WHAT DOES IMPASSE MEAN?

Most State Supervisors are aware that the SU Negotiating Team declared, on Tuesday, 3 April 2007, that the successor contract negotiations with the State of Alaska were at "impasse" and the parties require the assistance of a Federal Mediator. The State did not agree that an impasse exists, so the declaration is unilateral and may be subject to review by either the Federal Mediation & Conciliation Service (FMCS), a federal agency that provides mediation services to collective bargaining parties in need, or the Alaska Labor Relations Agency (ALRA), the state agency charged with implementation and administration of the Public Employment Relations Act (PERA), the law which allows Alaska public sector collective bargaining.

The "question of the hour", however, is: what does "impasse" mean, and what happens now?

Before attempting the answer that question, let us briefly review the Alaska state bargaining process and tradition. Alaska law, PERA, has its own unique provisions and traditions, but there are some constants in the world of collective bargaining: 1) collective bargaining is a relationship between two (2) parties who simultaneously have common and disparate interests; 2) ultimately, the relationship is defined by power; and 3) while certain standards of conduct are required, the parties must, in the end, define/negotiate the terms and conditions of their contract – no adjudicator will grant or award contract provisions which could not be attained by negotiation.

A common expectation in labor bargaining is that the parties – employer and union – are expected to conduct their negotiating business "in good faith." Like "reasonable doubt" in criminal law, "good faith" in labor negotiations is an elusive condition which we recognize when we see it, smell when it is absent and is always subject to opinion, scrutiny and examination based upon the actual, specific conduct of the parties. While compromises and counterproposals are usually the best way to assess good faith negotiations, for instance, no labor law requires either party to actually make compromises or counterproposals – the burden of good faith negotiating can, technically, be met through alternative techniques and actions (please don't ask how!).

In the current SU-SOA negotiations, the parties have met, face to face, at nine (9) meetings. Typically, the first order of business in labor negotiations is to agree upon groundrules which will govern the negotiations. SU and SOA were unable to agree upon goundrules; they agreed upon a nearly-complete set of groundrules but the state refused to agree to a date, any date, certain by which the state would promise to submit its full package of initial proposals. (A date certain for submission of initial topics of negotiation is usually a management concern – management does not want to be on the verge of an agreement and suddenly have the union raise a brand-new topic to negotiate; in Alaska, the date certain has special meaning because state law allows the State Legislature to decline to consider new laws involving the expenditure of money if those new laws are not submitted to the Legislature before the sixtieth [60th] day before the end of the session. New collective bargaining agreements are submitted to the State

Legislature as new laws.) Having consumed almost three (3) days trying to resolve groundrules, the parties abandoned groundrules and moved forward into negotiations.

Typically, the negotiating parties work their way through the contract by addressing individual articles, or even major topics within individual articles. As articles are agreed, the agreements are reduced to writing, the writing is initialed by the Spokespersons and the articles, or topics, are set aside as “tentative agreements” or “T/As”. The initial T/As are usually simple, easy, non-controversial topics, such as Recognition, Policy & Purpose and Employer/APEA Responsibilities. As “easy” T/As accumulate, the parties then move on to more complicated or more controversial issues. Eventually, the parties address and resolve the entire contract, have a “full package tentative agreement”, which is ratified by the union membership and passed as a new law by the State Legislature, then signed into law by the Governor. After completion of our nine (9) meetings, SU and SOA have tentative agreements on twenty-one (21) of forty (40) articles and none of the appendices or template letters of agreement. Such a minimal accomplishment is amazing, and disturbing, given the maturity of the relationship and contract between SU and the state.

When parties are unable to resolve their negotiating issues, there is usually a declaration of “impasse”, which operates to formally identify issues/topics in dispute and authorizes introduction of outside assistance. That assistance usually comes in the form of a mediator, an experienced labor relations practitioner who serves as a go-between and tries to facilitate resolution of the differences between the parties. Since Alaska does not have its own state mediation service, we either mutually agree upon someone to mediate or request a mediator from the staff of the FMCS.

If both parties agree that there is an impasse, mediation is almost automatic. If a party disputes whether an impasse exists, an investigation is usually conducted, either by FMCS or ALRA. If the investigation determines that impasse exists, mediation is ordered; if not, the parties are directed to resume negotiations.

The mediator’s job is to help, cajole, push or even bully the parties into agreement. The mediator does not care about the provisions of an agreement, whether an agreement is “good” or “bad”, the mediator simply wants the bring the parties to an agreement. (One of collective bargaining’s traditional axioms is “Any contract is better than no contract.”) The mediator talks with the parties individually and collectively; the mediator assesses strengths, weaknesses, obstinacy and flexibility; the mediator tries to keep the parties working long and late hours, so long as the mediator perceives that there may be some chance to strike a bargain. If the mediator concludes that an agreement is not possible, the mediator leaves.

If the mediator leaves, the parties still must complete their negotiations. Perhaps the mediation experience has enabled them to resume direct negotiations and move towards resolution of an agreement; if so, they will no doubt commence those discussions. One party of the other, or both, may decide to assert Unfair Labor Practice (ULP) charges before the ALRA, alleging that the other party has violated its duty to “negotiate in good

faith" – these charges involve preparation and assertion, followed by an ALRA investigation, preliminary determination of whether a prima facie case has been established, then a full hearing. It is, by nature, a time-consuming process, elongated by the fact that recent Administrations have severely reduced ALRA's budget, staffing and ability to provide services as quickly as embattled negotiating parties need those services. If a party successfully prosecutes the ULP charge, the traditional remedy is that the "guilty" party is reprimanded, directed to discontinue those specific improper actions and probably required to "perform public penance" by posting an announcement of their conviction in all workplaces where the misconduct occurred. Then, the parties resume negotiations – because contract terms and conditions must result from negotiations.

In order to advance their negotiation efforts, the union may commence collective or concerted actions – overt demonstrations by the union membership – designed to convey to the employer the membership's determination to attain whatever provisions are yet being proposed by the union, but unsatisfied by the employer. These may be off-duty actions designed to demonstrate membership solidarity and resolve, or they may be partial or complete interruptions of work activity by the membership.

Whatever concerted actions are undertaken by the union, the union must assure that they will be successful, that they will motivate the employer to negotiate more constructively and agree to terms and conditions which will meet the needs of the union membership and result in ratification of a satisfactory new contract.

There is a point – undefined, recognizable by circumstances – whereat the employer is permitted to unilaterally implement the employer's last official legal proposal. That point is when impasse, mediation, possible charges or other issues have been exhausted and there are no on-going, fruitful negotiations between the parties. The union may take an official vote to ratify that unilateral implementation, or may merely accept by acquiescence, or may strike – withhold the services of its membership in order to compel the employer to negotiate more favorable conditions.

In the Alaska public sector, strikes are not simple. PERA identifies three (3) categories of public employees, all of which are included in the SU Bargaining Unit: Category 1, employees who provide such fundamental and essential public safety (eg, Troopers, COs) that they are prohibited from withholding their services; Category 2, employees who provide sufficiently significant public services (eg, teachers, road maintenance personnel) that they may only strike for a little while, until a court directs them to return to work; and Category 3, all other employees who have no legal restraints to their right to withhold their services.

Category 1 personnel are compensated for their inability to strike by having the right to demand that their unresolved negotiation issues be resolved through a binding interest arbitration process. A neutral arbitrator is selected by the parties, and that arbitrator conducts a hearing wherein the parties each submit their version of what should be the terms and conditions of the in-dispute portions of the contract. The arbitrator renders a decision, and that decision is binding on the parties – they both must accept and

implement the conditions, terms, rules of the arbitrator's decision. (This is how the Correctional Officers' union was able to obtain higher wage increases and extend GeoDiff Pay to Ketchikan and Juneau in their last contract.)

Category 2 personnel are compensated for their limited ability to strike by having the right to demand that their unresolved negotiation issues be submitted to an advisory interest arbitration process. A neutral arbitrator is selected by the parties, and that arbitrator conducts a hearing wherein the parties each submit their version of what should be the terms and conditions of the in-dispute portions of the contract. The arbitrator renders an opinion, which is not binding on the parties, expressing how the arbitrator recommends the outstanding contract issues should be resolved. That opinion then usually becomes the basis for renewed, post-arbitration negotiations between the parties, which hopefully results in a mutually-acceptable agreement.

As stated, Category 3 personnel are not restricted in their right to strike, and the resolution of their contract issues is defined by the relative power between the employer and the workers.

In the end, negotiations must result in a mutually-agreed contract and only the collective bargaining parties – the employer and the union/its members – decide what provisions, rules and benefits that contract will provide.