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A Common Sense Glossary
of Negotiations Terms
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The following words and phrases are used often, and sometimes too freely, in connection with the negotiations process. In the realm of negotiations, it is best to think of words as "labels" or descriptors of complex, legalistic, and sometimes arcane concepts, many of which change periodically due to legislative and judicial re-interpretation. This Common Sense Glossary is not intended to provide precise "legal definitions" for such terms, nor is it an exhaustive list; rather, it is an attempt to translate these concepts into common sense language.

1998 ACSA SYMPOSIUM FOR NEGOTIATORS
AND NEGOTIATION TEAMS
January 7, 1998
San Diego, California

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COMMON NEGOTIATIONS TERMS

AGREEMENT - The document which results from negotiations between districts and employee associations, sometimes also referred to as the contract, the collective bargaining agreement or CBA. By law, agreements cannot exceed three years in length. (See also "Reopeners" and "Successor Agreement" below.)

BARGAINING - Used interchangeably with "negotiations" (see below) to describe the process. Technically, under the EERA, school districts engage in "collective negotiations," while the term "collective bargaining," commonly used as a descriptor, comes from the private sector.

BARGAINING UNIT - The group of employees represented by a particular union. For example the bargaining unit represented by the certificated union may include all teachers and other certificated employees except, e.g., psychologists (or it could include them too). All employees in the covered classifications/job titles (usually described in the "recognition" clause of the negotiated agreement) are members of the unit regardless of whether they are also members of the union (see "Duty of Fair Representation").

CERTIFICATED EMPLOYEES - The technical term provided by the Education Code to describe teachers and other school district/county office of education ("COE") employees who must hold a certificate or credential from the State of California to practice their profession (e.g., psychologists, nurses, special education specialists, administrators). (By distinction, see "Classified Employees").

CLASSIFIED EMPLOYEES - The technical term provided by the Education Code to describe all school district/COE employees for whom a certificate or credential is not required as a condition of employment (e.g., clerical staff, classroom aides, custodial, maintenance, operations, and transportation employees). Some of these positions may require other kinds of licenses, e.g., for bus drivers or grounds persons who work with hazardous materials.

CONCERTED ACTIVITY - When a group of employees act "in concert" in connection with the labor-management relationship in order to persuade, sway or pressure the employer regarding its position in the negotiations process, or in response to action taken or threatened to be taken by the employer on a matter within the scope of representation. The most well-known form of concerted activity is a strike; however, the phrase refers to any group activity within this definition, such as a work slowdown, a "work to rule" (where employees perform the absolute minimum duties required by contract, "rule," or policy), a letter writing campaign, picketing, a sleep-in at the district office, a parade down main street, etc. (See Protected Activities.)

DUTY OF FAIR REPRESENTATION - The legal duty imposed on the exclusive representative (the union) to defend and enforce the contractual and related rights of all members of the bargaining unit, regardless of whether they are also dues-paying members of the union. In answer to the often asked question "Why is the union going to bat for this person when they know, and have confided to the district, that the employee is in the wrong?" the usual response is the union's duty of fair representation ("DFR"). Unit members can (and frequently do) sue their own union for an alleged "breach" of the DFR, e.g., if the union fails or refuses to process a grievance through arbitration or refuses to pursue an unfair practice charge.

EDUCATION CODE - The body of statutory law (meaning it is created by the Legislature or, more recently through the initiative process) governing school districts, community colleges, COE's, the University of California and the California State University. With approximately 10,000 sections (not counting hundreds of subsections), an abridged version of "the Code" runs over 1700 pages, and the official versions contain 12 volumes. The Code is a favorite object for revision by the Legislature; every year hundreds of bills are proposed and many are passed into law to amend, modify and, supposedly "clarify" the Code. This is ironic because for many years the California Constitution has stated the Code is permissive, meaning governing boards and school districts are free to engage in any activity which is not prohibited by the Code or some other law. One might ask, therefore, why the Legislature needs to continually pass hundreds of laws stating, in effect, that schools may engage in specified activities?

In addition to the Code, there is a set of regulations (the California Code of Regulations) promulgated by the State Department of Education, designed to assist districts in implementing the Code.

Since the EERA provides that mandatory provisions of the Code are outside of the scope of negotiations, reference is often made to the Code during negotiations, both as a sword and a shield.

EDUCATIONAL EMPLOYMENT RELATIONS ACT - Also referred to as the EERA or Rodda Act (after its author, Senator Albert Rodda), or Senate Bill 160, this is the law (Government Code section 3540, et seq.) which in 1976 created the current system of negotiations in California's public educational sector. Its primary impact was to elevate the process from one of informal "meet and consult between employer and professional association" to the private sector model of "meet and negotiate between the employer and the exclusive representative (union)." The SERA contains provisions defining the duty to negotiate (and over what subjects); how exclusive representatives are "certified and de-certified and [how bargaining units are] modified"; provisions on agency shop; violations, the impasse process; the public notice process and more. The EERA is administered, interpreted and enforced by the Public Employment Relations Board ("PERB").
GOOD FAITH NEGOTIATIONS (OR BARGAINING) - The EEWA imposes a duty on the employer and union to meet and negotiate in good faith over certain subjects. The good faith requirement means each party must "come to the table" with a sincere and subjective desire to reach agreement. So long as a party's conduct reflects this intent, it will meet the good faith requirement, even if no agreement is actually reached (the EEWA does not require either party to reach agreement). Whether good faith is present is usually measured by examining a whole set of actions during bargaining (a "totality of circumstances"), such as responding to proposals in writing; having authority to negotiate at the table; not negotiating regrettably; not canceling numerous meetings, being on time, etc. In addition, some actions are seen as such egregious violations of the duty, that an isolated incident can be held illegal, e.g., unilaterally changing a negotiable condition of employment without giving the union notice and an opportunity to bargain (these are called "per se violations"). When a party violates the duty to negotiate in good faith, the other party can file an action with PERB called an "unfair practice charge."

EXCLUSIVE REPRESENTATIVE - The union which represents a particular bargaining unit. The word "exclusive" has important legal meaning because once the union is "certified as the exclusive rep", the employer may meet and interact with only that union (and not another organization) regarding employer-employee relations matters under the EEWA. Some employees may belong to other labor organizations, but there can only be one exclusive representative for the bargaining unit. For example, in some districts, some certificated employees belong to CTA while others are AFT members. However, if CTA, for instance, is the exclusive rep, the district must meet and negotiate and otherwise interact only with CTA regarding EEWA matters. Reciprocally, AFT members are members of the bargaining unit represented by CTA and CTA owes them a Duty of Fair Representation.

IMPASSO PROCESS - Under the EEWA, if the parties cannot reach agreement in face-to-face negotiations, they must participate in the impasse process. The first step is mediation in which a neutral third party assists the parties (usually via "shuttle diplomacy") in attempting to reach an agreement. If mediation fails, the next step is fact-finding, in which each party appoints a panel member and those two choose a neutral member from a list provided by PERB. An informal hearing is held at which both parties present facts to support their bargaining position. Since most impasses center on compensation issues, fact-finding usually involve lengthy presentations on the district's budget and its "ability to pay" what the union is demanding. The fact-finding panel then issues an advisory report to the parties with its recommended settlement. Either party is free to accept, reject, or modify the recommendation as its official bargaining position. The parties must then engage in some activity—usually more negotiations—to determine if the fact-finding report can break the impasse and lead to a settlement. If not, "second impasse" is reached, and the employer may lawfully unilaterally impose its last best offer to the union. At this point, the union is able to (and almost always will) engage in concerted activities, including a strike or work stoppage.

INTEREST-BASED BARGAINING ("IBB") - A non-traditional form of bargaining in which the parties share basic interests (what they really want out of negotiations, as opposed to formal proposals) and jointly develop options (ideas which might become agreements between the parties to meet interests) through an open-ended brainstorming process. IBB is intended to be collaborative rather than confrontational; all parties recognize interests as legitimate concerns or needs for which all team members seek solutions. Instead of two bargaining teams, a third team of the whole evolves to attack problems and not people. IBB usually yields better, longer-lasting and wiser results in which there is a high degree of shared ownership, as opposed to confrontational bargaining. The most prevalent IBB programs are taught by the California Foundation for the Improvement of Employer-Employee Relations (CFIER) and the CTA/Management Model for Interest-Based Bargaining, both of which are based largely on the principles set forth in Fisher and Ury’s book, Getting to Yes and other materials from their Harvard Negotiations Project.

NEGOTIATIONS (OR MEET AND NEGOTIATE) - The process in which the governing board and/or representatives meet with the exclusive representative to bargain over wages, hours, benefits and other matters within the scope of representation. Negotiations result in a written agreement or contract between the parties. A failure or refusal to meet and negotiate in good faith regarding such matters usually will be held to violate the EEWA and the offending party will be found to have committed an unfair practice.

PROTECTED ACTIVITIES - Any activity engaged in by an employee which is protected by the EEWA. Although at its extreme, this may include Concerted Activities (see above), this phrase describes a broader range of conduct such as the right to join a union, participate in union activities, file a grievance, or otherwise complain about a working condition which is within the scope of representation or in some other manner falls within the employer-employee relationship as defined under the EEWA. In some circumstances, a single employee can engage in legally protected activity. The issue of whether an activity is protected usually arises when an employee alleges he/she has been disciplined in retaliation for engaging in a protected activity; if true, the employer will have committed an unfair practice.

PUBLIC EMPLOYMENT RELATIONS BOARD (PERB) - The five-member board appointed by the Governor, which administers and enforces the EEWA. Unfair practice charges are reviewed by the Board if a party appeals from a hearing officer's decision. Parties may seek review of PERB decisions by the California Court of Appeal, whose acceptance of such cases is discretionary.

REOPENER NEGOTIATIONS ("REOPENERS") - Most negotiated agreements are three years in length; however due to the vagaries of the funding process for California schools, ironclad compensation agreements usually do not extend two years into the future (i.e., beyond the current year). Therefore, three year agreements typically contain "reopener" provisions for the second and third contract years, usually over wages, health benefits, and one or two more subjects to be selected by each party (neither party wishes to renegotiate every provision.
of the contract every year). Under this arrangement, negotiations during the second or third year are called "reopeners."

**SCOPE OF REPRESENTATION (OR SCOPE OF BARGAINING)** - The EERA defines the subjects over which employers and unions are required to meet and negotiate in good faith. Some matters are specified in the law: "wages, hours of employment ... health and welfare benefits ... leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees," etc. (Government Code section 3543.2, subd. (a).) However, the "scope" section of the EERA also includes "other terms and conditions of employment." This seemingly simple phrase has been the subject of hundreds of PERB and court decisions, especially those dating back to the inception of the law in 1976, when employers, for the most part, sought to restrict and unions sought to expand the scope of bargaining. When this issue arises, a party will claim that a proposal is "outside the scope of negotiations," usually based on an argument that the matter is covered by the Education Code in a manner which supersedes ("preempts") negotiations on the subject (See Education Code, above). Whether such a claim is valid may depend on a PERB or court decision up to three years in the future. For example, the California Supreme Court recently as "outside the scope of negotiations" the subject of release of probationary certificated employees, since this matter is preempted by the Education Code and is exclusively within the province of the governing board.

**SUCCESSOR NEGOTIATIONS** - At the end of the contract term, the entire agreement is up for renegotiation of a successor agreement. Such negotiations are referred to as "successor negotiations," as distinguished from "reopeners."

**SUNSHINE OF PROPOSALS** - The phrase used to describe the public notice process required by the EERA. Since public education and the schools are matters of great community interest, the EERA requires that initial bargaining proposals of both the employer and the union be presented at a public board meeting, and that the public be allowed to comment on them, before any negotiations take place over those proposals. When a new subject of bargaining arises at the negotiations table after initial proposals have been "sunshined," the new subject must be posted for the public to see within 24 hours. If negotiations occur without the required "sunshining," a member of the public can file a "public notice complaint" against the governing board (not the union), which will be heard by PERB.

**UNFAIR PRACTICE AND UNFAIR PRACTICE CHARGE** - If a party believes another party has violated the EERA, it may file an Unfair Practice Charge with PERB alleging that the offending party has committed "an unfair." Most of these charges involve an alleged refusal to negotiate in good faith, or an allegation that the employer has taken unilateral action over a negotiable matter, without allowing the union an opportunity to negotiate the decision or the effects of the decision on working conditions. The charges are reviewed by PERB attorneys to determine if they really state an EERA violation; if so, PERB issues a formal "complaint." The hearing process begins with an informal settlement conference, then a formal hearing before an administrative law judge, who issues a written decision. Either party may then appeal to the PERB itself and up to the California, or even United States Supreme Courts.