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So Now You're on the Bargaining Team – WHAT NEXT?

PRESENTED BY:

REX RANDALL ERICKSON, ERICKSON LAW FIRM A.P.C.



ERICKSON LAW FIRM
— A PROFESSIONAL CORPORATION —



**ASSOCIATION OF CALIFORNIA
COMMUNITY COLLEGE ADMINISTRATORS**

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Disclaimer

This presentation is designed to be a **general guide** and should NOT be considered legal advice. For questions about specific situations, please consult an attorney.





Establish Labor Philosophy

Define the District's approach for labor negotiations, considering:

- History with local union(s)
- Closed-session discussions with Board
- Meet with supervisors/administrators



Review Bargaining Agreement

Conduct a **critical review** of the CBA:

- What is unclear?
- Has there been any part impacted by new laws or recent Court decisions?
- Have there been grievances?
- What is not working for the District?



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Anticipate Demands

Both locally and at neighboring Districts:

- What has the union demanded?
- What speeches/statements have come from the union or the negotiator?
- Has there been a new stance taken at a statewide conference?
- Have there been grievances? Over what?



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Establish Roles in Negotiation

Determine who will be at the Table:

- Who will take notes?
- Will you bring in a Negotiator?
- How will the two teams communicate?
- Who can participate at the Table?
- Establish ground rules for negotiating?



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Collect Financial Data

At a minimum, find out:

- What is the cost of **salary** and **benefits**?
- What is changing in **hidden** costs? (PERS/STRS?)
- What are the **ongoing** costs? (Step/Column)
- Are there **avoidable** costs? (OT?)
- What will **1%** cost the District?
- Where is the District in **comparison** to others?



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Develop Initial Proposals

What would you change about the CBA?

- Revising outdated terms/procedures
- Ensure agreement is lawful and enforceable
- Economic posture** of the District
- What are the District goals in next 3 years?
- What is the local/state outlook for next 3 years?



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Defining the Terms

- **“Initial Proposal”** – A set of proposed terms of employment, brought forth by a public school employer or a public school employee organization, as a first effort to negotiate a collective bargaining agreement.
- **“Sunshining”** – A process required by law in which a public school employer and a public school employee organization present, in a public meeting, their **initial proposals** for collective bargaining.



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Sunshine

The phrase “**sunshining**” is used to reflect Government Code § 3547:

“All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.”



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Sunshine

Let the public know what will be on the Table:

- Give sufficient **specific** topics/articles
- Articulate clear and **cohesive** goals
- Establish the **philosophy** of the District



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Sunshine

Contents of the Initial Proposal



- The District intends to negotiate Article 17.
- The District intends to negotiate wages.



- The District intends to negotiate wages by proposing a method of wage calculation that is tied to the Consumer Price Index.



Scope of Bargaining

Labor relations for California community colleges involve three broad types of matters:

- ▶ **Mandatory** subjects of bargaining
- ▶ **Prohibited** subjects of bargaining
- ▶ **Permissive** subjects of bargaining



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Mandatory Subjects Of Bargaining

“The scope of representation **shall be limited to** matters relating to wages, hours of employment, and other terms and conditions of employment.”

Government Code § 3543.2(a)



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Mandatory Subjects of Bargaining

Overtime, Extra-Duty, and Severance Pay
 Special Achievement Awards (monetary)
 Employee Uniforms, Equipment, and Supplies
 Use of District/Personal Vehicle and Travel Expenses
 Employee Property Loss
 Tuition Reimbursement
 Timing and Method of Payment
 Salary Classification Systems
 Payroll Deductions
 Hours of work on particular days
 Distribution of workdays in a week
 Days worked per year and calendar
 Shift schedules
 Breaks and duty-free time during the day
 Assignment of special duties, extra hours
 Teacher instructional hours
 Vacations and holidays
 Modification of hours of a vacant position
 Calendars
 Beginning and Ending Times of a Workday
 Standby or Waiting Time
 Released Time
 Lunch and Yard Duty
 Preparation Time
 Rest Time and Breaks
 Schedules and Shift Assignments
 Time Clocks and Sign-Out Policies
 Call-back or Call-in Time
 Assignment of Duties outside of job description

Some Transfers of Work and Contracting Out
 Some Staffing Level Decisions
 Health and welfare
 Leaves
 Transfer and reassignment policies
 Safety conditions of employment
 Class size
 Procedures to be used for the evaluation of employees
 Organizational security
 Procedures for processing grievances, and
 Alternative compensation or benefits for employees adversely affected by pension limitations
 Ground Rules
 Association/Management Rights Clauses
 Emergency Assignments (including during strikes)
 Faculty Service Areas
 Impacts and Effects of Reorganization, Classification and Reclassification, Subcontracting, and Layoffs
 Policy defining acceptable and unacceptable uses of the internet
 Forms used to document public complaints against employees
 Certain Aspects of Discipline
 Some Hiring Issues
 Retirement Issues Generally Negotiable
 Seniority – Calculation not negotiable, but other aspects are
 Impacts and Effects of Layoffs
 Transfer of Bargaining Work in General/Subcontracting
 Access to the premises to observe conditions of employment
 Inclusion of statutory anti-discrimination clauses
 Past Practices



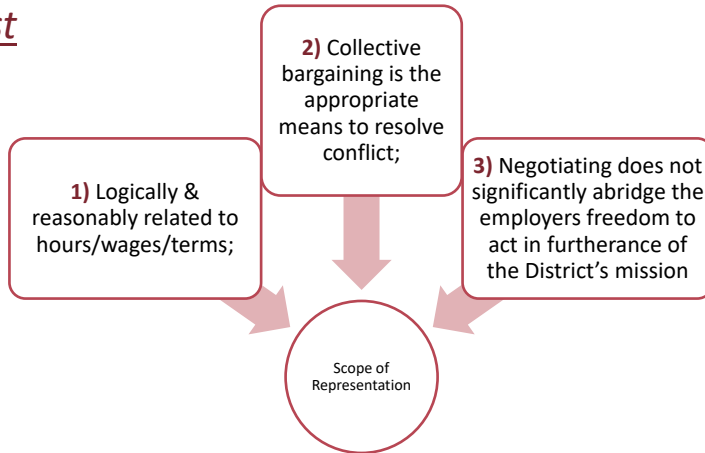
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Non-Enumerated Subjects

The “Anaheim” Test

PERB Decision No. 177

Is the subject:



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Past Practices?

Some policy or practices may be established as “past practice.” For a past practice to be binding, it must be:

- ▶ Unequivocal
- ▶ Clearly enunciated and acted upon, and
- ▶ Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

However, a “past practice” cannot be enforced where it directly contradicts contractual language.

When a practice implicates a mandatory subject, it is **absolutely** negotiable.



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Permissive Subjects Of Bargaining

“All matters **not specifically enumerated** are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that **nothing herein may be construed to limit the right of the public school employer to consult** with any employees or employee organization on any matter outside the scope of representation.”

(Govt. Code § 3543.2(a).)



Permissive Subjects Of Bargaining

- ▶ There is **nothing illegal** about making or agreeing to a proposal on a permissive non-negotiable subject.
- ▶ However, there is **no obligation** on either party to negotiate.
- ▶ A party may not **condition** agreement on specific mandatory subjects as a prerequisite to further negotiations on other issues.
- ▶ Parties may not insist to **impasse** over permissive subjects.



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Permissive Subjects Of Bargaining

- ▶ Once agreement is reached on a permissive subject and it is embodied in a CBA, the parties are bound by the terms of the agreement **until it expires or is modified** by the parties.

Eureka City School District (1992) PERB Decision No. 955

- ▶ However, by once bargaining and agreeing on a permissive subject, the parties **do not** make the subject a mandatory topic for future bargaining.

Poway Unified School District (1988) PERB Decision No. 680



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Prohibited Subjects Of Bargaining

Government Code § 3540 - The provisions of the EERA relating to collective bargaining agreements do not supersede provisions of the Education Code.

Some subjects are  "illegal" subjects of bargaining



Prohibited Subjects Of Bargaining

Where the Legislature specifically sets forth statutes governing the operations of schools and colleges in the Education Code ... those matters are **not subject to negotiation** and any provision in collective bargaining agreements contrary to the statutes are **unenforceable**.

Board of Education v. Round Valley Teachers Assn.
(1996) 13 Cal.4th 269



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Prohibited Subjects Of Bargaining

Sunnyvale Unif. Sch. Dist. v. Jacobs (2009) 171 Cal.App.4th 168

- ▶ Round Valley was **not** limited to situations where the Education Code specifically set forth rules and procedures regarding matters.
- ▶ Where the Education Code gives **general or specific discretion** on a subject to the District, that subject may not be a subject of bargaining. Any contract provision that contradicts or dilutes the discretion of the district is void and unenforceable.
- ▶ An employee does not have a **right to grieve** statutory rules or procedures on matters that are within management discretion, even if incorporated into a collective bargaining agreement.



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Prohibited Subjects Of Bargaining

United Teachers of Los Angeles v. LAUSD (2012) 54 Cal. 4th 504

Sunnyvale was affirmed by the California Supreme Court, holding:

Collective bargaining provisions which annul, set aside, replace or “directly conflicts with” provisions of the Education Code cannot be enforced.

More importantly, the Supreme Court held that a court may find that a provision in a collective bargaining agreement is unenforceable **before** arbitration takes place.



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Prohibited Subjects Of Bargaining

- ▶ Issues relating to administrator contracts (§ 72411.5)
- ▶ Sale or lease of property (§ 81363.5)
- ▶ Construction projects (§ 81949)
- ▶ Prior years of service as temp towards tenure (§ 87475)
- ▶ Ability to cancel overload assignments (§ 87484)
- ▶ Decision to terminate probationary faculty (§§ 87608, 87608.5)
- ▶ Employment of part-time regular employees (§ 87612)
- ▶ Termination of temporary/adjunct/part-time employees (§ 87665)
- ▶ Union entitlement to leave for union officers (§ 87768.5)
- ▶ District reimbursement for union officer leave (§ 87768.5)
- ▶ Decision/procedure to terminate/layoff employees (§ 87740)
- ▶ Power to grant leave for illness, accident, or quarantine (§ 87765)



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Subjects \neq Style



- ▶ The EERA still applies, and PERB retains jurisdiction, despite **the form** of negotiation used.
- ▶ The style of negotiation defines **the process**.
- ▶ The style of negotiation does not relieve the parties of the duty to bargain in **good faith** or change **the subjects**.



Positional Bargaining



- Traditional
- **Adversarial**
- One party clearly **wins**
- Each party is **entrenched**
- Chief negotiator acts as **gatekeeper**
- Parties try to persuade others out of their entrenched positions.

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Interest-Based Bargaining

- “Big picture”
- Introspective
- “Problem-solving” approach
- Time consuming
- Tedious



Hybrid Bargaining Approach

- **Borrows** from both Positional and IBB models.
- Parties present **proposals** to outline initial position.
- Parties **evaluate** commonality and conflict.
- Parties adopt a **problem-solving** approach.
- Parties identify **interests** and potential **solutions**.
- Parties **cooperate** to find positions that are mutually beneficial.



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Stay Focused on the Goal

The parties **define** their relationship.

Everyone knows their **rights**.

Everyone knows their **obligations**.

The terms of the contract are **clear**.

The terms of the contract are **enforceable**.

Labor Peace



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GOOD FAITH

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NO

Saying “NO” takes **practice**

During the initial stages of bargaining, you may wish to accept proposals of little consequence to establish some good faith.

Rarely should you accept language absent making modifications that represent your interests.



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Be Careful of “*Boulwarism*”

General Electric Co. (1963) 150 NLRB 192

Be prepared to demonstrate you have a sincere desire to reach an agreement.



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Role of the Board

Board Members should:

- Determine Institutional objectives
- Determine overall strategies
- Determine District interests
- Determine general policy



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Role of the Board

Board Members should:

- Guide management
- Set operational parameters for administrators
- Engage in thoughtful deliberation
- Take action as a unit



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Role of the Board

Board Members should **not be**:

- Factfinder
- Guardian
- Mediator
- Pipeline
- Hero



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Role of Management

The District speaks in **one** voice

No intermeddling in negotiations by non-members of negotiation team

Administrators operate with firm and fair conviction

Management expresses **unity**

No provocation

Share all information with the Board



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Role of Management

Diplomacy

Team players

No shooting from the hip

No loose cannon

"Hero negotiators" need not apply



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Communicate Effectively

The District should speak to the
union negotiators, employees,
and to the public in one **clear**
and unified voice



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Under Pressure

Management negotiators frequently spend time and energy on the **technical aspects** of “at-the-table” negotiations while their union counterparts are utilizing the **political process** to influence management compromises. Political pressure and lobbying of board and management team members by unions can lead to undesirable settlements.



Management Response

- ▶ Management should be **responsive** to labor's concerns
- ▶ Management should attempt to address concerns by providing **explanations** and reasons for its actions



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Focus on Organizational Demands

Too much credit to Union proposals

Employer proposals are just as important

Do not mislead Union to think they will get everything they ask for



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Timing is Everything

Both sides must feel they have been through the process or they will not value the bargain

Extract concessions first

The later the offer, the more it is worth

Unless truly the last offer, undermines credibility



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Don't Be A "Hero"

"Hero negotiators" are seldom successful

"Hero negotiators" exhibit weakness

"Hero negotiators" destroy the credibility of the Employer's negotiator and their team

"Hero negotiators" protract bargaining



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Package or Piecemeal

Isolation of proposals results in giving more

- You soon run out of "gives" without achieving an agreement
- Better to deal in "packages" and trades
- Get something for every concession



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Beware “Quick” Agreements

Agreement is not a function of the # of meetings

Do not raise form over substance

Timing and frequency of meetings is very important

Too frequent meetings indicate a lack of firmness



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Any questions?



Thank you for participating!

Rex Randall Erickson
Erickson Law Firm A.P.C.
800.864.8111 | www.EricksonLaw.com

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