

Labor Negotiations Handbook for Municipal Officials

Joseph W. Fremont

© Michigan Municipal League

Table of Contents

Chapter One: Getting Organized	
A. The Extent of Unionization	1
B. A Brief History	1
C. Why Do Employees Want Unions?	1
D. Staying Non-Union	2
E. When Employees Form a Bargaining Unit	2
F. Unfair Labor Practices	4
Chapter Two: Bargaining Preparations	5
A. The Duty to Bargain in Good Faith	5
B. Getting the Negotiations Underway	5
C. Selecting a Management Team	5
D. Pre-Bargaining Research	6
1. Fiscal data	6
2. Economic data	7
3. Comparing wages and employee benefits	7
4. Bargaining unit history	7
5. Bargaining unit politics	8
E. Developing Management's Bargaining Goals	8
F. Strike Plans	9
G. Ground Rules	9
1. Place of meeting	10
2. Time of day of meetings	10
3. List of participants on each team	10
4. Meeting length and frequency	10
5. Press relations	10
6. Record keeping	11
Chapter Three: Negotiating the Agreement	12
A. Presenting proposals	12
B. Format of Proposals	12
C. Describing Proposals	13
D. Discussing Proposals and Issues	13
E. Explaining Your Viewpoint	13
F. Candor and Openness	14
G. Putting an Agreement Together	14
H. Presenting Package Proposals	15
I. Closing the Deal	15
J. Ratification	15
K. Special Bargaining Situations	16
1. First contracts	16
2. Act 312 unions	16

Chapter Four: Negotiation Dispute Resolution Procedures	18
A. Mediation	18
B. Fact Finding	19
C. Interest Arbitration (Act 312)	20
1. Description of Act 312	20
2. Petition	21
3. Act 312 team	21
4. Answer to the petition	22
5. Appointment of an arbitrator	22
6. Preparations	22
7. Presentation of the Act 312 case	23
8. Final offers	24
9. Panel meetings	24
10. Opinion and award	25

Chapter One: Getting Organized

A. The Extent of Unionization

In Michigan, most government employees are represented by unions. Nationally, the most well-accepted numbers show the public sector to be 37.5 percent unionized and the private sector around 10 percent or lower. In the early 1980s, the Michigan Municipal League surveyed its members, and found they were 85 percent unionized. There have been very few de-certifications of unions since then, so there is no reason to believe the numbers have changed much since the League's survey. It is safe to say that the overwhelming majority of cities and villages in Michigan with workforces of more than a few employees have to negotiate with and deal with unions.

B. A Brief History

Public employee unions began in Michigan in the 1930s in the larger cities. There were a couple of nasty strikes in Detroit, one in the middle 1940s and another in the early 1950s. But public sector unionism didn't really take off in Michigan until 1965 when the Public Employment Relations Act (PERA) was enacted. This law followed the earlier laws in Wisconsin and New York. It amended the anti-union Hutchinson Act passed in 1947 which banned strikes by public employees and imposed serious penalties on strikers. PERA, in 1965, preserved the prohibition against strikes but removed from the law all the penalties. The new law encouraged unionization and protected those who organized unions. It required good faith collective bargaining and specified unfair labor practices that were prohibited and established a state agency to administer and enforce the new law.

Right away there was a great flurry of activity organizing unions, converting old employee associations to unions and engaging in a great many strikes. As the State Supreme Court put it: strikes are still illegal, but because the penalties were removed from the law there exists a "de facto right to strike."

Among the rash of strikes were strikes by police and fire employees including the big police strike in Detroit in 1967. These led to the passage in 1969 of Act 312, the Police-Fire Arbitration Act. This law provides for a state-appointed arbitrator to decide the terms of a

labor contract, if negotiations are unsuccessful.

The two laws, PERA and Act 312, are the basic labor laws covering municipal employees in Michigan. There were amendments in 1995 restoring strike penalties for school employees, but not for municipal employees. There have been a few minor police strikes since Act 312 was passed, but generally Act 312 has been very successful in eliminating police and fire strikes because it has become a very real windfall that police and fire unions do not want to jeopardize. It has made negotiations with police and fire unions very difficult, as we discuss later.

C. Why Do Employees Want Unions?

A generation ago, one of the great attractions of working for a government was job security and job stability. Business was steady. Layoffs of government employees were unheard of. It was also true that security-related employee benefits such as health insurance, life insurance and pensions, were much better in the public sector. But wage rates were lower. By the early 1960s, many public employees felt they had missed out on the post-war economic expansion because of their low wage rates. Many took on second jobs so they could provide a better standard of living for their families. The 1960's was a period of great expansion of unions of public employees, especially in Michigan. The main reason appeared to be a desire to "catch up" with the wage rates of other Americans. But the 1960s and 1970s also saw another change: local governments began having financial problems and layoffs of public employees began occurring. This break in the tradition of assured job security coupled with the desire of public employees to receive paychecks like those in the private sector, caused a great boom in unionization particularly in states, like Michigan, that had passed legislation favorable to the formation of unions.

After the big growth spurt of unions in Michigan's public sector in the late 1960s and early 1970s, union growth slowed to a steady process of smaller groups of employees deciding to form or join unions. These employees were people who had been non-union and something changed their minds. Almost always there was a pattern: 1) something about the job became unsatisfactory; 2) there was a sense of not having

any way to deal with the dissatisfaction; and 3) somehow they became convinced that a union could address the problem and perhaps solve it. The most common dissatisfaction was a concern about job security. Another common concern has been the perception that employees are not treated fairly in such things as vacation schedules, promotions, or assignments. Most union organizers will tell you that their successes in convincing people to unionize are often due to some management person who is inaccessible, unfair, or paternalistic.

D. Staying Non-Union

If your employees are non-union and you'd like to keep it that way, you must remove one of the three ingredients that lead to forming unions. The one over which the employer has the most control is the second one, the one about the employees feeling they have no way to deal with problems in the workplace. An open door policy is a good place to start. In large organizations it can be useful to institute a formal written grievance procedure. Of course, the employer must do more than just listen to the employees; the employer must act to solve the problem. If the brakes aren't working on the truck, they must actually get fixed. Talking about the brakes isn't enough. Some employers work very hard at keeping employee dissatisfaction to a minimum. They have very active programs to make sure the workplace is safe and even pleasant to work in and they try to provide benefits that compensate employees well and deal with their needs. When these efforts are combined with access to management people who can and will solve problems, the employees will usually not join or form unions.

However, in local government in Michigan, the horses are mostly out of the barn. The unions have been organized and the vast majority of the employees are represented by them. Keeping a workplace non-union is easy; getting rid of a union is almost impossible.

E. When Employees Form a Bargaining Unit

A bargaining unit is a group of employees of one employer who have joined together to bargain collectively regarding wages, hours and other terms and conditions of employment through representatives they have chosen. Usually the representative is a union. A union is a voluntary association of people that usually have

something in common such as a common trade or a common industry where they work. A person can be in a bargaining unit represented by a union and still choose to not be a member of the union.

There are two ways a union or other representative can become the official representative of employees in a bargaining unit: 1) by being voluntarily recognized as the representative by the employer, or 2) by being certified as the representative by the Michigan Employment Relations Commission (MERC).

MERC is the state government agency that enforces the state's labor laws covering all local governments including counties, townships, cities, villages, school boards, public universities and colleges, district libraries and special authorities.

A would-be bargaining representative can petition MERC to be certified. If the petition is accompanied by a "showing of interest" and if the employer has no objection, MERC will conduct a secret-ballot election to determine if the employees in the bargaining unit want to be represented by the petitioner.

A "showing of interest" exists when 30 percent or more of the members of the bargaining unit have signed a statement that they wish to be represented by the petitioner. If there is a showing of interest, MERC will hold a conference with the employer and the petitioner to ask the employer if it agrees to an election among the employees. This is an important point in the process. The petition filed by the union has in it a description of the desired bargaining unit. This description may say something like "All employees of the Village . . .", or "All employees in the City's Police Department . . ." This description may not be to the employer's liking. You might want to exclude part-time employees, or the city manager's secretary, or supervisory employees. It is during the election conference that the employer has the best opportunity to amend the description of the bargaining unit. The employer can refuse to consent to the election, and has no obligation to state a reason. This refusal will trigger a hearing before an Administrative Law Judge and will inconvenience the union petitioner. But if you say that you will consent to an election if the bargaining unit description is modified, you'll find most unions willing to agree to reasonable modification. If you wait and try to amend the unit description after the union has won the vote and has been certified, you'll find most unions

will not be so reasonable but will demand some concessions in exchange. The management representative should be prepared to state the bargaining unit description that management would prefer and have it in written form to be used in the pre-election conference. Even if the conference is a telephone conference call, be ready.

The preferred bargaining unit description states clearly, by job classification title and by department, just who specifically is in the unit and then states who is not in. An example of an acceptable unit description is: "All regular, full-time equipment operators, heavy equipment operators, mechanics, laborers, and water distribution system workers in the Department of Public Works; BUT EXCLUDING all executives, supervisors, clerical employees, temporary employees, part-time employees, casual employees, confidential employees, and all other employees . . ." If you see a unit description like this one, you can bet that the original petition probably said something like "All DPW employees," but an alert management person got it modified.

If there's a dispute regarding what is the appropriate bargaining unit, MERC will decide. There will be a hearing and, although it's not legally required, the employer very definitely should be represented by a lawyer who specializes in public sector labor law.

There is a lot of case law regarding what constitutes an appropriate bargaining unit. MERC will allow supervisors to be in bargaining units but not the same units that include people they supervise. MERC does not allow one-person bargaining units. Act 312 eligible employees will not be included in units with people that are not Act 312 eligible. There are a number of situations where, by mutual agreement of a union and management, these rules are not followed, but MERC will follow them if it is deciding the composition of the bargaining unit.

Either by agreement and consent of the union and the employer, or by order of MERC, the bargaining unit description will be established; and, if there is a showing of interest an election will be scheduled. Frequently, these are conducted by mail, with MERC sending out the ballots, and then receiving the responses and counting them. If a majority of those voting choose the union, the union will be certified by MERC as the exclusive collective bargaining representative.

Over the years, most public employers in Michigan have not resisted their employees organizing or joining unions and have not campaigned to try to persuade employees to reject a union. This is in stark contrast to employer behavior in the private sector. There are rules governing the behavior of employers including all its officials and management representatives while a union is attempting to organize the employees. Violations of these rules are either called unfair labor practices, or they can cause a new election to be held if the union loses. If you choose to campaign to try to convince employees to vote against the union, you should obtain advice from a labor attorney. The general rule of thumb is you cannot promise or threaten anything either directly or indirectly. You must not say that if they vote for the union, you'll have to look into privatizing the operation or if they reject the union, they'll get a big raise. You can indicate that you, or the city council, don't feel a union is a good idea.

After the election, if the petitioning union wins, MERC will certify that the petitioner is the exclusive representative of the employees in the described bargaining unit for purposes of collective bargaining relative to wages, hours and other terms and conditions of employment, which is sometimes referred to as the "scope of bargaining", or as "mandatory subjects of bargaining." By "exclusive representative" we mean literally that only the representative stated in the certification can negotiate on behalf of these employees. The employees themselves can no longer make their own deals. If one of them says to the boss "I want a raise", it would be an illegal unfair labor practice for the boss to discuss it with him.

Another point to remember: the employer should not increase or decrease wage rates or improve or reduce benefits between the time the representation petition is filed and the time of the election because it may be interpreted as an improper interference with the election. If such changes are important, get advice from a labor attorney as to just how and when such changes can be made. After the election, and after the MERC certification, no changes can be made regarding any mandatory subjects of bargaining without the expressed agreement of the union. The union will contact the employer about setting up a meeting to commence negotiations. The union has the right to ask for, or "demand" that its proposed wage and benefits improvements be retroactive back to the date of

the MERC certification. As with any union demand, the employer does not have to agree.

F. Unfair Labor Practices

Section 9 of the Public Employment Relations Act (PERA) states: “It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.”

Section 10 of PERA lists a number of possible activities of both employers and unions that are prohibited. These are called unfair labor practices. A summary of them is:

1. Employer unfair labor practices that are prohibited

- a. To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in Section 9.
- b. To initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization.
- c. To discriminate in regards to hire, terms or conditions of employment in order to encourage or discourage membership in a labor organization.
- d. To discriminate against a public employee because he or she has given testimony or instituted proceedings under PERA.
- e. To refuse to bargain collectively with a representative of the public employees (subject to Section 11 which allows an individual employee to present and settle a grievance if it doesn't violate the contract between the employer and the union and if the union representative was given the opportunity to be present when the grievance was adjusted.)

2. Union unfair labor practices that are prohibited

- a. To restrain or coerce public employees in the exercise of the rights guaranteed in Section 9 or a public employer in the selection of its representatives for the purpose of collective bargaining, or the adjustment of grievances.
- b. To cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection 1-C above.
- c. To refuse to bargain collectively with a public employer.

Chapter Two: Bargaining Preparations

A. The Duty to Bargain in Good Faith

Section 15 of the Public Employment Relations Act requires both the employer and the union to bargain in good faith regarding the mandatory subjects of bargaining, i.e., wages, hours and other terms and conditions of employment. This obligation does not compel either party to agree to a proposal and it does not require the making of a concession. The requirement is to meet at reasonable times and confer in good faith. The representatives must display, through the totality of what they say and do, their sincere desire to reach an agreement. Surface bargaining, going through the motions with no intention of ever reaching any agreement, will be regarded as a violation of the duty to bargain in good faith. On the other hand, hard bargaining, bargaining with the idea of reaching an agreement but an agreement which overwhelmingly favors your side, is not a violation of the duty to bargain in good faith.

One of the most common unfair labor practices occurs when management fails to bargain in good faith by unilaterally changing a mandatory subject of bargaining. If something is a mandatory subject of bargaining such as a wage rate, an insurance or pension provision, or a work schedule or safety rule, management cannot change it except when the union agrees it can be changed or except when there has been bargaining but an impasse has been reached. An impasse is the point in negotiations where the positions of the parties have solidified and further bargaining would be useless. There must have been a good faith attempt by management to negotiate, a reasonable term of bargaining (the longer the better), and both parties must be clearly aware of just what are the positions of both parties that have become fixed. The Michigan Employment Relations Commission has laid down some strict criteria for determining if an impasse exists. An employer should not act unilaterally thinking there is an impasse, without the advice of a labor attorney.

Without impasse, the employer may not change benefits or terms and conditions of employment unless the union agrees. This agreement could be language in the contract previously agreed upon. It may be that the union has already agreed that management can change something. A well-written management rights

article specifies a number of things management can do without further agreement of the union. This enables management to react to unforeseen circumstances in a timely way.

B. Getting the Negotiations Underway

After a union is first certified, it will contact management with a request to begin negotiations. This may take some time because the union may want to prepare a lengthy proposal covering all the provisions it would like to see in a contract. If the union has been established for awhile and has a contract due for renewal or re-negotiations, the contract will specify or, at least, give a hint as to when the new negotiations should begin.

Management should be ready. As soon as management knows negotiations are about to commence, it should do several things to prepare:

1. The management bargaining team should be selected.
2. Appropriate research must be done.
3. The general goals and desired outcome should be discussed and decided upon.

C. Selecting the Management Negotiating Team

The first step in preparing for negotiations is to select the team that will be conducting the negotiations. The size of the team and its make-up will vary with each situation. Usually three persons is enough and more than five is probably too many. There should be a chief spokesperson, a note taker, and people who are knowledgeable about the interests and concerns of the employer as they pertain to the negotiations such as a finance director or department head.

Because the negotiations are important, the team members must be people who can devote the necessary time which can be quite a bit. The team must consult with all affected management people, conduct research, and then work with top management, often the elected officials, to formulate the employer's goals. Then the team must meet with the union and feedback to top management and repeat, then continue going back and forth as necessary and meeting with the union until an agreement is reached, then typed,

proofread, and ratified and signed. If the union is new and the negotiations are regarding a first contract, the negotiations will take much longer than negotiations for a renewal contract. First contracts sometimes take several years and usually require many months of negotiations, depending on the reasons the employees formed or joined the union and whether they have realistic expectations regarding the outcome of the negotiations. Renewal contracts, on the other hand, may take only two or three bargaining sessions, or may take ten or twelve, depending on the difficulty of the issues involved.

Leading the team is the chief spokesperson. This should be somebody who is experienced with negotiating and who is comfortable in the role of chief spokesperson. An employer may be fortunate enough to have somebody in-house who can do this or the employer may bring in an outside expert to lead the negotiations. A number of law firms can provide this service. It is penny-wise but pound foolish to attempt to conduct negotiations with a chief spokesperson who, for whatever reason, is not suited for the task. Some city and village councils assume the city manager can do this. Even if he or she had the time to lead the negotiations, the manager may not have the specific expertise or experience required. City and village managers are a talented group of people but not all of them are experts in all fields. Another reason to not assume a manager, or a department head, should be the chief spokesperson, is temperament. Chief spokespersons need to be patient, and they need thick skins, because sometimes there is abusive language, heated emotions, and frustrating delays. It is not a weakness or a failing to not be suited for labor negotiations. Employers need to keep in mind the importance of the outcome of the negotiations when selecting a chief spokesperson.

The other regular spot on the negotiating team is the person who takes notes, organizes all the paper and keeps a record of all proposals, offers and agreements. If there were only two people on the team, it would be this note taker position and the chief spokesperson. It is never appropriate to have only one person doing the negotiating and meetings should be postponed if only one person is available.

The other members of the management bargaining team should be people who have one or more of the following attributes: 1) they get along well with members of the union's bargaining team; 2) they bring useful knowledge

to the bargaining table such as knowledge of operations (department head or department supervisors), or of finances or of employee benefits; 3) they have previous experience with bargaining; 4) they will need to know later what has been negotiated because, as managers, they will have some responsibility to administer the new agreement.

D. Pre-Bargaining Research

There are a number of political, social and economic forces that, one way or another, affect the negotiations. Knowing what these are, and how they bear upon the negotiations and the negotiators, is essential to successfully conducting the bargaining. Conducting research to do this is simple but tedious and time-consuming. This is where management's "natural advantage" can come into play. Management people are able to conduct more research and assemble more data than union people. This may be because the typical union representative in the public sector has a staggering workload and will probably have to either do the research personally or recruit members of the bargaining unit to assist. Since much of the pertinent data is local and only available locally, the state or national union's ability to assist is limited.

Management, on the other hand, lives with and works with much of the data on a regular basis. Also, management people are often well trained to conduct research and there are usually more people on the management side that can be put to the task.

1. Fiscal data

Municipalities usually have a good handle on their own financial condition and they usually are aware of how neighboring and comparable communities are doing as well. The assessor, the planner, the person responsible for preparing the budget, all have a wealth of data. How much money does the city have? How much will it have in the next few years? Do you have a long-term fiscal plan projecting revenues ahead at least five years? Is your unallocated surplus as large as your auditors and financial advisers recommend? What kind of big financial burdens loom in your future, such as infrastructure replacement and maintenance needs? What is your bond rating and what do the rating companies say about you? What is your tax rate? Is there a tax rate limit in your charter? How does your community compare to your

neighboring communities and to other similar communities regarding all these questions?

Being financially well off and fiscally responsible does not mean big pay raises for your employees, but being broke or fiscally challenged can set upper limits on what you can do in the shorter run. You can't spend money that you don't have.

2. Economic data

Everyone wants a glimpse of the future. Economists are always being asked to predict the future, but none of them are very good at it. Looking at historical trends in economic data can give clues as to your town's near-term economic future. Unemployment rates generally and in your community, rates of inflation and changing patterns in census data should all be gathered. What are the leading industries, if any, in your town? Who are the largest taxpayers and how optimistic are they about their own futures? One of the many good sources for basic economic data is the U.S. Bureau of Labor Statistics whose Internet address is www.bls.gov. Ask your planner and your local banker about the economic prospects for your community. If times are going to be tough, you may be facing the need to reduce services which is a major factor affecting the negotiations. If the present and the future are bright and rosy, that's good, but don't be caught off guard – don't be building in big employee pay and benefits costs if the revenues are not going to be there to pay for them.

When fiscal and economic data are gathered together, it's a good idea to picture the numbers in graphical form – especially historical data. Graphs make numbers come to life and make it easier for understanding during group discussions such as management goal-setting sessions.

3. Comparing wages and employee benefits

An important part of getting ready for negotiations is finding out how your municipality compares to other similar communities and also to neighboring communities regarding wage rates and employee benefits. This is a difficult and complicated task. It's relatively simple to find out what other places pay their employees. What's hard is determining if the duties, responsibilities, skills, etc. of their employees are similar to those of your employees. To the extent that they are different, you are comparing apples to oranges

and the data have little meaning. Just because the job in each town has the same name, doesn't mean it has the same duties or required qualifications. Also, if you do compare wage rates, remember that you are only comparing part of one person's compensation package with part of another person's and you don't know how big a part wages plays in either! Ideally you would conduct a study, a detailed job analysis, in several comparable communities, finding jobs with similar duties and responsibilities, and requiring similar skills and qualifications. Then you would analyze the entire compensation package of all jobs being surveyed and "cost" them out. This is a procedure of adding up the costs of all benefits in dollars and cents and dividing by the hours actually worked (scheduled time plus overtime, less time off). This will show you the cost per productive hour in each town being studied which can be compared. Anything less than that is like comparing a slice of one pie with a slice of another and trying to draw some conclusion about who has the bigger pie. It can't be done. Unfortunately we seldom are able to get complete cost of benefits data. It's hard enough to calculate for our own benefits and it's very hard to get all the necessary data from another employer. There are very few shortcuts, but some cities and villages routinely share as much information as possible on a regular basis so they have an ongoing rough idea of what the others are doing. Another obvious comparison pertaining to an upcoming negotiation is how do benefits compare for members of this bargaining unit with those of other employees of the same employer. If you've been treating one group of employees better than another, you'll hear about it at the bargaining table. All too often employees think they've been short-changed because someone else has a better benefit, but they don't know or have chosen to ignore some benefit area where they are ahead of the others. If one group has a better pension plan and the other group has a better insurance package, they'll both want to "catch up" with the other. This is called whipsawing. It is a very common union negotiating tactic. The more comparable data you can get, the better you'll be able to resist or defend against the whipsaw.

4. Bargaining unit history

In preparing for bargaining, the team needs to review the events of the relationship that occurred during the term of the contract. All

grievances, particularly those involving contract interpretation, need to be studied. If a grievance had an unfavorable outcome, you will need to change the contract to avoid repeating the problem. Even grievances that were finally disposed of to your satisfaction, may indicate that the contract language is unclear and should be improved.

If this is one of several bargaining units in your organization, you need to consider if there is a history of pattern bargaining where one group settles first and sets the pattern the others follow. Is this group the leader, or the follower? Do two or more bargaining units traditionally attempt to whipsaw the employer? History has a way of repeating, so it is worthwhile to identify what has been the bargaining history with this unit.

5. Bargaining unit politics

Who are the leaders of this group? What are they like? If there are differing factions within the unit, are they all represented on the union's bargaining team? The shifting demographics of the bargaining unit and its bargaining team can offer clues to how they will behave in negotiations. More senior employees generally are more concerned with retirement benefits. Employees who have families appreciate the value of health insurance more than single, healthy employees do. Younger people place greater value on benefits that put cash in their pockets. Employer negotiators have very limited resources to work with in negotiations, so they need to determine where they can get the "biggest bang for the buck." They need to maximize the aggregate utility or satisfaction, as economists might put it. This is something management must figure out. The union won't be a lot of help. If you ask a union negotiator if he would prefer an increase in shift premium payments or an increase in the dental insurance coverage, he'll say "yes" and expect you to do both. Correctly, "reading" the union regarding its real preferences depends in part on knowing the facts of its demographics (seniority, age, sex, family status, etc.) and being aware of the subtleties of the group's politics.

With respect to each issue, there is one, perhaps two, people on the union bargaining team that is the person to persuade. It may be a different person or the same person with different issues, but there is always a key person. Understanding how and why each person was elected to the bargaining team can help in

knowing where to focus your efforts.

E. Developing Management's Bargaining Goals

The negotiating team needs to bring together all the data and information it has gathered, organize it, analyze it, and decide what it believes to be the possible range of outcomes of the upcoming bargaining. These possible outcomes need to be realistic and well-founded on the social, economic, and political facts that have been identified.

Each possible outcome will have various advantages and disadvantages associated with it. For instance, the not-so-realistic outcome of keeping all pay rates and benefits constant for three more years will have the advantage of being easier to afford since most costs will hold steady, except probably the insurance premiums. The disadvantage is that the union won't agree to it and you will get an unwanted result like a strike, an interest arbitration case (police or fire), low morale, or high turnover. At the other extreme, there are outcomes the employees would love, but you can't afford them or they would require a big tax increase (if such is even possible) and trigger a taxpayer revolt. In between, there are many possible outcomes, so the team needs to identify a few that seem realistic and meet the needs and problems faced by both the employer and the employees. The reason for narrowing the number of possible outcomes is so they can be discussed in a group setting that includes the bargaining team and top management, usually the elected governing body.

In the goal-setting discussion with the city or village council, someone needs to explain to the council or remind the council that the goals need to be established prior to the beginning of the negotiations and cannot be changed later. Nothing upsets the bargaining more than trying to add a new proposal after the negotiations are well underway or near the end. The council may need time to consider the possibilities. Usually at least two meetings are necessary. It helps a lot if the team gives the top management and elected officials a well-organized notebook containing the research as well as charts and graphs of data and summaries of complicated material along with the team's recommendations. This should show the projected costs of current benefits, costs of various improvements, savings from possible benefit reductions, and the revenue projections through the expected period of the

next contract. Desired changes in non-economic language should be detailed with explanations as to why they are needed.

Sometimes, unfortunately, the goal-setting process reveals a dilemma. For instance, you may have to choose between a reduction in service or a tax increase. Because the total expenditures of a local government are in the range of 60 percent to 75 percent wages and fringe benefits, problems with revenues will have a big impact on the negotiations. This, of course, is also true regarding rising costs over which the local government has little control, such as health insurance premiums.

Underlying all the demands and proposals that are made at the bargaining table are the real interests of the parties. For a local government, the real interests are mainly serving the public, effectively and efficiently. Revenue shortfalls or rising costs are only problems because they can interfere with pursuing the true interests of the city or village.

Proposals made in bargaining are, almost always, a perceived solution to a problem. We need to remember that there are often other solutions, and more importantly, other ways to satisfy our interests. When we are setting our bargaining goals, it's all right to express our concerns in terms of specific changes in the contract, but we need to be very aware of the interests involved and the problem that the proposal would attempt to solve. We need to know what we want, but we need even more to know why we want it.

F. Strike Plans

Strikes by municipal employees are rare and, when they happen, don't last very long. Police and fire employees don't strike because they don't want to jeopardize the availability of interest arbitration and the other employees have discovered that strikes are not effective. Even so, it is a good idea to be prepared for a strike. Michigan's Public Employment Relations Act defines a strike as: "the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in employment conditions, compensation, or the rights, privileges or obligations of employment." Sick-ins, slow downs and similar actions are strikes. Picketing on the employees' own time is not striking – it is

simply the exercising of free speech rights.

The first thing to do when considering what to do during a strike is to decide which services being interrupted should be continued and which can be deferred. The public health and safety are paramount, of course, so services such as water delivery and sewerage will make the list to be continued if possible. Since these are largely automated, the non-striking supervisory staff can usually keep the systems running in the short and medium terms. There are private companies that operate water and sewer systems. It would be good to find out who they are and keep their phone numbers at hand.

There are services that, when stopped, cause inconvenience but do not endanger the public's health or safety. In a strike, it may be prudent to simply allow the inconvenience to occur, at least, for a short time.

If a strike occurs, management will want to secure all properties, facilities and machinery and vehicles. Sabotage by overly enthusiastic strikers does happen. Somewhere there should be safely locked away and carefully marked, a complete set of keys to all locks and vehicles.

There should be an information control system to prevent the spread of harmful rumors. One person only should be the designated spokesperson and all information should be forwarded by all management personnel to one central place.

Public employees in Michigan who strike can be fired. Their only defense is if they were "forced" to strike because of the unfair labor practice being committed by the employer (except school employers). Therefore, if you fire the strikers you can be sure they will accuse you of committing all sorts of unfair labor practices. It is probably wiser to refrain from firing them unless the strike lasts a very long time. Put your efforts into negotiating an agreement thus ending the strike the more business-like way.

G. Ground Rules

Sometimes it is a good idea to agree upon ground rules to govern some aspects of the bargaining. Experienced negotiators, especially if they know each other and trust each other, will omit having ground rules. Each element of the ground rules is probably based on somebody's bad experience, but those stories have been forgotten. Written ground rules can help put the bargaining on a businesslike basis and can head off disruptive misunderstandings. The following are common ground rules subjects:

1. Place of meeting

The bargaining should take place at the employer's place of business, probably the city hall. The best conference room should be used. This demonstrates that the negotiations with the union are being given the highest priority by management. The room should be large enough to easily sit everyone on both bargaining teams at a single table and the room should be secure and private. As a gesture of goodwill, management should provide coffee and water.

2. Time of day of meetings

This might be difficult. If the persons who are going to be involved can be spared from their jobs, it is best to conduct negotiations during regular business hours. If this cannot be done, then hold the meetings at times that are most convenient for the most people. If possible, avoid holding the meetings when people have not been able to get proper rest or when they don't have time to get cleaned up from their jobs.

An important consideration that bears on the times of meetings is the question of whether or not the employee members of the union's bargaining team are going to be paid while negotiating. While the Public Employment Relations Act forbids an employer from contributing to the administration of any labor organization, it clarifies this point by saying, "Provided, that a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay . . ." For a number of reasons, including avoiding abuses, an employer should limit what it will pay union bargaining committee members to what this provision in the law allows. Time spent preparing for negotiations should not be paid time. If a meeting extends beyond an employee's normally scheduled working hours, that time should not be paid. Never pay overtime to union negotiators unless you enjoy lengthy meetings that run late into the night! It is normal and reasonable to pay the union negotiators their normal straight time pay for normally scheduled work time that is spent in negotiations, but the law does not require this time be paid, it simply permits it.

3. The list of participants on each team

It is sometimes agreed in the ground rules to keep each other informed of who will be on the bargaining team. Neither side can dictate to the other who they may have on their team, but it is

especially important that management know well ahead of time if an employee is going to need to be excused from work to participate. This also bears on the question of whether or not the union team members who are employees will be paid by the employer during negotiations because it raises the question of how many will be paid. Neither management nor union can tell the other how large its bargaining team can be, although both must be reasonable. An extraordinarily large team can be disruptive and turn the negotiations into a circus, and no one is required to participate in such an event. However, even within reasonable ranges of team size is the question of how many will management pay for. Since management is not required to pay for any, it absolutely controls this number. The recommendation is to agree to two or three. If the union has a professional staff representative as its chief spokesperson, who is paid by the union, then two more persons paid for by the employer should be enough. If the union has some peculiar political need to have a larger bargaining team, the union can pay people to participate or they can volunteer their time.

4. Meeting length and frequency

Sometimes ground rules indicate how long each meeting might last or how often the meetings will be held but this is a mistake because it can interfere with the natural flow of the discussion. If a meeting is obviously going nowhere, cut it off; if great progress is being made and you're deep into meaningful discussions, keep going. The time between meetings may be affected by the need to do further research or to consult with decision makers not on the bargaining teams. Keep flexible on meeting length and flexibility, place a high priority on proceeding toward a settlement, meeting for as long and as often as necessary to pursue the settlement goal.

5. Press relations

Ground rules often specify limits on public comments regarding the negotiations because such comments never aid in the pursuit of settlements and can cause great damage if only a partial story is told or if someone is misquoted or even just misinterpreted. In a democracy, elected officials don't feel comfortable being muzzled, so don't agree to ground rules along these lines without their concurrence. Ground rules limiting or banning comments and press statements are good but they are difficult to enforce and very hard feelings and mistrust may result from their

violation.

6. Record keeping

Ground rules often specify that there will be a sign-in sheet at each meeting and that the chief spokesperson for each side shall initial and date each time there is an agreement on an item. These agreements are called "tentative agreements" or "TAs". It is a very good idea to put in writing and initial each TA as you go along because it eliminates disagreements later regarding the details of agreements. Just remember that each TA is tentative pending overall agreement on all issues. Also remember that it is very bad form to back away from a TA after it is initialed so don't do it without good reason. Try hard not to do it at all.

Chapter Three: Negotiating the Agreement

A. Presenting Proposals

The first negotiating meeting between the two teams is sometimes devoted to introductions and discussions of ground rules and usually the union presents its proposals at the first meeting. Sometimes the union wants to trade proposals at the first meeting in the mistaken belief that it isn't fair for management to see the union proposals before presenting its own.

The real reason experienced management negotiators like to see the union's proposals before preparing management's proposals is because they like to allow the union to set the tone and style of the negotiations. Management doesn't want to start a war with a long list of hard-hitting proposals only to learn that the union has decided to be reasonable and moderate. The internal political problems faced by union negotiators are much worse than those faced by management negotiators so it is helpful to the process to allow the union's chief spokesperson to lead the way in terms of the style and also in terms of the basic timing of the negotiations.

If the employer gets impatient, for instance, and pushes hard for an early settlement, he may do nothing more than prolong the process. Sometimes the union absolutely insists on "swapping" proposals and there isn't much to do except go along. At the time the union presents its proposals, it's a good idea to tell them that the employer will respond with its proposals at the next meeting and it doesn't hurt to describe in general terms the concerns that management's proposals are going to address.

If the negotiations are for a first contract, the union's proposal will probably be for a total contract with all the union's wildest desires covered. The employer should respond, if possible, with a total contract proposal showing the union what it is willing to do. Normally this will protect and conserve as much as possible management's "rights" and powers to react to public service needs and will not include very many changes in employee benefits and terms of employment. A more detailed discussion of first contract negotiations appears in a later section.

If the negotiations are with an Act 312-eligible union, that is police, fire, or public safety, then management needs to include a few proposals whose purpose is to give the union negotiators a reason to avoid the arbitration

process. These deterrent proposals help skillful union negotiators persuade their more militant members that interest arbitration (Act 312) can be risky, and that an amicable voluntary settlement is the better negotiating goal. In a later section, we discuss the special challenges of negotiating with Act 312 unions.

Both sides will probably state at the end of their proposals that they reserve the right to add to, amend or withdraw proposals. It is best to avoid adding new proposals or upping the ante after some point in the early stages of the negotiations. During the goal setting stage prior to negotiations, this point needs to be emphasized to all concerned. While you may add things, the bigger or more important or more numerous they are, or the later in the negotiations they are presented, the more they chill the process and the closer you come to committing the unfair labor practice of bad faith bargaining.

In rare cases, such as serious economic hard times, management may need to seek concessions from the union such as benefits reductions. In these cases, the employer becomes the moving party advocating change and it would be appropriate for the employer to present its proposals first. This is a different situation from when the employer seeks one or two concessions but is willing to increase benefits in other areas. It is common for the employer to indicate it will need to reduce health insurance costs in order to be able to make even a modest wage increase offer. This is not the situation that triggers management presenting its proposals first. The rule of thumb is the party that wants to change the contract goes first; the party that could live with the status quo goes next.

B. The Format of Proposals

All proposals should be neatly typed and written in as clear a format as possible. We usually write what we want and save the arguments and reasons why we want it for the oral discussions. Keep the written proposal as short as possible, but remember that clarity is most important. Proposals do not need to be in the form of contract language, but sometimes that is the best way to achieve clarity. If you must rewrite long passages of old contract language to make changes, then, if at all possible, use the format of lining out language to be deleted and putting

new language in bold face, such as is done in the Legislature with bills that would amend existing laws.

But don't make a union hunt for your proposals. If you just want to reduce the number of holidays, just say so and say which holiday is to be eliminated. If possible, and this is not always easy, have your proposals speak for themselves without the need to reference the expiring contract. Number your proposals, indicate clearly that they are your proposals to this union and date them. The notetaker should always keep a clean copy of all proposals so they can be copied later. Mark the union proposals if they're not already, with the date and the name of the union and the fact that they are union proposals.

C. Describing Proposals

When you first present your proposals you should give a brief explanation of them so that it is clear what you're asking for. When the union presents its proposals, you should ask them to do the same thing. It is important that all proposals are on the table and both sides understand clearly what is being proposed as early in the bargaining process as possible. If there aren't too many issues this should be achieved by the end of the second meeting. The issues are now joined and the bargaining may begin.

D. Discussing the Proposals and Issues

Once the proposals are on the table and understood, the process of explaining, justifying and persuading gets underway in earnest. The process is a communicating process and the key to success is the ability to listen. Listening is an art and is the most important skill a negotiator can possess.

The discussion stage of the bargaining is the longest. During it, both parties will communicate their interests, concerns and real priorities, turning all their cards face up, as it were. Once this is done, the negotiations will enter the short, rapid-paced settlement stage.

A good negotiator has certain skills and knowledge. The most important skill that can be learned is the ability to listen well. He or she must be honest, trustworthy and credible and must have a great deal of knowledge regarding the terms and conditions of employment that will be discussed. Experience is very helpful because it gives the negotiators more opportunities to learn.

Listening begins with paying attention when the other side is talking. This is not easy because sometimes the subject matter is not very interesting and it is much more desirable to talk about yourself and your own problems. You not only need to hear what is said, but you need to observe and note the non-verbal communication such as body language and facial expressions. This is so important that one member of your team should be assigned to focus on the non-verbal messages being sent since the chief spokesperson and the note taker may miss something important. Very often it is the non-verbal signals that tell you which person on the other side is the one to convince regarding an issue. The listener needs to believe that he or she understands the other side and then needs to take positive steps to confirm the understanding. Ask questions until you think you understand. Paraphrase what is being said, put it in other words and ask, "Is this what you are saying?" Don't interrupt and don't feel you need to respond to every point or answer every accusation or correct every error of fact. You are trying to find out what the other side wants, why they want it, and, most importantly, what problem they have that the proposal being discussed would supposedly solve. Don't get angry or lose your temper and don't say or do anything that would embarrass anyone. Your own body language and that of your teammates can be a very important part of good listening. Your non-verbal language states clearly whether you are listening, whether or not you are taking seriously what is being said, whether you care about their problem or not.

E. Explaining Your Viewpoint

When it is your turn to talk, only your chief spokesperson should say anything except when it has been pre-arranged that another member of the team will speak to a particular topic or when, by pre-arranged signal, the chief spokesperson requests another member of the team to speak. Team members who interrupt to say something could very well cause harm to the process. Revealing information out of sequence or when the other side is not ready to receive the information can confuse them or send the wrong message causing their expectations to get distorted.

The chief spokesperson should explain management's position regarding each issue as clearly and completely as possible, then explain why management takes that position, and which of management's basic interests is involved.

Questions should be encouraged and answered thoroughly as soon as possible (sometimes more research is necessary to get the answer to a question).

When firmness is in order, be firm. It is very bad to waffle or say “maybe” when the only answer you’ll ever be able to give is “no.” Remember that it always happens that a union must be told “no” during negotiations. If you cannot do that, don’t be involved. The union expects some “no’s.” A union negotiator who was told “yes” to all his proposals would faint and then chastise himself for not asking for enough. He wants to get all there is to get and he knows he has arrived when management finally says “no.”

F. Candor and Openness

Never deliberately mislead or lie to the union. Never withhold information you possess that they have a right to see. Always try to help them by giving them pertinent data or by suggesting where they might get it. You may be kind and diplomatic and you may avoid being brutally frank, but always be honest and speak the truth, even if it hurts.

G. Putting an Agreement Together

People often say that timing is everything in negotiations. Although this statement may have a profound truth buried within it, it is so vague that it is, in a practical way, of very little help. After all the issues are on the table and understood by both the parties, somehow, progress toward an agreement must be made. Each issue must be disposed of, either by agreement or by its withdrawal. If you think the time is right, or if you want to find out if the time is right, you might get the ball rolling by agreeing with one or two of the union’s proposals or by offering part of what they have proposed. You might also withdraw one of your own proposals to demonstrate that such things can happen. If the union does not respond in kind in some manner, the time is just not right yet to begin progressing toward an agreement. If you make the gesture, however, you have sent the message that you’re ready to start dealing, and the next move and the timing of the next move, are clearly up to the union.

The first tentative moves or overtures to make moves usually deal with the easiest and least important matters. Even an agreement to correct spelling and grammar errors or to delete obsolete language can be a very important

beginning because it symbolizes and demonstrates that agreement between these two parties is possible.

Once the process of agreeing has begun, the chief negotiator should attempt to press forward to dispose of more and more issues. This pressure should usually be gentle and patient, but the negotiator should be prepared to move rapidly if the other side is so inclined. This means that the negotiating team needs to have decided well in advance what it is prepared to do with each issue. This may require extensive research and will usually require authorization from whoever must approve. Nothing is worse than tentatively agreeing to something at the bargaining table and then having to back away from or renege on the agreement.

There are only a few things you can do with an issue. If it is a proposal from the other side you can agree to it, reject it or make a counterproposal designed to deal with the problem but in a different way. If it is your proposal you can reaffirm it by insisting on it, you can withdraw it or you can modify it in a way that still deals with your problem, but in a way that might be more acceptable to the union.

There are normal sequences to negotiations. In the most common situation, the negotiation of a renewal contract in a well established union management relationship, the most common sequence is to begin with the easy and simple issues and progress gradually toward the larger or more important issues. In this sequence pension and health insurance issues are near the end and wage rates usually come last.

In negotiations for a first contract with a new bargaining unit and union the sequence is similar in that the less significant matters are usually settled before the big ones, but it is also true that non-economic issues such as grievance procedures, union security, management rights and zipper clauses will usually get settled before the big issues that will cost money. In new contracts much work is required to simply write down language that describes current benefits and working conditions that no one is proposing to change. This is not easy. The employer may have written policies that describe these things but the language may not be clear enough or complete enough to be used in a labor contract. Language in a policy manual or an old council resolution was easy to change. If an ambiguity arose or a question came up that had not been anticipated, the city or village council could easily amend or add to the previous language. With the employees now organized into a

bargaining unit, the language describing their benefits and working conditions is going to be chiseled into the rock of a labor agreement where management cannot change it without the negotiated agreement of the union. Much time is necessarily devoted in negotiating first contracts to simply writing down, in good labor contract language, the existing benefits and conditions.

The other situation that has its own sequence is the negotiation of an agreement with a union that has available Act 312 (of 1969 as amended) sometimes known as Compulsory Arbitration of Labor Disputes in Police and Fire Departments, or simply as the Police-Fire Arbitration Act. Although this is more thoroughly covered in a following section, the sequence here is to dispose of as many minor issues as possible reducing the list to the economic issues and, perhaps, a non-economic issue if it is of prime importance, and then to make a “total package” settlement proposal that settles, one way or another, all the issues. The other side responds with a total package settlement counter-proposal. The parties continue swapping settlement proposals, which presumably are getting more and more alike, until one party accepts the package proposal of the other.

H. Presenting Package Proposals

Even when the union is not eligible for Act 312, the idea of making package proposals can sometimes be helpful to the process of reaching agreements. The idea is simple – you simply put two or more issues together. You might say, “We’ll agree to your proposal to equip the road grader with air conditioning if you’ll agree to our proposal to change the co-pay on the health insurance drug rider.” There does not need to be any logical connection. The proposal itself shows a willingness to make trade-offs. The package can be a total settlement package or a “mini package” that covers two or more issues. It does not need to change anything. It could be as simple as, “We’ll drop our proposal #7 if you’ll drop your proposal #6.” The advantage of packages is people feel there is a trade-off taking place, that they are getting something and, therefore, it saves face for people who cannot make movement on single issues without feeling they are capitulating.

I. Closing the Deal

While each bargaining situation is unique, there are a few general concepts about closing the deal and settling that are true often enough to discuss. First, remember that both bargaining teams will need to convince their principals to agree to the deal. If the management team has done its homework, then its challenge in selling the agreement should be much smaller than the challenge facing the union team. Because of this, the final sequence of settling can affect the ratification process.

If the final tentative agreement was a proposal made by the union, individual members of the union and of the union’s bargaining team may believe the deal is a better deal than if the exact same outcome had been a settlement proposal made by management. If management accepted that last proposal after agonizing over it and sweating blood, all the better.

The psychological commitment to the deal is stronger for the party who made that last proposal. This can be very important later when ratification of the agreement is being considered. Almost always the union has the greater challenge in getting the deal ratified because the management negotiators kept their decision makers informed about what was going on and because they stayed within the parameters that had been set.

J. Ratification

With few exceptions (some of the old craft unions), union bylaws require that the members of the bargaining unit who are dues-paying members of the union in good standing shall have an opportunity to vote on approving a tentative agreement. Normally the members of the union’s bargaining team present and explain the deal at a meeting and try to persuade the members to approve. Similarly the management bargaining team will need to sell the agreement to its side, the city or village council and, of course, the chief executive who should have already pre-approved it.

When the tentative agreement is reached, it is a good idea to discuss the ratification process both sides face. The union should be urged to proceed as quickly as it can. The more time that elapses between reaching the agreement and voting on whether or not to ratify it, the more likely will be a negative vote.

If a summary of the new agreement is prepared and reviewed by both the union and the management negotiators before the ratification, misunderstandings regarding just what was agreed upon can be avoided. It is also a good idea to have the union hold its ratification vote before submitting the question to the elected body. The city or village council should know that its approval will finalize the agreement. If the union ratification vote is still pending, the elected officials may be tempted to postpone their consideration of the deal, so you may as well wait until the union votes. Of course, if the union votes against the agreement there is no point in even discussing it with the elected body except as a point of information.

K. Special Bargaining Situations

1. First contracts.

When a group of employees form a new bargaining unit and begin the negotiating process, there are difficulties that are not present in older, established bargaining situations. Most significantly, there is usually not a good employee manual or other document that spells out the details of employee benefits and working conditions. Even if there is a pretty good manual, it is probably not written in the tight language needed in a labor agreement or union contract. Language describing benefits for non-union employees could be changed quickly and easily by action of the city/village council if that language was not clear or seemed to provide a benefit the council didn't intend. Language in a labor agreement cannot be changed unless the union agrees, and unions rarely agree to anything unless you make it worth their while. So even if the negotiators are trying to write down nothing more than a description of current benefits, payroll practices and working conditions, this can be a very big time-consuming project.

Secondly, the negotiation of a new first-time contract is taking place against a backdrop that may include hard feelings. Public employees in Michigan have had the right to engage in collective bargaining since 1965. Why did they wait until now to do it? What caused them to form a bargaining unit after all these years? Whatever it is, it's going to make the negotiations more difficult. It is not uncommon for first-time negotiations to last for several years because of these difficulties.

2. Act 312 unions.

Negotiations with unions (police and fire) who have available by state law, compulsory binding interest dispute arbitration (Act 312 in Michigan) also present special challenges to management negotiators. Many such unions take the position expressed or implied, that either management gives the union what the union wants or the union will submit the dispute to arbitration. One of the pitfalls is that arbitrators rarely, if ever, give management any consideration for concessions made in the negotiations prior to arbitration. If management agrees to costly improvements in some benefits, the arbitrator is likely to ignore those new costs and focus on the unresolved issues. The arbitrator is not likely to award all the unresolved issues in favor of management just because management was generous in the negotiations that led up to the arbitration. Although most arbitrators will claim that they are not "baby-splitters", the fact is they never fail to award some issues to each side if they possibly can. For this reason, the more normal sequence of progress in negotiations – settling relatively minor issues first, then progressing up the ladder to the more difficult or more expensive issues – would not be effective for management in dealing with an Act 312-eligible union. Any money committed in the settlement of any issues would be wasted if the union submits the last few big economic issues to arbitration. The way around this pitfall is simple: at some point in the negotiations, perhaps when all or most of the non-economic and trivial economic issues are settled, put all discussions of serious economic issues together as a package. Make package settlement proposals. Try to get the union to respond in kind. This way, nothing costly is settled and off the table until an overall agreement is reached that concludes the negotiations.

The alternative to this "package proposals" approach is to repudiate any agreements you have made during negotiations if the matter is submitted to arbitration. This has the disadvantage of damaging your credibility but it is allowed. [*City of Manistee v Manistee Fire Fighters Association*, 1987 MERC Lab. Op. 590,601 enforced 174 Mich App 118 (1989), lv den 434 Mich 864 (1990)].

The largest pitfall of Act 312 is its ready availability. In another case involving the City of Manistee, the Michigan Court of Appeals held that good faith bargaining to impasse is not a prerequisite to Act 312 arbitration. [*City of Manistee v Michigan Employment Relations*

Commission, 168 Mich App 422; 425 NW2d 168 (1988)] There need be only a dispute, no impasse is needed. This makes it very easy for a union to proceed to arbitration. It is too easy. A union negotiator eager to please as many of his or her members as possible can avoid the difficult process of dropping or compromising some of the union's proposals and simply proceed to arbitration. The process of negotiating is not easy. Difficult decisions have to be made if a settlement is going to be reached. The ready availability of interest arbitration provides a convenient alternative to the difficult decisions inherent in good faith negotiations. To counter this pitfall, about all management can do is try to find some way to discourage the union from wanting to use the arbitration process. Put something the union already has or wants at risk. Do not agree to make the process simple, easy or inexpensive for the union.

Before the negotiations begin the management team should prepare several special proposals whose purpose is to give the union reason to avoid arbitration. The arbitrators have generally given too much weight to one of the factors that the Act 312 statute requires they consider: the comparison of benefits with those provided by other employers. While this is only one of nine factors in the law, it is clearly the one relied upon most by arbitrators in case after case. Unions have learned that it is not smart to bring an issue to arbitration where they are better off compared to others, but instead they submit issues regarding benefits where they are a little (or a lot) behind. If only the issues selected in this manner by the union are in front of the arbitrator, the union is likely to make gains relative to other employees. This process is a form of whipsaw as each bargaining unit tries to "catch up" with everyone else. There are two ways to counter this union strategy. The first is to find an arbitrator who understands that not every bargaining unit can possibly be behind everyone else. Gather the complete data regarding all the benefits of all the other employers and find a consistent way to evaluate all this data. Then show it all to the arbitrator who will then conclude that while this bargaining unit may be behind in some areas, it is ahead in others and does not need to "catch up." This approach is sometimes very difficult to do. The complete data from the other employers is usually not available and, at best, very difficult to get. The costing procedure or method of evaluating benefits is complicated and very difficult to explain to an arbitrator.

The better approach, because it makes the point more clearly, is to propose in the negotiations a reduction in benefits that the union could easily lose in arbitration. This could be anything where your bargaining unit is ahead of or better off than other employees of other employers. Another favorite Act 312 deterrent proposal is to offer to pay half of any future increases in health insurance premiums, with the employees paying the other half. This has another advantage. In situations where the employer has been paying the entire health insurance premium, it is common for the employees to be unaware and unconcerned about health insurance costs. While national union leaders give lip service to the health insurance cost problem, their members and representatives at the local level dismiss the matter as a "management problem." Many of them won't discuss any of the ways to deal with rapidly rising insurance premiums. So when management proposes to share premium cost increases, it is offering to increase its own costs (not demanding a give-back), putting an arbitration deterrent on the table, and possibly educating a group of employees as to how good their benefits really are.

Other than putting something at risk for the union, about the only other arbitration deterrents are the costs of the proceedings and the length of time the cases take. Union leaders and arbitrators often pressure management to cooperate in various ways to "make the process more efficient" to speed it up or cut the costs involved. This can be very tempting because the costs can be very burdensome to management and the time frames play havoc with responsible budgeting. But keep in mind that these efficiencies also make the process even more available to the union.

Chapter Four: Negotiation Dispute Resolution Procedures

A. Mediation

In Michigan in 1939, not long after the famous sit-down strikes and sometimes violent union organizing efforts in the automobile industry, the Legislature enacted the Labor Relations and Mediation Act. This law created the Labor Mediation Board whose name was later changed to the Michigan Employment Relations Commission (MERC) and established a Mediation Division to assist in the settlement of labor disputes in the private sector. In 1965 the Public Employment Relations Act (PERA) was passed which, among other things, extended the mediation service to labor disputes involving public employees.

Mediation is a process in which an impartial neutral person tries to help the labor and management negotiators reach an agreement. The mediator has no power, other than expertise and persuasion, and cannot order a resolution of any disputed item. By law the mediator cannot disclose confidential information given to him or her by either of the parties. Mediation can be very effective if the parties involved will trust the mediator and cooperate with the process.

Section 7 of PERA requires the parties to notify MERC at least sixty days before the expiration of a labor agreement of the status of negotiations. This notice is usually sent by the union, but the requirement is for both parties to do so. MERC will send a very short questionnaire to both parties asking for the names, addresses and phone numbers of contact persons, the size of the bargaining unit, and the date of contract expiration. MERC will then notify the parties of the name of the mediator assigned to the case. This is merely to make it easy to contact the right mediator if a party wants to. Although MERC has the explicit authority to send a mediator into negotiations on its own, it will rarely do so unless one of the parties requests mediation.

When a mediator is brought into the negotiations several basic principles should be kept in mind:

1. The mediator is an employee of the State. There is no fee for his or her services.

2. The mediator is neutral and doesn't care if management or union prevails on any particular issue. The mediator's job is to try to get the parties to reach an agreement.
3. The mediator should take control of the negotiations in terms of deciding when and where the mediation sessions are to take place. It is important to cooperate with the mediator.
4. Most important – trust the mediator. You can tell the mediator your most confidential positions regarding the issues. You can reveal the bottom line. If you hold back and conceal such information in an attempt to manipulate the process you damage the process. To encourage the candor that is necessary for the mediation process to work, the law clearly prohibits a mediator from disclosing confidential information.

Sometimes inexperienced parties don't realize that the mediator is neutral and treat the mediator as an agent of the party who requested the mediator's involvement. For this reason it is better if the management negotiator holds back and allows the union to be the party requesting mediation, just in case there is someone on the union's bargaining team that suffers from this misunderstanding.

Usually the mediation begins with a joint meeting where both parties explain to the mediator what the issues are that are preventing a settlement. It can be very helpful to prepare in advance a set of materials that will help the mediator understand the issues and the parties' positions. This will probably include the old agreement, if there is one, and all demands, proposals and offers made by the parties.

At the joint session, there is no point in arguing or trying to persuade the mediator to agree with your point of view. It is counterproductive to accuse the other side of being unreasonable, greedy, stingy, stubborn or any other such thing. Try to explain what the issues are and exactly what has been your position regarding each issue. Most important, listen carefully to the union's explanation of the issues and its positions. You may discover at this

point that you've been misunderstanding the union all along and the issues may suddenly appear to be more solvable.

Next, the mediator will probably separate the parties and alternately talk to the bargaining teams privately. If you are providing the facilities, be sure to arrange for separate rooms where there is no possibility of anyone overhearing what is being said in the other party's room. The mediator will shuttle back and forth between the two rooms, bringing questions, suggestions and maybe even proposals. Listen carefully to the mediator. This is a person who has a great deal of experience and often is able to suggest solutions to bargaining problems that might not have occurred to the parties. The mediator can also give you information that can be helpful, such as an overview of recent settlements in your general labor market.

It is true that you should cooperate fully with the mediator. It is also true that you should obey the most important axiom of bargaining: never say yes when you should say no. Don't let the mediator talk you into a bad deal – something you cannot live with. Remember the mediator's job is to get a deal, not to protect either party from getting hurt. It is up to you to know what your side can afford, financially and politically.

The mediator can help both parties save face. Perhaps in the heat of the moment in an earlier negotiating meeting, you said you would never agree to a particular union demand, or the union said it would never agree to a contract that didn't include a particular benefit or provision. Now, even though the situation has changed, you or the other side won't budge for fear of losing face. There are several ways a mediator might get around this. One is to present the outcome as a "mediator's proposal." This proposal can be brought back to the union membership or the city council as an opportunity to reconsider a previous mandate or frozen position.

There are many techniques often used by mediators. These vary depending on the circumstances of each situation, the mediator's personal preferences and the various styles and approaches used by the negotiators involved. Mediators are masters at communicating, keeping the parties focused on the issues, defusing emotional barriers and suggesting realistic outcomes.

B. Fact Finding

Fact finding is the second dispute resolution procedure provided by Michigan's public sector labor laws and administered by MERC. It is available to all unions and their employers that are covered by the Public Employment Relations Act except those that are covered by Act 312, the Police-Fire Arbitration Act.

The underlying hope of fact finding is that the logjam of unsuccessful negotiations might be broken if there is public awareness of the facts regarding the negotiations. Perhaps political pressure or public embarrassment might persuade an unreasonable or stubborn party to come to its senses. The fact finder, at the conclusion of the process, issues a report and findings of fact and a recommendation regarding each issue. The recommendations are just that and neither party is required to give in or agree to the recommendations so fact finding doesn't settle anything unless the final report persuades one or both of the parties to change its previous position.

Mediation is a prerequisite to fact finding. After mediation is tried either party may petition MERC for fact finding using forms supplied by MERC. The other party is required to file an Answer to the Petition. At MERC's option, MERC begins the process by sending a list of five potential fact finders to the parties. Each party can cross off up to four as unacceptable and can ask MERC to disqualify a candidate if that person is an advocate for either management or labor or happens to have a conflict of interest in the particular case. Each party then prioritizes the remaining names and MERC appoints a fact finder. The fact finder is an agent of the State and is fully paid by the State. The parties are responsible for the fees and expenses of their own representatives and witnesses.

The fact finder will conduct a hearing at which both sides will present evidence in support of their positions on the issues. This evidence will be in the form of exhibits and the testimony of witnesses, but the proceedings are somewhat informal and the technical rules of evidence do not apply. The principles of evidence do apply, however, and hearsay and unsupported evidence will not carry much weight with the fact finder. It is wise for the employer, if it is going to take the process seriously, to be represented by an attorney, preferably by one experienced with fact finding.

There may be opening and closing oral arguments and, especially if the evidence presented is voluminous, briefs may be filed. The hearing is open to the public, but the fact finder can close it for good cause, such as disruption by persons attending.

Many fact finders are also experienced interest arbitrators and are familiar with Michigan's Act 312 which specifies a number of "factors" an arbitrator must consider in arriving at a decision. It would be helpful in preparing and presenting a fact finding case to consider the Act 312 "factors" and present evidence that addresses them, if such evidence supports your positions.

Fact finders have, over time, had a tendency to gravitate toward a mid-range position on major issues between the employer's position and that of the union. Anticipating this "baby-splitting" tendency, sometimes the union's strategy is to take an extreme position. If splitting down the middle was a certainty of the fact finder, the union would simply ask for twice what is wanted. Although such a scenario is overly simplistic, there are times when a fact finding case seems to follow such a script.

One of the great weaknesses of fact finding and interest arbitration, too, is that the fact finder most likely is unfamiliar with public sector finance. He or she needs to be educated from the most elementary concepts on up if he or she is going to be able to consider the limitations on the employer's ability to pay for the wage rates and benefits being considered or recommended.

After the fact finder issues the findings and recommendations, the bargaining process continues. The legal obligation to continue does not end there. After good faith bargaining continues for at least sixty days, but not before, it may happen that an impasse is reached. Remember an impasse occurs when the positions of the parties on the issues have solidified, are very clear, and further bargaining would be useless.

C. Interest Arbitration/ Act 312 in Michigan

1. Description of Act 312

Interest arbitration is a process in which a third party arbitrator determines all or part of the contract between the parties. Wages, benefits and contract language may be issues the arbitrator will determine. Interest arbitration should be not confused with rights arbitration which is also known as grievance arbitration.

They are very different and arbitrators who are excellent grievance arbitrators may be terrible interest arbitrators.

Rights or grievance arbitration is a process in which a third party arbitrator determines if there has been a violation of the labor agreement and, if so, what would be the appropriate remedy. It is a quasi-judicial process where a set of facts is examined relative to the labor agreement to determine if that agreement has been violated. It is an alternative to a civil lawsuit, hopefully, a little faster and a little cheaper with the judge and jury (the arbitrator) bringing to bear special knowledge regarding labor / management relationships and the so-called "common law of the shop."

If grievance arbitration is quasi-judicial, interest arbitration could be said to be quasi-legislative because it will determine what the labor agreement, the law in the workplace is going to say. Usually interest arbitration centers on the big three benefits: wage rates, pension benefits, and health insurance, but any issue that is a mandatory subject of bargaining can be at stake. Almost half the states have some form of legally mandatory interest arbitration available to some public employees. "Traditional interest arbitration" is the term given to the version where the arbitrator may fashion any outcome to an issue that he or she feels is appropriate. It is distinguished from "last best offer" arbitration where the arbitrator must choose either the position of the union or the position of the employer. "Total package last best offer" is the version where the arbitrator must select the total contract offer of one or the other of the parties and cannot compromise the outcome. Arbitrators greatly prefer to have more power and flexibility so they can bring to bear their experience and special expertise and so they very much prefer "traditional" over "last best offer" systems.

In Michigan, interest arbitration is provided by Act 312 of 1969, as amended, which covers police, fire, public safety, emergency medical service, and dispatch employees of police, fire, public safety and sheriff departments in cities, villages, townships and counties. Various public safety employees of colleges, universities and special authorities are not covered. The Michigan State Police by virtue of a special constitutional amendment are also covered. Act 312 is traditional arbitration relative to non-economic issues and is "issue-by-issue last best offer" arbitration relative to economic issues. That is,

on each separate economic issue, the arbitrator must award either the position of the union or that of the employer.

Because of the structure of Act 312, there are often quarrels about whether or not an issue is economic and also over identifying just what is an issue. When the parties agree that the term of the contract being submitted to arbitration shall be for three years, they may still disagree over whether wage rates is one issue or three (a separate issue for each year). Sometimes a party may feel it would be to its strategic advantage to “bundle” similar issues and sometimes it may feel it is better off to “splinter” issues into several distinct issues. The law provides that, absent a stipulation of the parties, the arbitrator shall “identify” the issues in dispute. Sometimes arbitrators fail to do this, or to do it well, and confusion occurs.

Another feature of Michigan’s Act 312 is that it calls for an arbitration panel of three persons: a neutral arbitrator appointed by the Michigan Employment Relations Commission (MERC) and two delegates to the panel, one appointed by the union and the other by the employer. The two partisan delegates are paid, if at all, by their representative parties, and the fees and expenses of the neutral or chairperson of the panel are shared equally by the State, the union and the employer. The chairperson’s daily fee is set by the State. It was last increased to \$650.00 per day on October 1, 1999. The law also provides that a verbatim record of the proceedings be made, at the expense of the State, and, if either party orders a transcript of the record, it shall pay the costs. A transcript is not required for a decision by the arbitration panel, but usually both parties order transcripts, share the costs of doing so and provide a courtesy copy of the transcript to the panel chair. MERC policies allow the panel chairperson to bill up to two additional days for each day of hearing if such days are needed and used. Conscientious arbitrators often spend more than two additional days poring over hundreds of pages of transcript, hundreds of exhibits, and voluminous briefs, but cannot bill for more time than the limit of two additional days.

An Act 312 case begins when the union, or the employer files a petition for arbitration with the other party with a copy to MERC. MERC has developed a form for this petition. Over 99 percent of Act 312 petitions are filed by unions. Although the Public Employment Relations Act requires both parties to bargain in good faith and Act 312 states that it is to be deemed to be

supplementary to PERA, it has been ruled that there is no requirement that an Act 312 petitioner must bargain in good faith in order to file a petition. For that matter, there is no requirement that there be a bargaining impasse. The only two requirements are that the petitioner has requested mediation at some point, and that there is a bargaining “dispute.”

2. The petition

According to MERC rules (R423.505), a petition for Act 312 arbitration must be prepared on a form furnished by MERC, signed by the petitioner, with the original served on the other party by registered or certified mail and with three copies filed with MERC. There are six pieces of information that MERC rules specify shall be included in the petition:

- a) The name and address of the employer and the name and telephone number of its principal representative.
- b) The name and address of the collective bargaining representative (union) involved and the name and telephone number of its principal representative.
- c) The name of the arbitrator from MERC’s panel of arbitrators that the two parties have selected, if they have (see below).
- d) The name and address of the petitioner and the signature and telephone number of the person executing the petition.
- e) A copy of the most recent labor agreement between the parties.
- f) A copy of the last offer made by each party to settle the agreement.

In addition, the petition form supplied by MERC calls for “. . . a list of any issues in dispute and the related facts thereto . . .” In most cases the union representative is the petitioner and the petition does not include a copy of the most recent labor agreement, does not include the last offer made by each party to settle the agreement, lists only some of the issues in dispute (the ones raised by the union) and does not include any facts related to the issues. These common deficiencies do not bother MERC which proceeds to process the petition anyway.

3. The Act 312 team

When an Act 312 petition is about to be filed, or when one is filed, management should form a team of persons who will manage the case from the employer’s side. The most important member of this team is the advocate who will present the case, argue management’s positions and prepare the brief. This person should be an attorney,

preferably one with plenty of Act 312 experience.

The second team member is the employer's delegate to the three-person arbitration panel that will decide the case. This person should be an experienced negotiator and should have Act 312 experience. He or she will contribute to overall strategy discussions as a member of the team, will feedback information regarding how the arbitrator is receiving the various arguments during the hearing and will be the employer's only representative in the all important private discussions of the issues by the arbitration panel.

Other members of the team would be the negotiating team, the department head and the persons who will be assigned to conduct surveys and do other research, prepare exhibits and testify. It is sometimes helpful to designate some individual to be the case coordinator who makes sure all deadlines are met and proper records are kept and so on.

4. The answer to the petition

Prior to the adoption of MERC's Act 312 rules in 1995, MERC, by resolution, required the party upon whom an Act 312 petition had been served to file an Answer to the Petition. The current rules do not mention anything at all about an Answer to the Petition but it is usually a good idea to file one, especially if the petition failed to list issues raised by management in the negotiations. This answer should be sent to the union and to MERC and should be sent to the arbitrator when one is finally appointed. You certainly don't want your issues to be forgotten about simply because the union failed to list them in the petition and MERC has failed to enforce its rule that all issues be included in the petition.

5. Appointment of an arbitrator

MERC maintains a list of Act 312 arbitrators called its panel of arbitrators with about thirty-eight names of arbitrators on it. If the parties can agree on one of these persons serving as the chairperson of the tripartite panel that will hear the case, MERC will appoint that person. If there is no such agreement MERC will send the parties a list of three of the members of its panel and instruct the parties that they each may strike off one of the names. This is done in the strictest of confidence with neither party knowing who was struck by the other party. If the parties strike different names, MERC will appoint the

remaining person. If the parties strike the same name, MERC will choose one of the remaining two.

It is important to get the best arbitrator possible and a lot of thought and effort should go into selecting an agreed-upon arbitrator or deciding which of the three to strike off. The full team should discuss the question and other friendly Act 312 experts should be consulted.

6. Preparations

Of course, preparations for an Act 312 case should begin prior to commencement of the negotiations. The issues raised by management with the hope that they might deter the union from submitting the case to arbitration at this point apparently haven't worked. Hopefully, they were carefully chosen and are issues that management can plausibly win — that there is evidence to support management's case. If you raise "deterrent" issues that are nothing but "throwaways" and then you throw them away once an Act 312 petition is filed, your credibility will be damaged and future "deterrent" issues will be seen as nothing more than empty threats.

You need to have, at the onset, a "theory of the case" which includes your issues, both the very serious needs of the employer and the "deterrent" issues as well as good reasons, backed by evidence, as to why you should prevail on your issues and regarding your positions on the union's issues. This "theory" is the heart of your case and it must be something that can be explained in short, clear, ordinary language so that anyone can understand your position.

A critical part of preparing the case is gathering the evidence you need to support your theory of the case. This will inevitably involve conducting surveys. No one likes being on either end of a survey, but surveys are the only tried and true way to get evidence that meets the requirements of Section 9(d) of Act 312. This particular section of the Act has been the most abused and overused by the arbitrators over the years. Section 9 lists eight factors upon which the arbitration panel must base its findings. Subparagraph (d) is the one that requires comparison of wages, hours, and conditions of employment with those of other employees performing similar services in "comparable" communities. It also invites comparisons with other employees generally and with employees in the private sector, but arbitrators all but ignore these two points. Many arbitrators act as though this comparison factor were the only important

factor. This is why it is very important that you have survey data that supports your positions regarding the disputed issues.

When selecting the comparable communities that will be used in your surveys and exhibits, select them based on objective criteria, such as type of government, population, proximity to your community and general wealth of the community. The fewer criteria used, the better. Do not select them because their wages and benefits make you look good. This is called “cherry-picking” and is frequently used by unions. Arbitrators may let a union get away with cherry-picking but they expect better of employers. You might begin with an arbitrary population range such as plus or minus fifty percent of your population and an arbitrary proximity measure such as a fifty-mile radius from your town. List all communities of your type (don’t compare cities to counties) that fit the criteria. You’re looking for a manageable number of communities that you’ll be able to survey (no more than 12 to 15) and enough so as to give a picture of what others are doing with wages and benefits (6 to 8). Adjust your parameters – smaller or wider ranges – to get a workable number. It is not a good idea to compare a wealthy town with a poor one so you may need to look at wealth measures such as taxable value per capita and exclude towns that are substantially different from your town.

When surveying other communities, remember the Golden Rule. No one likes surveys. One way to ease the pain and encourage cooperation is to start slowly. Send the target cities a polite letter informing them of your survey, thanking them in advance for their assistance, apologizing for the inconvenience you’re causing, and making it easy to help you. In the letter, ask them to send you copies of materials readily at hand such as labor contracts, personnel handbooks, pension actuarial valuations, seniority lists, and so on. You’ll be surprised at how many of your survey questions you’ll be able to answer yourself from such materials. Later, you may be able to fill in the blanks and gaps with a few easy questions, asked over the phone.

You will need to decide how to present the survey data in exhibits to be presented to the arbitration panel. Also, you will probably have previously agreed at the pre-arbitration meeting to exchange exhibits with the union by a deadline specified as so many days prior to the first scheduled day of hearing. All of your case presentation keys off of this exchange date. As

to the survey data, you want to allow enough time to complete the survey and prepare the exhibits but, on the other hand, you want your data to be fresh and current, so don’t do the surveying too far in advance. If possible, allow enough time to send copies of your exhibits to your survey communities, asking them to check the data for accuracy and also asking them to inform you if any of the data changes.

Survey data, as well as all the data to be presented in all the exhibits, should be laid out on each page in a simple, well-labeled format that is easy to understand quickly. A common mistake is to cram too much information onto a page. Another common mistake is to supply sketchy or enigmatic column headings that leave the reader wondering what the numbers mean. Early drafts of exhibits should be “tested” by showing them to some disinterested person and asking him or her to explain the point being made by the exhibit. If this person cannot do this easily, the exhibit needs more work. Teenagers are good testers. They don’t give a hoot about the issues in your case, have short attention spans, simple reading skills and limited knowledge of statistical methods, economics, and municipal finance — much like many arbitrators. When preparing exhibits or having them prepared, remember that you or some other person, is going to be sworn in as a witness to present the exhibit and explain it. This should be the person who prepared it or under whose direction the work was done. Nothing is worse than a witness that cannot explain the exhibit, where the data were obtained, the underlying assumptions of the exhibit, or who cannot answer questions arising from the exhibit.

7. Presentation of the Act 312 case

Most important: hire a lawyer to be the advocate who presents your case. Preferably, this will be a lawyer who specializes in labor and employment matters who has experience with Act 312. There is a juxtaposition or special relationship between facts and conclusions or data and arguments that lawyers are trained to understand and develop. Act 312 has become a specialized forum that requires special knowledge of public sector labor negotiations as well as experience with the peculiarities of the Act 312 process that have evolved since 1969. You’re Act 312 case is not a good place for an advocate to learn about Act 312 any more than your brain would be a good place for a brain surgeon to be learning procedures. Get a good solid experienced Act

312 lawyer, place him or her in charge of the case, do what he asks and help him conduct the case.

Help your advocate stay organized. Keep the exhibits organized and numbered properly. Take notes during the hearings. Be able to explain your theory of the case (why you should prevail) to help your advocate articulate this to the arbitrator. Suggest lines of argument that the advocate might include in the brief. Be alert to inconsistencies or contradictions in the union's case and point these out to your advocate. Shield your advocate from distractions during the hearing. Monitor the arbitrator. Read all the non-verbal messages he or she gives out. Is the arbitrator hearing and understanding your case? Does he pay attention to your witnesses? Where are his sympathies? Is he confused? You should be able to feed back this kind of information to your advocate so that adjustments or embellishments in the case presentation can be made.

8. Final offers

When all the witnesses have testified and all the exhibits have been introduced, the hearing will end. Normally a date a week or two later will be selected as the date the parties will exchange their last offers on the issues. With respect to the economic issues, these positions are irrevocable. Usually the arbitrator will require the parties to also submit final positions regarding the non-economic issues. All positions should be in the form of the exact contract language the party desires or seeks. Commonly these final offers are called "last best offers" or "LBOs." Because the LBOs on the economic issues cannot be changed, it is important that each issue is clearly identified and circumscribed. Treating an issue as two issues or two or more issues as one issue can make the parties' LBOs confusing and even impossible for the arbitrator to deal with. Although it is clearly the responsibility of the arbitration panel to identify the economic issues in dispute (Section 8 of Act 312), many arbitrators are careless and imprecise and confusion results. Which issues are to be splintered into several or bundled into one should be discussed and made clear before the hearing is closed and before LBOs are exchanged. Each party has a responsibility to see that this is done. If the arbitrator and the union are not interested in identifying and clarifying the issues, you should go to the trouble of drafting a detailed listing and description of the issues as a proposed stipulation.

LBOs and briefs should be exchanged through the arbitrator, that is, submitted to him or her and then, by him or her to the parties. This avoids the horrendous situation of one party seeing the other's LBOs or brief prior to preparing or submitting its own.

9. Panel meetings

If your delegate to the Act 312 panel is a skilled and experienced panel delegate, it will be to your advantage to request and encourage executive sessions of the arbitration panel as early in the process as possible, and to request more rather than fewer meetings. Your delegate should be able and prepared to argue the issues persuasively. This means he or she should be an experienced public sector labor relations negotiator who is carefully and thoroughly prepared to discuss the issues and the facts of this case. You and the advocate need to have special meetings to brief your panel delegate prior to meetings of the arbitration panel. One aspect of panel meetings is your delegate may get only a split second to decide what to say regarding an issue or to counterpoint an argument by the union's delegate. Consequently your delegate must be familiar with all the issues, all the arguments and all the facts supporting or not supporting each argument. This must be at his or her fingertips. In a panel discussion, there is no time to reflect or consider or think it over. Chances to make effective points or point out persuasive exhibits or particular pages of transcript come and go very quickly. Once an arbitrator makes a preliminary decision on an issue, he or she is unlikely to change his or her mind later. The focus will be the next issue. Your panel delegate must be familiar with your priority of issues. Which is most important? You should develop with your entire Act 312 team, a crib sheet showing priorities. Rank each issue. If you could only win one or two or one-half of them, which would they be? Are there any that you must win? Are there some that don't matter? Although you will tell the arbitrator in the brief that each issue is important and why you should win them all, this inflexibility has no place in Act 312 arbitration panel executive sessions. A hard-nosed approach here will probably be counter-productive and yield worse results than a flexible approach. Remember, the panel discussions are off-the-record and secret. Nothing is politically sensitive in panel meetings.

10. Opinion and award

The arbitrator will issue an Opinion and Award explaining his or her reasoning and deciding all the issues. The case is over. Hopefully your panel delegate had a chance to review and proofread a draft of the award with an eye to removing any embarrassing references such as how the testimony of one of your witnesses persuaded the arbitrator to rule for the other side. Sometimes arbitrators forget to “clean up” what they write and do unnecessary damage to one or both parties.

Although Act 312 Awards can be appealed on certain narrow grounds listed in the statute, it is almost always futile to do so. Rarely do the courts overturn an Act 312 Award. It just doesn't pay to appeal. Although it is not technically necessary, most employers and unions take the trouble after an Act 312 Award to draft a new contract incorporating the award. This keeps the formal contractual relationship in a familiar format and a single document which is much easier to live with later.