has Changed

Successful bargaining depends on the free exchange of information. A common understanding of the negotiations “model” being used also facilitates good results. For example, it is preferable if both parties are using an interest-based or core-values approach. It is folly to believe we can educate the other side into submission or train them to surrender.

Regardless of how much we depend on data or the approach we use, negotiations always are based on a dynamic mix of substance and emotion because people do

the negotiating. Recently, however, the bargaining process has become more emotional and less substantive. In these anxious times, I expect this trend to continue.

The facts only go so far since the economic data are built on a foundation of quicksand. At some point, a negotiator may declare, “I know the facts. I understand the facts. But I don't *like* the facts, and I'm not going to listen to them anymore. What I know is that I'm scared, I'm mad as hell, and I'm not going to take it anymore.”

This emotion will change the labor-management relationship. In the alternate universe of collective bargaining, labor wants to be treated as a partner in defining the rules of the workplace. When a patronizing management attitude is perceived at the bargaining table, the union will not tolerate this disrespect and will insist on being treated as an equal instead of as a child.

Now things have changed. At a recent negotiations session, a part-time classified worker broke down in tears and said, “Just save our jobs; my husband was laid off and now I'm the only one providing health benefits for my family.” Even though it will never be said directly, many employees and their unions feel the presence of unconscious paternalism. The goal in negotiations is to ensure the employer will take care of their basic needs.

I am not suggesting that we adopt a more paternal tone. But we all need to comprehend what I understood when that classified worker spoke through her tears: Union negotiators and the employees they represent have a real fear of losing their jobs and the dignity that comes with providing for those who depend on them. Thus is the human element of negotiations ascendant.

This has caused a role reversal in the kind of open- or closed-door contracts that management and labor seek. Traditionally, labor wants a contract with as many reopeners — open doors — as possible to maximize its opportunities to achieve better wages, benefits, and working conditions. The employer wants as few reopeners as possible, to close

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the doors on the possibility of making more concessions at the bargaining table.

Now, labor seeks multi-year closed contracts to reduce management's ability to get reductions in compensation or working conditions. The employer wants more reopeners, or maybe only a one-year contract, in case it needs to get concessions if the economic crisis continues.

In the recent past, I have reached tentative agreements on closed multi-year contracts with no salary increases that were based on proposals from the union, not the district. In one case, the union rejected an offer to reopen the contract in the third year. "No," they said, "we want this agreement buttoned up for as long as we think this fiscal crisis will last." Negotiators are operating with different interests and must look at the opened and closed doors from a new perspective.

Can Negotiations Survive Without Any Gold?

What else can be done to promote the survival of the negotiations process after the gold is gone? Some would say nothing can or should be done, hoping to at last be free of the burdens of bargaining. As the old saying goes, "collective bargaining is like hitting your head against a brick wall — it feels really good when you stop!"

However truthful, wishing for the demise of negotiations is short-sighted. And collective bargaining serves as an orderly and efficient problem-solving process that fosters stability in the workplace. It is unrealistic to expect it to disappear. Instead, our energy must be directed to making the process work even in tough times. Here is what labor and management can do.

Reexamine our system of negotiations. I believe in the negotiations process, but something is either broken or near the breaking point. In too many places, bargaining takes too much time and energy, and causes lost work and money. This is counterproductive when there is little money and more work to be done with fewer workers. Here's an

astounding reflection on our current state of negotiations: Although we know that negotiations are a mandated activity for which districts receive cost reimbursement, we have not received that money and are owed about \$150 million. As I understand the proposed state budget, to fund the collective bargaining mandate, base revenue limit funding would need to be reduced more than has been proposed. Let's get this straight. We should cut funding for public schools to pay for bargaining over wages, benefits, and working conditions? I do not propose we get rid of negotiations, but this house cannot stand.

Define victory, then claim it.

There will be no raises this year. Class sizes will not be reduced; in fact, reduced class sizes may disappear. We will not reclassify positions into higher salary ranges even if a study says we should. These kinds of "big ticket" items are not in the offing. But there are small victories we can pursue. Is there an hourly rate or a stipend that, if increased just a little, would acknowledge the efforts of a group of employees? Is there a process or policy that can be improved without sacrificing management rights? Most importantly, is there a way to keep employees "whole" when increased benefit costs and no wage increase result in a total compensation *decrease*? Now is the time to jointly define "victory" in negotiations and then claim it together.

Suspend, don't eliminate. In this climate, we may need to discontinue practices we cannot afford. Rather than completely eliminating them, consider suspending them instead. This is a more proportionate response and does not overreach. And, it offers the union a politically viable opportunity to be part of the solution, with both parties able to express a shared belief that their fortunes will improve in the future.

Don't dig in your heels or draw lines in the sand. The only certainty we can claim at present is that there is, and will continue to be, uncertainty. This means we should avoid speaking in absolutes or making ultimatums. Instead, share

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proposals that can be refined through the give and take of negotiations. No problem exists for which there is only one solution.

United we stand, divided we fall. I hate trite sayings, but this is too apt to ignore. The immediate future looks bleak and we will feel the effects, but if labor and management are at odds, the impact on both parties will only be worse. Now is the time to “sprinkle a dose of reality” on local chapters if expectations remain out of line.

Don't be too hard on yourself. I am often asked, “Aren't we the worst, most dysfunctional, craziest district you work for?” And my answer is “no,” except for one district that has not asked me yet. I go to a different district every day. So, from my vantage point, they're all a little crazy — in a good way — and everyone does a better job than they believe. So go easy on yourself, especially in these trying times.

Don't be too hard on your union. A variation on the “aren't we the craziest district” question is, “Isn't our union the most unreasonable you've ever seen?” For the vast majority, the answer is a resounding *no!* Trust me, there are unions out there — even though they are few — that are amoral in their pursuit of power; more interested in attaining this power than representing their members; quick to sacrifice the interests of students for those of adults; and situationally ethical at best. I suppose there are employer counterparts to these unions, but the point is to realize it could be much worse. Do everything to prevent this from occurring in your district.

Remaining Positive in an Altered State

The task of negotiating is constantly stimulating. It demands creativity to craft solutions that apply to each district and the relationships it has with the union. But now we face a common challenge: How to hold on to the joy of the job and not surrender to the mind-numbing pessimism of a pervasive economic meltdown and keep creative juices flowing.

The answer is deceptively simple. First, we must recognize and reaffirm the value of the greater team, not just the bargaining team. We see examples where one group is pitted against another — management versus employees, certificated versus classified. Education can be distilled down to the teacher in the classroom, but no teacher teaches alone, and a quality program depends on a cohesive *team* of management, classified, and certificated employees.

Second — and this may sound trivial — we must keep a sense of humor even when the sacrosanct social contract of a free public education for all citizens appears to be breaking down. It is more important than ever to cut through the tension, lighten the mood, and laugh out loud together. Even in tough times, if we can't laugh it off from time to time, chances are we can't make it work. *