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KEYNOTE ADDRESS: THE EPIPHANIES OF NEGOTIATIONS

**ACSA Negotiators' Symposium
January 18, 2017**

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KEYNOTE: THE EPIPHANIES OF NEGOTIATIONS

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Today I wish to speak of epiphanies.

An epiphany is a sudden, intuitive insight into the reality or essential meaning of something. It is that moment of stark revelation, when you suddenly feel you understand, or become conscious of something that is very important to you. Although these moments can strike with the swiftness and power of lightning, ironically, they are usually initiated by some simple or commonplace experience. Let me give you a few examples.

Isaac Newton was sitting below an apple tree when an apple fell on his head, which caused him to develop his Universal Law of Gravitation.

Albert Einstein arrived home one night feeling defeated. He imagined having reached home at the speed of light, and how the light from the town's clock tower would not have reached him in his car, even though the clock inside the car would be ticking normally. This would make the time outside the car and inside the car just different enough to be striking. And so was born his Theory of Relativity.

Revelations need not be as complex as the theories of Newton and Einstein; in fact, they are usually quite simple. In his song "Badlands," Bruce Springsteen describes how to push back against hopelessness; he says:

*Talk about a dream,
Try to make it real
You wake up in the night,
With a fear so real,
You spend your life waiting,
For a moment that just don't come,
Well, don't waste your time waiting.*

And in the end, his flash of insight is straightforward: "It ain't no sin to be glad you're alive."

I recently had such an illuminating experience. I was going to work on BART – the bay area rapid transit system – lugging my huge, lawyer rolling black suitcase as usual. Rather than try to squeeze into one of the regular rows of seats, I sat on the one facing out into the open space right beside the doors; that way, I could position my briefcase in front of me.

Once comfortable, I noticed a sign above my seat that stated, "Reserved for handicapped and seniors." I immediately thought, "Oh man! I hope I don't get caught breaking the rules by sitting where I am not supposed to be!" Well, the ride progressed and more people got on, but no one gave me a second look. And then, without warning, it happened. I suddenly thought to myself, "Wait a minute, nobody thinks I AM breaking the rules! I am not 18 anymore! I AM eligible to sit here! I'm a senior!" This was my OMG moment, my epiphany.

Like most epiphanies, mine was triggered by a mundane, everyday experience. And it reminded me of the necessity for reflection, or more precisely, self-reflection. One observer has written:

Self-reflection entails asking yourself questions about your values, assessing your strengths and failures, thinking about your perceptions and interactions with others, and imagining where you want to take your life in the future.

My lightning bolt moment lead me to reflect on what I do for a living - my profession as a negotiator. I have been negotiating for school districts and community colleges nearly every day for over 36 years– that amounts to almost 10,000 days!

This lead me to think, “If I can be so blissfully oblivious of my own age, is it possible I have also ceased thinking critically about the process that has consumed over half my life - this thing we call collective bargaining? Has it become merely a routine for me?” In the words of William Wordsworth, have I become one of “the unreflecting herd” that is ruled by habit?

Mindful of these words and Socrates’ admonition that “The unexamined life is not worth living,” I began to ask myself questions, such as:

- I. How did this system originate?
- II. What were the original intent and purposes for which the process was established?
- III. Has the system evolved in a manner consistent with original intent?
- IV. If I ponder deeply enough, are their other epiphanies about negotiations just waiting to burst forth into consciousness?

These questions took me on a journey of introspection, questions and eventually answers, which I call the Epiphanies of Negotiations. Today, I would like to share my voyage with you.

I. HOW DID THIS SYSTEM ORIGINATE?

Collective bargaining in America was born in the private sector with the passage of the National Labor Relations Act (NLRA) in 1935 as part of President Roosevelt’s response to a potential massive economic collapse – the New Deal. The Act declared that:

Protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest.

Collective bargaining was endorsed as the appropriate process to increase consumer purchasing power and establish an equilibrium of influence between labor and management. At this time, however, the only public sector union in existence was the post office union.

In fact, the notion of bargaining with public employees was thought to contradict the concept of governmental supremacy which holds that the constitution and statutes are “the law of the land” which cannot be superseded or delegated away. In a 1937 letter to the President of the National Federation of Federal Employees, President Roosevelt stated:

All government employees should realize that the process of collective bargaining as usually understood, cannot be translated into the public service... The employer is the whole people, who

speak by means of laws enacted by their representatives in Congress... Accordingly, officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures, or rules in personnel matters.

At the start, then, our national public policy permitted and even favored private sector collective bargaining as a pathway towards economic prosperity and industrial justice, but prohibited any delegation of power away from the people – the taxpayers – who were the ultimate employer of public employees. This state of affairs continued until the 1960s. In 1963 President Kennedy issued an Executive Order granting all federal employees the right to unionize and collectively bargain on non-economic issues. Shortly thereafter, many states began to pass similar laws for state employees.

What about public school employees? The National Education Association was founded in 1857, but it did not endorse the concept of collective bargaining until more than a hundred years later, in 1969, nearly a decade after the American Federation of Teachers had done so. Now, according to the NEA, teachers in 34 states and the District of Columbia have the legal right to bargain as do classified employees in 32 states. Six states prohibit collective bargaining in the public education sector.

Our collective bargaining law, the Educational Employment Relations Act, went into effect on September 22, 1975, when then-Governor Jerry Brown signed the CTA-sponsored Senate Bill 160 by State Senator Albert Rodda. The EERA also established the oversight body now known as the Public Employment Relations Board (PERB). The law took full effect on July 1, 1976 and the first impasse was declared on July 2, 1976.

I cannot imagine the level of anxiety that must have surrounded implementation of the new law. In a 1976 article published by the UCLA Institute of Industrial Relations, the author stated:

I suppose the overwhelming sense [is]...one of uncertainty and concern...[S]chool managers and organizations of school employees had [just] begun to feel some confidence in their understanding of the rules [under the old law – the Winton Act]. Now, all of a sudden they are faced with a whole new set of rules.

Adding to this uncertainty was the vagueness of much of the language in the EERA regarding the scope of negotiations and the power and authority reserved to governing boards. The same author commented, however, that the solution to this legislative imprecision would evolve over time, primarily through the efforts of a new, expert agency:

[R]ules written by legislatures can, in this complex arena, rarely be clear and unambiguous. The parties, the Educational Relations Board and the courts will – over time – flesh out the legislative ambiguities, often deliberate, so that the parties will gradually know with more certainty how to behave. Now, I feel sure, there is vastly more uncertainty than certainty.

Senator Rodda also placed responsibility for the success or failure of the new law squarely on what is now PERB, stating:

The new law is no panacea; its success will largely be determined by the objectivity of its administration by the Board. The educational community has acted responsibly; the Legislature has acted responsibly; it is now the obligation of the Board to act responsibly.

II. WHAT WERE THE ORIGINAL INTENT AND PURPOSES FOR WHICH THE PROCESS WAS ESTABLISHED?

According to experts who consulted on the bill, and as reflected in the language of the law itself, the primary purpose of the EERA is to improve employer-employee relations and personnel management within the California public school system. This objective was intended to be achieved by:

1. Providing a uniform basis for recognizing the right of school employees to join organizations of their choice;
2. Representation of employees in their professional and employment relationships with the employer;
3. Selecting one organization as the exclusive representative; and
4. Affording certificated employees a voice in the formulation of educational policy.

According to a legislative staffer who contributed largely to the writing of the EERA:

The Rodda bill attempts to provide a framework in which bargaining can proceed in an intelligent and coordinated fashion. ... [T]he bill promote[s] stability that contributes to the public interest by [among other things] relieving school management of the need to be constantly involved in bargaining.”

Several of my essential questions have already been answered. I now know the origins of our system of collective bargaining and I have a basic understanding about why it happened, or at least what its framers intended.

III. HAS THE SYSTEM EVOLVED IN A MANNER CONSISTENT WITH ORIGINAL INTENT?

I am troubled, however, with the evolution of our law; in particular whether the original purpose and intent have been achieved under the auspices of PERB and the courts. All one need do to appreciate my concern is look at the scope of negotiations.

Limiting the scope of negotiations was the big concession made to school boards and administrators in exchange for their support of the bill. As that legislative staffer stated at the time:

The features of the bill that protect the interests of parents and pupils are...the limitation of scope and a special non-exclusive right to the exclusive representative of certificated employees to consult on various educational issues.

I think it is fair to say that whatever the limits on the scope of bargaining were intended to be, they seem to have all but vanished. Whatever the rights reserved to school boards were intended to be, they seem neither to have been defined nor excluded from the collective bargaining process.

The list of negotiable subjects seems limitless, especially when one understands the current state of the law requires effects bargaining on conceivably any non-negotiable decision. The law itself was changed a few years ago to require written notice to the exclusive representative “of the public school employer’s intent to make *any change* to matters within the scope of representation” in order to allow the union the opportunity to request effects bargaining. (Emphasis added.)

It is difficult, if not impossible, to avoid effects bargaining when the scope of negotiations has been expanded to include not only every working condition imaginable, many subjects impacting instruction, student learning

conditions and, as of late, matters of educational policy. Thus, even if a decision is technically the employer's to make, implementation is often delayed or thwarted altogether, thereby negating the very decision-making authority management supposedly retains.

After reviewing our collective bargaining law from its birth, through a maturation process of over 2500 PERB decisions to what it is today, my conclusion and my epiphany is that the system has not turned out to be what was originally intended.

I do not think the framers, or the management and labor groups who ultimately supported passage of the EERA, intended our system of bargaining over working conditions for school employees to end up effectively determining matters such as:

- How many days or minutes of instruction are provided to students;
- Whether a kindergartener's school day is a half day, extended day or full day;
- Whether a secondary school day is 5, 6 or 7 periods, thereby determining instructional offerings to students;
- The ability of site instructional leaders to build and retain the most effective team of professionals to serve students, based on factors including commitment to a common vision and approach to instruction; and
- Placing limits on the amount of time and frequency of classroom observation of teaching and assessment standards in order to effectively evaluate, remediate and, if necessary terminate teachers.

I also do not believe anyone envisioned the "double whammy" for employers of an all-encompassing scope of negotiations compounded by legislative enactments over the same subjects. The Education Code and other statutes regulate the minimum student instructional day and year, safety conditions, standards for certificated evaluation, maximum class sizes and caseloads, complaints against employees by parents and the public, discrimination in all forms, and much more. The Education Code contains 30 sections alone just for leaves for certificated employees and 21 sections of classified leaves, holidays and vacations The Legislature seems to be on a mission to add more leaves as the teacher shortage worsens.

These subjects that are so thoroughly covered by statute should be removed altogether or at least partially from the scope of negotiations, even if it means fleshing out some of these laws to ensure equity among districts. In addition, certificated and classified employees and their unions must have a meaningful voice in education policy through a system that guarantees their participation in decision-making but removes the understandable fear of governing boards that real engagement means the opportunity to veto fundamental policy decisions – a reality that exists in the negotiations forum as we know it.

IV. IF I PONDER DEEPLY ENOUGH, ARE THEIR OTHER EPIPHANIES ABOUT NEGOTIATIONS JUST WAITING TO BURST FORTH INTO CONSCIOUSNESS?

On to my fourth question: If I ponder deeply enough, are their other epiphanies about negotiations just waiting to burst forth into consciousness? I discovered that there are a few that immediately come to mind such as the following:

The Commandment Concept: According to biblical sources, the Ten Commandments were carved in stone to physically emphasize their unalterable nature. What about collective bargaining agreements? Does the "Commandment Concept" apply to contract language?

According to the NEA, the answer is no:

A negotiated union contract is not a set of permanent union work rules carved in stone. Any section can, by mutual agreement, be discarded or revised during talks over a successor contract.

Theoretically, this is correct. In my experience, however, the Commandment Concept thrives in negotiations, and is followed by both labor and management. And that is my first epiphany: Once language makes it into the contract, absent compelling circumstances or rationale, one must assume it will never be altered or eliminated. The more fundamental the term or condition, the deeper in stone the language has been etched. Even where language is outdated, unused or indecipherable because of the passage of time, it is not uncommon to hear "It was negotiated for some reason, so it cannot go away."

The insight to be gained from this revelation - our 11th Commandment if you will - is to negotiate carefully, craft language judiciously, and *always* consider the impact the proposed language might have over a long period of time during which conditions will surely change.

The Pandora's Box Problem: More introspection led me to my second negotiations epiphany – the Pandora's Box Problem. Originating in Greek mythology, the phrase "to open Pandora's Box" means to perform an action that may seem small or innocent, but turns out to have severely detrimental and far-reaching negative consequences. The action cannot be reversed.

Looking back at decades of negotiations, I am stunned to realize how often the Pandora's Box Problem has arisen! As the definition suggests, it starts so innocently – one party decides to open a small part of a large article, perhaps only to tweak, clarify or update to comply with new law. In response, the floodgates open, and before you know it, the entire article is open and you are faced with proposals that are much worse than the status quo.

The lessons to be learned from The Pandora's Box Problem are first, think carefully, not just once or twice, but three times before you decide to open a section of the contract for negotiations. Second, distinguish among the following three categories of proposals: Is it a) "dream" language; or b) "want" wording; or c) "must change" modifications? Third, if the reason for reopening falls into category (a) or (b), consider the Pandora's Box Problem to evaluate the potential for being worse off than you were before you opened the contract on this subject. A final caution: If you end up with inferior language, see also the Commandment Concept!

The Demonization Disorder: My third ascension to heightened awareness is something I call the Demonization Disorder which is the malady that occurs when one or both parties turn disagreement over issues, ideas, and proposals into personal attacks, character assassination and denunciations about lack of respect, unfairness and injustice. We have all seen the banners and flyers that claim "No Respect" or "District Unfair" or "Bad Faith." In the worst cases, the mudslinging has even descended to the use of profanity and universally condemned symbols, like the swastika.

The very purpose of negotiations is to provide a process by which parties with *different* needs and interests can resolve their differences in an orderly and organized manner. If there were no differences in needs or goals, there would be no need for the negotiations process. Knowing that there will be disagreement over issues in all negotiations, what causes an organization to vilify the other side with allegations and insults that everyone knows are patently untrue?

Teachers know their administrative colleagues and boards of education respect what they do because, in all but the rarest cases, they would not be part of the public education system if they thought otherwise. Employees who have decades of close personal relationships with their administrators know they do not mystically transform

during negotiations into uncaring ogres whose only goal is to prevent employees from enjoying a productive workplace imbued with fairness and respect.

Conversely, management knows that during bargaining, employees do not transmute into greedy, selfish beasts who suddenly stop caring about delivering quality education or their students and their futures.

This name-calling and invective is the worst kind of fake news; in fact it comes close to outright propaganda. In his book "How Propaganda Works," author Jason Stanley offers a definition of propaganda that extends beyond dictionary definitions of biased or misleading information used to promote a particular cause or point of view. He writes:

Propaganda is characteristically part of the mechanism by which people become deceived about how to best realize their goals, and hence deceived from seeing what is in their own best interests.

The New York Times review of the book goes on to summarize:

This is achieved by various time-tested means - by appealing to emotions in such a way that rational debate is sidelined or short-circuited; by promoting an insider/outsider dynamic that pollutes the broader conversation with negative stereotypes of out-of-favor groups; and by eroding community standards of "reasonableness" that depend on "norms of mutual respect and mutual accountability."

Everyone knows the delusion of an "us versus them" relationship among school district management and employees, and recognizes the fallacy underlying the Demonization Disorder. Why then does it persist? I think it is due to two factors, call them mini-epiphanies. First, the disorder arises when people equate listening with agreement and then stop listening to each other altogether. One school administrator put it this way after particularly contentious negotiations:

I appreciate, in a way that I hadn't before, that there is an essential value in listening and giving people the opportunity to seriously engage on important questions. [Still,] there is a difference between listening and agreeing.

The lesson here is if you sense that denigrating demon rearing its destructive head, start talking more softly or stop talking altogether so that you may concentrate completely on listening. I know I cannot learn anything while I am talking. Even if the words sound the same, if you listen more closely, you may hear something new.

The second cause of the Demonization Disorder is the frustration both sides experience due to the lack of resources needed to accomplish what everyone agrees is in the best interests of students and employees. Consider the major bargaining issues of the day:

- Teachers and staff cannot afford to live in the communities in which they work.
- The cost of living in major urban and suburban areas of California eats up so much of employee income that they have to leave to live or room with two, three, and four other adults in order to make ends meet.
- We cannot hire or retain the best and the brightest because they are fleeing to greener pastures or leaving the profession altogether.

- The number of students with diverse educational, social and emotional needs is increasing rapidly, straining our resources, increasing class sizes and caseloads, and outstripping the specially trained personnel who can meet their needs.

Given this state of affairs, and the prospect of a slowing economy, I will tell you the greatest single challenge I think we negotiators face today: We *agree* with the vast majority of requests and demands placed on the table by our counterparts, but are relatively powerless to do anything about them. This frustrates labor and management, leading one or both parties down a path away from substance to one that veers toward emotion and irrationality. It is in this environment that the Demonization Disorder thrives.

I believe the way to contain if not prevent disagreement from turning into mudslinging is for the parties to first openly acknowledge their areas of agreement. This poses a risk in the traditional negotiations model because we are afraid that once we say “We agree with you,” our counterparts will respond with “Aha! Gotcha! Now you’re required to do what we ask.” Both parties must agree to create a safe haven at the bargaining table that precludes this, thereby allowing for an honest and rational discussion.

Second, instead of one party making demands and holding the other party responsible for coming up with solutions, labor and management together should identify the challenges they face and the obstacles preventing them from addressing agreed upon areas of need. Neither party is obligated to solve problems alone in their separate labor and management silos; rather, they should identify and seek ways to meet challenges together.

If we keep listening, neutralize the destructive force of frustration by bringing it out into the open, and then jointly seek solutions rather than assign blame, I believe the Demonization Disorder can be prevented.

The No Good Deed Doctrine: My fourth and final insight was the No Good Deed Doctrine which states simply: No good deed goes unpunished! The No Good Deed Doctrine exemplifies the inherent tension between who we are and the responsibilities we are required to fulfill as human resources and labor relations professionals.

To prove my point, just look at the words contained in those two titles. The first – human resources – denotes a duty to address the needs of *people* whose jobs are to serve students. It is the *sine qua non* of school administration, which means it is essential and indispensable. As we know, *people* represent anywhere from 80% to 90% of a school district budget since only *people* can deliver the core education program and provide the support systems that enable this to occur.

The second – labor relations – signifies a responsibility to attend to critical *relationships*, the strength of which will determine whether employees feel valued and rewarded for the jobs they do and, as a result, provide their *labor* enthusiastically and satisfactorily.

Based on these definitions, it is not surprising to find – at least in my experience – that HR and LR folks are typically caring and sensitive and genuinely want to solve problems, improve the workplace and help people. The tension arises, however, when one realizes that the dictates of law and the basic principles of labor relations require a one size fits all approach in an environment suffused with the variability of thousands of individual employees and situations.

If you stray from past practice, or make an exception, or go the extra mile, you may be accused of violating the contract, committing an unfair practice, discrimination, or setting a new precedent that must now apply to everyone. Let me give you an example.

Recently a district administrator discovered that one of his newly hired teachers had lost her short-term lease for the rooms she was using while she searched for permanent lodging. In fact, the administrator discovered the teacher had become homeless and was living out of her car, a fact she announced to her students, causing them great distress.

Instinctively and immediately, the supervisor tried to help the teacher and came up with a great idea – he decided to give the teacher a salary advance so that she could at least find a hotel room. Although this was truly a “good deed,” it was a tremendous risk. Did he take unilateral action on a negotiable subject? Yes – wages. Did he notify the union of his intent before he made the decision? No. Will he be vulnerable to allegations of favoritism or discrimination if he does not grant subsequent requests for a salary advance? Probably.

These fears and this reality lend great strength to the No Good Deed Doctrine which causes us to exercise restraint before we act according to our innate best intentions. It requires us to stop, look and predict the adverse consequences before we grant that leave request for reasons that do not fall within the contract; or forgive missing that deadline; or pay that per diem rate for extra work for which the hourly rate or no compensation has been the practice. Every time we contemplate making an exception to the rule, we must stop and chant to ourselves: “No Good Deed Goes Unpunished.”

Conclusion

- How do we analyze whether language we agree to today might become harmful to our interests sometime in the future, knowing that those words may live forever per the Commandment Concept?
- How do we determine whether and when to seek change in our agreements, knowing that the Pandora’s Box Problem is always looming out there somewhere?
- How do we establish a safe haven at the bargaining table that allows both parties to openly acknowledge each other’s needs, and the limits on our capacity to address those needs? How can we move from a process in which one side makes demands and holds the other side responsible solving the problem in isolation, to one in which both parties jointly seek solutions to challenges, thereby avoiding falling prey to the Demonization Disorder?
- And finally, how can we cope with the No Good Deed Doctrine? We resolutely reject favoritism, abhor arbitrariness and denounce discrimination in any form, but what can we do to preserve the *human* element in human resources and the *relationship* component in labor relations?

For me, the answer to all of these questions is this: No matter how stark the differences or how wide the gulf, respecting each other and protecting relationships must remain paramount in everything we do. We cannot succeed in our mission to provide quality education to students if we neglect the needs of those who make this possible. Therefore, within the structured chaos that is collective bargaining, and amidst all of the laws, procedures, regulations, contracts, and past practices, one supreme rule must prevail: Do the right thing. Always. Every time.

This seems so simple, so obvious and self-evident, but it is an essential truth that goes to the heart of something very important to us. After all, such is the definition of an epiphany.