



DANNIS WOLIVER KELLEY

Attorneys at Law

COVID-19 ARTICLE



How to Negotiate During a COVID-19 Recession

By Gregory J. Dannis

May 28, 2020

The recession we now face resulting from shutdowns of state, national and international economies is staggering in its proportions. The Governor's May Revise Budget has provided the first view of the potential impact on California schools and the broader system of public education. As most pundits state, the only thing certain about this fiscal snapshot is its uncertainty. This is not the final picture we will see.

Labor relations practitioners must now pivot instantaneously from strategizing how to negotiate compensation increases that account for rising costs (STRS/PERS, health and welfare premiums etc.) to determining whether the district can afford to settle for a closed contract at zero increases or instead must pursue monetary concessions. If employers need the help of labor partners to reduce costs, how do we prepare for and conduct negotiations in a potentially fractious environment?

We have been there before. Although not nearly as sudden and tragic and severe, we have weathered several recessions since the 1980s, the most recent being the "Great Recession" of 2008-2010. The following article, "Negotiations in California After the Gold Rush," was written during that time. It was the keynote speech at the 2009 ACSA Negotiators' Symposium and subsequently published in the California Public Employee Relations (CPER) Journal in August 2009 (Institute for Research on Labor and Employment, UC Berkeley).

The goal of this article was to advise districts how to navigate and negotiate during an economic downturn. Upon review, I believe most if not all of the strategies, approaches and "values" still apply with equal force to our present circumstances and immediate future. It is reproduced below for your information and assistance in meeting this new challenge.

NEGOTIATIONS IN CALIFORNIA AFTER THE GOLD RUSH

January 21, 2009

By Gregory J. Dannis, Dannis Woliver Kelley

INTRODUCTION: REMEMBER THE GOOD TIMES?

Remember how negotiations used to be? It seems like only yesterday that we were:

- Debating whether we could pass through the entire Cost of Living Adjustment, as the union demanded at minimum, or hold something back to account for increased costs of doing business, such as rising energy prices;
- Assessing the true cost of step and column movement to determine whether it should be subtracted from the salary raise;
- Attempting to contain the increased cost of health and welfare benefits for current and retired employees and asserting that this cost must be counted as part of the total compensation increase; and
- Dissecting the District's budget, all the way to fact-finding if necessary, to determine if the District did indeed have the "ability to pay" a little bit more than its last best offer.

Who would have thought that someday – like today – we would look back wistfully and say "Ah, those were the good times!"

California became a state only a few years after gold was discovered at Sutter's Mill, and we have prospered for over 150 years since then, 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 were born as, and believed we would always be, the "Golden State;" now, however, we exist in a new world of "after the gold rush."

We've experienced economic crises before. Proposition 13 decimated the very basis of school district funding from which we have never recovered fully. And in the early 1990's we experienced the "un-cola years," for which we were finally made whole with the "10% COLA" only a few years ago. Is this year any different?

I believe it is for many reasons including:

- The current crisis is revealing with cruel clarity the fundamental defects and weaknesses in the very structure of state finances, including the funding system for public schools. California cannot maintain its claim to be the "Golden State" when it contributes less money to schools than 95% of the other states, even while about 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 anymore than the prospector can guarantee there will always be more gold in the mine.
- This time, it is not just the schools that are suffering; rather the entire safety net of social services to those in need is being threatened. And if that net is pulled away, our educators will be challenged more than ever to teach children who are homeless, hungry and ill.
- The crisis is national this time, not just local. All told, 40 states are reporting an estimated \$150 billion in budget shortfalls. California alone represents about 28% of that amount at \$41.5 billion and New York, like us, faces a gap of about 25% of its entire budget.

It is not an exaggeration to say the financial upheaval is global in scale. As the saying goes, however, even if we think globally, we are only empowered to act locally – in each of our 1000 school districts. As negotiators, our ability to act locally occurs at the bargaining table. Since these times are so different we should think about how negotiations and our job as negotiators have changed and will continue to evolve after the gold rush. Here are my thoughts.

NEGOTIATIONS AFTER THE GOLD RUSH

Crisis: An Opportunity for Change?

Our new President was elected on a platform of change. He faces a crippled economy with the attitude that crisis presents an opportunity for changes, the only question being how deep and fundamental they will be. Should we approach negotiations the same way – 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, a great victory may be just preserving benefits, salaries and working conditions. Management, on the other hand, may see this as an opportunity to finally get that health benefits cap, or increase that class size or workload or decrease that work year.

If such actions are absolutely vital to the district's solvency, then we should put these issues on the table and pursue changes in good faith negotiations. The danger, however, is in over-reaching. We cannot fall prey to the temptation to "go after the contract" to get rid of all those things we've wanted to for all these years by using the economy as a pretext for these demands. Labor must likewise not retreat to the old saw of "if there's no money, then get language that management has always opposed."

Instead, labor and management must both critically assess what is truly needed from negotiations as opposed to what is merely wanted.

Can We Satisfy Our Constituents?

A common reason for breakdowns in negotiations is unrealistic constituent expectations; this happens more frequently in times of crisis.

School boards are faced with the prospect 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 automatically compromise core needs and beliefs. This is unlikely, however, and management needs to resist accusing labor of not appreciating the gravity of the situation and of being selfish. In fact history teaches us that in difficult times, labor will agree to difficult concessions, if at all, through *negotiations* rather than by abdication of its role.

On the other hand, 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 in order to solve the problem.”

Both parties will be unsuccessful in negotiations if they take these unrealistic positions. If either party does so, it will only increase the likelihood of unilateral actions and decrease the chances for bilateral agreements to the detriment of both parties and their relationship.

I am also seeing increasing demands for a faster pace of negotiations. Everyone wants “the fix” done NOW! Raise those class sizes. Get that health benefit cap. Get that job protection clause. Get that guarantee of no reduction in salaries or benefits. These are huge changes, many of which would directly threaten or protect individual security. As such, the pace of change – and the pace of negotiations – will be slower than usual.

Management and labor must understand that neither our bargaining law nor the agency that enforces it give any consideration to how quickly a party may need a change or how long the negotiation and impasse processes may take. The EERA and PERB care only that the process – every step of 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 taking unilateral action on matters which by law must be negotiated. To my knowledge, however, 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 twenty 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 layoff, reassign or transfer personnel, the answer is still that these matters are not negotiable, assuming in the latter two cases that you are following existing contract language.

Since existing contract language never anticipated the current economic crisis, one cannot argue it was “the intent of the parties” to apply this language in a certain way in our present circumstances. No party can make this claim because the crisis was never discussed back when the language was negotiated. Recently, however, management and labor appear to be reinterpreting and re-construing 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 will always be applied to unforeseen situations, but the underlying meaning and the plain words of the agreement are not magically transformed into more management authority or greater worker protections simply because times have changed.

The same phenomenon is occurring over the concept of past practice. Both parties seek to turn a single example of conduct into a binding past practice if, in that isolated instance, the action favors their interest. If ten years ago the employer for one time allowed a worker facing layoff to bump into a position in which he or she never served, the union asserts that this binding past practice confers this right upon all employees. If the union for one time allowed management to reduce a worker’s hours without negotiating the decision, the employer asserts a right to do so at will due to this binding past practice.

This distorts and degrades the utility of past practice as an interpretive aid that helps the parties to enforce the contract and maintain universal definitions of work place rules. If allowed to prevail, this approach will ultimately prompt management to try anything once and compel labor to oppose anything that has never been tried. Just when both parties need more flexibility than ever, we will have created more rigidity.

Good Faith Negotiations Are Threatened

The duty to negotiate in good faith requires us to behave during negotiations in a manner which demonstrates a sincere desire to reach an agreement.

Part of this duty means providing relevant and accurate information in a timely manner and not delaying the process. Responding to union RFIs – Requests for Information – is usually not a problem for the employer unless the union is really issuing RFHs – Requests for Harassment. RFHs are those endless requests for volumes of paper made solely for the 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 may even wait for the first interim report in order to get a clearer picture of district finances before they negotiate over salaries or benefits. If a district insists on waiting longer – for example until the second interim report –the union may accuse the employer of unreasonable delay and bad faith bargaining.

Now, however, we are forced into relying on a seemingly endless stream of bad information at the bargaining table. Since the Governor’s Declaration of Fiscal Crisis about a year ago, we have learned that *no* information is really the most accurate information. 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.

We are past the mid-point of the 2008-2009 school year and we still do not have a real budget. We face a whole new set of unknowns and more uncertainty than ever: midyear cuts and no COLAs for one or two more years. How can we bargain effectively in this environment of delayed information, changed information and bad information? Neither side is bargaining in bad faith but dysfunction at the state level is preventing negotiations in which both parties can have any faith at all when it comes to economic issues.

This is not healthy for the relationship. As both parties get more frustrated, emotions will rise, someone to blame will be sought, and the process will erode. 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 often depends on the free exchange of information between the parties. A common understanding of the negotiations “model” being used also facilitates good results, for example, if both parties have been trained in and are using an interest-based or core values approach. It is folly to believe, however, that we can educate the other side into submission or train them how to surrender.

Regardless of how much we depend on data or the approach we use, negotiations will always be based on a dynamic mix of substance and emotion simply because it is people who do the negotiating. I often think of an old song lyric to describe negotiations as “a walking contradiction, partly truth and partly fiction.” Recently, however, I have seen the bargaining process become more emotional and less substantive. In these anxious times, I expect this change in the human element of negotiations to continue and reveal itself in several ways.

The facts will only go so far, especially since the economic data are built on a foundation of quicksand. There may come a point when someone will begin to feel and even declare out loud: “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 a way that will probably never be confronted openly. In the

alternate universe of collective bargaining, labor traditionally demands 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, in the minds and hearts of many employees and their unions, there is an unconscious paternalism present. Their goal in negotiations is to ensure that the employer will take care of their basic needs.

Am I suggesting that we adopt a more paternal tone? Not at all; what I am saying is we should comprehend what I did when that classified worker spoke through her tears: The people across the table and those they represent have a real and present 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 already caused a role reversal of sorts in the kind of contracts management and labor seek to achieve. I think of it terms of open or closed doors. Traditionally, labor wants to bargain a contract with as many reopeners - open doors – as possible in order to maximize its opportunities to achieve better wages, benefits and working conditions through negotiations. The employer, on the other hand, wants as few reopeners as possible, to close the doors on the possibility of making more concessions at the bargaining table.

Now the roles are reversed. Labor seeks to minimize negotiations through multiyear closed contracts in order to negate management’s ability to seek reductions in compensation or working conditions. The employer, however, may insist on more reopeners, or maybe only a one-year contract, in case it needs to pursue contract concessions if the economic crisis continues.

In just the last few weeks, I have reached tentative agreements on closed multiyear contracts with no salary increases. These agreements were based on proposals from the union, not the district. In one case, the union even 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.” As negotiators, we must therefore look at the opened and closed doors from a new perspective and with different interests.

CAN NEGOTIATIONS SURVIVE WITHOUT ANY GOLD?

What else can we do to promote the survival of the negotiations process even after the gold is gone? Some would say nothing can or should be done, hoping they might 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!”

While there may be some truth to this sentiment, wishing for the demise of negotiations is short-sighted. In most places, collective bargaining serves as an orderly and efficient problem-solving process that fosters stability in the workplace. It is unrealistic to expect the process to simply disappear, so our energy should be directed toward making the process work even in these tough times. Some of my random thoughts on what we can do – both labor and management - are as follows:

- **Re-examine Our System of Negotiations:** As much as I believe in the negotiations process, something is either broken or near the breaking point. In too many places bargaining takes too much time, energy, emotion, lost work, and money, especially when there is no money and more work to be done with fewer workers. Here’s an astounding reflection on our current state of negotiations: We know that negotiations is a mandated activity for which districts receive cost reimbursement. We also know we have not been receiving that money –we are owed about \$150 million, most of which is due to negotiations. As I understand the proposed state budget, in order to fund the collective bargaining mandate, base revenue limit funding would need to be reduced even more than has been proposed. Let’s get this straight. We should cut funding for public schools in order to pay for bargaining over wages, benefits and working conditions for public school employees? I am not proposing to get rid of negotiations, but this house cannot stand.
- **Define Victory, Then Claim It:** There will no raises this year. Class sizes will not be reduced; in fact reduced class sizes may disappear. We will not reclassify scores of positions into higher salary ranges even if there is a study that says

we should. Most people understand these kinds of big ticket items are not in the offing. But are there small victories we can pursue? Is there an hourly rate or a stipend that, if increased just a little, would still acknowledge the efforts of a group of employees? Is there some definition or process or policy that can be improved just a little without sacrificing management rights? Most importantly, is there a way to at least keep employees “whole” by preventing the combination of increased benefit costs and no wage increase from resulting 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, there may be a legitimate need to discontinue practices we cannot afford. Instead of completely eliminating these contract provisions, consider proposing to suspend them instead. This approach responds in a more proportionate measure to your needs and does not overreach. This offers the union a politically viable opportunity to be part of the solution, and allows both parties 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 and making ultimatums instead of proposals that can be refined through the give and take of negotiations. There exists no problem for which there is only a single solution.
- United We Stand, Divided We Fall: I hate trite sayings more than anyone, but this one is too apt to ignore. The immediate future looks bleak and we will no doubt feel the effects, but if labor and management are at odds, the impact on both parties will only be worse. I am encouraged by expressions from state-level union leadership that now is the time for them to “sprinkle a dose of reality” on local chapters if expectations are still out of line.
- Don't Be Too Hard On Yourself: You would not believe how many times I am asked, “Aren't we the worst, most dysfunctional, craziest district you work for?” And my answer is invariably “no,” except, as grammar and logic would dictate, for that one district which fortunately has not asked me yet. My vantage point is different from most of yours: I go to a different district every day, whereas you work in one place. So I can state with certainty that you're all a little bit crazy – in a good way – and you all do a better job than you let yourself 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 90+% of you, the answer is a resounding “NO!” Trust me when I tell you 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 for you to realize it could be much worse, so do everything you can to prevent this kind of change from occurring in your district.

These thoughts and suggestions are focused externally on the negotiations process itself during times of crisis. But what about the internal perspective – how do we as negotiators cope with this altered state of negotiations after the gold rush?

For me, the excitement of this job has always been the exposure to the great variety of people, places and cultures. As I've often said, I get to visit a different country every day. This variety provides me with a diversity of fascinating issues and problems. The task is constantly stimulating and demands creativity in order to craft solutions that apply uniquely to each district and the relationships it has.

But now we all face a common challenge whether we negotiate in one or one hundred districts: How to hold on to the joy of the job instead of surrendering to the mind-numbing sameness and sadness of a pervasive economic meltdown and to somehow keep those creative juices flowing.

I think the answer to this challenge is deceptively simple. First, we must recognize and reaffirm the value of the greater team, not just the bargaining team. We already see examples of one group pitted against another– management versus employees, and certificated versus classified. It is true that 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 maintain a sense of humor even when the sacrosanct social contract of a free public education for all citizens appears to be breaking. It is more important than ever for us to be able to cut through the tension, lighten the mood, and laugh out loud together. Let me give you a few examples of what I mean.

- The union’s initial proposal was 20 pages long and contained hundreds of modifications to the contract. After taking three hours to present it, I asked, “Why have you made so many proposals, especially given the budget situation?” The union representative looked at me, smiled, and said “Greg you should know better. These aren’t just *any* changes; these are changes we can believe in!” After regaining my composure, I said, “Fair enough, but what do you expect me to do? How can I possibly respond to all this?” My labor friend smiled even wider this time and said, “Greg, you still don’t get it. It’s very simple – all you need to do is respond to all of our proposals with three simple words: “Yes we can!”
- I am noticing an increase in name calling in union publications. One union president publishes an annual “Naughty and Nice” list at Christmas time. This year I was ranked number 1! The president said: “Chief Negotiator Greg Dannis – maybe I should call him Devious Dannis – seems to operate in a shadowy fashion.” Now, I intend to ask at the end of every negotiations session, “Do you really think you know what I meant about anything I said or proposed today? Be careful!”
- Another union paper had this to say about me in a district where I had just started as the negotiator: “[We would have made more progress in negotiations] had their new legal counsel shown less of a tendency to suggest padded and obfuscatory legal language.” I sent the following response to the union newspaper:

Sir or Madam: With regard to the “Union Talk” column by the Executive Vice-President which appeared in your newspaper, I respond as follows to the comments that I utilize “padded and obfuscatory legal language” in my role as legal advisor to the District in negotiations with the union:

In the aftermath of my perusal, which I conducted with both visual acuity and intellectual discernment, of your ponderous periodical in which you question if not malign my capacity and ability to articulate expressions of position or persuasion in a straightforward manner insofar as such postulations are reduced to a format in which words and phrases are grouped together thematically and thereafter are caused mechanistically to appear on that media known to be derived from pulped wood, I am compelled, if for no extraneous motive other than preservation of my professional pride, to categorically, completely and utterly reject your contemptuous characterization of my prowess insofar as it relates to the substantive endeavor described herein.

Concisely yours,
Gregory J. Dannis

Even in these tough times, if we can’t laugh it off from time to time, chances are we won’t make it work. I hope these thoughts are useful to you as you continue to face negotiations after the gold rush and that I have refrained from articulating them in a padded, legalistic or obfuscatory manner.

Thank you.

DWK remains dedicated to providing high quality legal support during this unprecedented time and will continue to respond to the ever-changing nature of COVID-19 issues. For more information regarding the impact of COVID-19 on your district’s operations, please visit our COVID-19 Resources page at <https://www.dwkesq.com/covid-19-resources-page/>.



Danniss Woliver Kelley (DWK) is a full service education law firm focused on serving and providing legal representation for California public school districts, county offices of education, community colleges and other educational organizations. Established in 1976, DWK is one of the largest women-owned law firms in the country. The firm’s areas of practice include: Board Ethics, Transparency and Accountability; Business and Property; Charter Schools; Construction; Labor, Employment and Personnel; Litigation; Public Finance; and Students and Special Education. DWK provides preventive, practical and cost effective legal counsel on key issues surrounding your core mission—the education of students.