

RECOMMENDATIONS FOR CONTRACT LANGUAGE

The remainder of this report takes a close look at contract language in specific areas. The goal of the following sections is to provide those negotiating and approving collective bargaining contracts with the understanding necessary to negotiate contracts that work for school districts, teachers, and students.

A collective bargaining contract is just that: a legally binding contract. It should clearly state the rights and responsibilities of the parties involved. It is not a treatise on broad-based policy issues, nor should it contain vague goals or clauses intended to have no real effect. Every word and phrase should be examined carefully, remembering that it must stand up under the scrutiny of an independent arbitrator or judge.

The ultimate goal of school board members, administrators and their representatives must be to ensure that students are provided the best possible educational opportunities. To accomplish this, they must preserve necessary authority while adequately supporting employees. The union's interest is to ensure that employees' wages and hours are protected from arbitrary changes and that the terms and conditions of employment will enable the employees to work effectively. An effective contract will attempt to protect the respective interests of both parties, while allowing the district to achieve the ultimate goal of excellent education. It is always better to err on the side of providing and protecting excellent academic opportunities for students.

Changes in contract language must come about through the collective bargaining process. Because the process requires give and take from both sides, a school board wishing to remove a contract provision should carefully weigh the benefits and consequences of bringing up the subject. The trade-offs the union might demand for giving up its control in one area might be worse than the original situation. A school board's efforts may need to be concentrated on those areas most detrimental to the education process, with others allowed to slide. The best course is prevention—an informed school board can guard against inserting detrimental contract language far more easily than it can get it removed.

The contracts in this study were analyzed with the following criteria, which can be applied to any contract provision:

- Does the contract provision accurately reflect the applicable law? If the law allows flexibility, does any variation in the contract remain within the range allowed by law?
- Does the contract provision improve or hinder student learning by any modifications it makes to the rights and responsibilities of the parties?
- Does the contract provision prevent the school board from fulfilling its statutory responsibilities to the public, teachers, administrators, and students?
- Does the provision safeguard the individual rights of teachers as well as the rights of the Association?
- Does the provision support flexibility in seeking educational solutions and accountability for educational results?

MANAGEMENT RIGHTS

Summary

School boards and administrators negotiate management rights clauses in their collective bargaining contracts so that they can have the discretion necessary to manage the district. Most existing clauses are worded too vaguely to accomplish this objective. Only clauses that specifically reserve control to the administration in a concrete area will succeed.

Analysis

The obligation to bargain

The school board has the ultimate responsibility for the education and safety of students. State law empowers the board to fulfill this responsibility by granting it control over the supervision and operation of the district.¹ In exercising its powers, the board is accountable both to the state and to the voters to ensure efficient and effective school operation. This responsibility is hampered too often by the risk of committing an unfair labor practice when school boards make changes in policy. Careless wording in collective bargaining contracts increases this danger.

The school district's ability to change policy is limited by its obligation to bargain on all mandatory subjects of bargaining, including the "terms and conditions of employment."² If a particular subject is not covered in the collective bargaining contract, the existing conditions are, in effect, incorporated into the agreement. This rule requires the school district to maintain existing "conditions of employment," even if the district has never negotiated on those subjects before.³ A board could have both the need to change a policy and the power to change that policy, but still be required to bargain over the change if it affects the conditions of employment.

The requirement to bargain on "conditions of employment" has surprising breadth. Public employers have been liable for an unfair labor practice by actions such as these:

- banning smoking inside an unventilated workplace,⁴
- changing work schedules within pre-authorized limits,⁵
- making promotions without posting notices of job openings,⁶
- requiring surnames to appear on ID badges,⁷ or
- changing student enrollment procedures to require more involvement by instructors.⁸

As previously noted, if a decision on a subject of bargaining that is merely permissive impacts wages, hours, or terms and conditions of employment, the effects of that decision must be bargained as well.⁹

Contracts which include permissive subjects of bargaining increase the district's obligation to bargain. If an issue is already subject to the collective bargaining agreement, any proposed change in it during the contract period would have to be collectively bargained, even though the area was a permissive subject of bargaining.

Contract provisions that expand the obligation to bargain

Going beyond the requirements and intent of the law, some school districts have explicitly granted the union input on all major decisions. An example of this follows:

The Board shall consult with the Association on any new or modified fiscal, budgetary or levy programs, construction programs, or major revisions of educational policy, which are proposed or under consideration, and the Association shall be given opportunity to advise the Board with respect to said matters prior to their adoption and/or general publication.¹⁰

Another clause that may broaden the district's obligation to bargain is the "maintenance of standards" clause. Sometimes such a clause explicitly states the district's obligation to bargain on a particular issue, or at least engage in the next step down, "meet and confer":

The duties of any employee and the responsibilities of any position in the bargaining unit will not be substantially altered without an administrator meeting and conferring with the Association and the affected employee.¹¹

This type of language, with hard-to-define terms such as "substantially," may severely hamper a district's ability to quickly adjust or be flexible to student needs or legislative mandates.

Ineffective attempts to retain management discretion

A school district may seek to retain or regain management control for specific policy changes by getting the union to waive its right to bargain. A specific statement that the district has discretion in a particular area is an effective waiver. Where the union has waived its right to bargain, the board can modify its policies on that issue without reopening bargaining. These waivers require precisely crafted language stating the areas that remain within the board's discretion.

Most districts negotiate generic management rights clauses, often closely following the statutory language of RCW 41.59.930.¹² These general management rights clauses are not effective as waivers.¹³ A typical management rights clause reads:

Except as specifically provided herein, nothing in this Agreement shall be construed to interfere with the responsibilities and rights of the District as specified by the federal and state law and provisions of the Act.¹⁴

Another clause that is of little assistance when management needs to change an existing policy is the so-called "zipper clause." Zipper clauses purport to eliminate any requirement to bargain on subjects not covered in the agreement, but vague language such as this has little value:

The parties acknowledge that each has had the unlimited right and opportunity to make proposals with respect to any matter deemed a proper subject for collective bargaining. The results of the exercise of that right are set forth in this Agreement. Therefore, except as otherwise provided in this Agreement, each party voluntarily and unqualifiedly agrees to waive the right to oblige the other party to bargain with respect to any subject or matter not specifically referred to or covered by this Agreement.¹⁵

Both of the clauses above are too vague to preserve management rights. When management makes a unilateral change, PERC has found that such clauses do not show that the union has waived its right to bargain on a specific matter.¹⁶ If PERC believes that a waiver was not knowingly made, it will hold that the parties are required to bargain.¹⁷

Another way districts jeopardize the effectiveness of their management rights clause is through a “maintenance of standards” clause. These clauses usually read as follows:

Unless otherwise provided in this agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate or otherwise detract from current wages, hours, terms or conditions of employment under existing rules, regulations, policies, resolutions or practices of the district in effect prior to the effective date of this agreement.¹⁸

PERC found that the duty to bargain was not waived in a contract that had a clause similar to that above, and a purported waiver of bargaining in the management rights clause.¹⁹ Bargaining is the standard practice in labor relations. Where two clauses are unclear, PERC is more likely to interpret the contract in favor of a duty to bargain.

Requirements of an effective management rights clause

A management rights clause must contain clear language reserving to the board discretion over the specific areas the board seeks to preserve within its sole authority. Some contracts preface detailed reservations with generic language. These provisions do not effectively waive the right to collective bargaining over the areas listed. For example:

The Association recognizes that the Board has the responsibility for formulation and implementation of policies and rules governing the education programs and services of the District. No delegation of such responsibility is intended or to be implied by any provisions of this Agreement, and any occurring shall be void and without effect.

Without limiting the generality of the foregoing, it is expressly recognized that the Board’s operational and managerial responsibility includes, subject to the terms and conditions of this Agreement... (followed by specific areas of board responsibility)²⁰

To be effective as a waiver, the management rights clause must do more than acknowledge the district’s “responsibility.” The clause should explicitly grant the board the right to make changes in a specific area without providing the union notice or opportunity to bargain.²¹ Otherwise, the district will still be obligated to bargain its decision, regardless of its managerial responsibility over the subject matter.

A carefully worded management rights clause allows a district to make necessary policy changes without being forced to resort to collective bargaining in order to implement those changes.

Each school district must preserve its rights to create and change policy to effectively fulfill its statutory duties and obligations to the public it serves. Management rights are a mandatory subject of bargaining, so the district can insist that a management rights clause is included in the contract.²²

Districts need to take careful stock of the possible effect contractual phrases may have on their ability to fulfill their responsibilities. A carefully worded management rights clause allows a district to make necessary policy changes without being forced to resort to collective bargaining in order to

implement those changes. On the other hand, generic or contradictory language generates unnecessary confusion and/or grants the union an inappropriate level of control over the administration of the school district.

Recommendation

School districts should adopt strong management rights clauses that explicitly list the rights reserved to the district.

The best way for a district to avoid an unfair labor practice charge over a policy change is to explicitly reserve the right to make policy in that area by means of a carefully worded management rights clause. The clause must both state that the district management has sole discretion to make policy in the area, and specifically describe the area of policy reserved. Where the contract specifically states management's right to take a particular action, the action will not be considered an unfair labor practice.

Following is a sample management rights clause with explicit reservations of rights. Not all of the clauses suggested may be appropriate in all districts, and legal advice should always be sought before making a contract proposal:

Except as otherwise specified by the provisions of this Agreement, the Board retains the exclusive right and power to manage the District, to direct its employees and to delegate, to the extent allowed by law, said right and power to management personnel, including the customary and usual rights, powers, and functions, and authority of management vested in the District by law. Such rights shall continue to vest in the District and be exercised thereby without prior negotiation with any bargaining representative. These rights shall include by way of illustration and not by way of limitation, the right:

1. To manage and administer the school system, its properties and facilities and to direct its administrators, teachers, and other employees in the execution of their duties;
2. To make such operating changes as deemed advisable for the efficient, effective operation of the District;
3. To determine the size, composition, and direction of its working staff;
4. To control the use of all facilities and equipment;
5. To direct the work force and schedule working hours;
6. To hire, classify, evaluate, promote, retain, transfer, assign and reassign employees in positions and work functions and establish, modify or change work schedules or standards;
7. To suspend, non-renew, discharge, demote, or take disciplinary action against employees;
8. To deal with all phases of school location, use, design, feasibility, need, cost, control, and determination;
9. To prepare, allocate, and prioritize the District budget;
10. To develop and adopt curriculum and educational programs;
11. To determine standards of behavior, discipline, and order of students in the schools, and procedures for enforcement of such rules;
12. To determine the means and personnel for conducting school district operations and functions efficiently therein;
13. To utilize technology; and
14. To release employees for lack of work.

All matters not specifically and expressly covered or treated by the language of this Agreement are retained as management rights and may be administered by the District in accordance with such policy or procedure as the Board of Directors may from time to time determine.²³

Districts may want to consider reserving their authority over class size; leave;²⁴ processing of parental concerns; specifications for services, supplies, and equipment; and health and safety policies as well.

EXCLUSIVE REPRESENTATION

Summary

Washington state law requires districts to bargain only with the approved union. However, state law does not grant that union the exclusive right to use school property or assist teachers on non-labor issues. Contracts that grant the union these rights limit the options of teachers.

Analysis

Exclusive representation requires that all terms and conditions of employment, including wages and hours for individual teachers, be determined only through the collective bargaining process with the exclusive representative. A union becomes the exclusive representative of a group of employees when approved by the majority of the employees voting. After that point, the school district may not bargain with individuals directly or with other unions.

Selection of an exclusive representative

The Public Employee Relations Commission (PERC) oversees the election of an exclusive representative. A union that wants to become exclusive representative must bring a petition to PERC showing that thirty percent of the employees in the appropriate bargaining unit support the union. PERC then holds an election among the employees by secret ballot, either through the mail or on site. If the union receives majority approval from those voting, it is certified by PERC as the exclusive representative.

Decertification

Employees can decide to make alterations in their collective bargaining process such as operating without a union. This is called decertification. To decertify, or to change their exclusive representation, thirty percent of the employees represented by the bargaining unit must petition PERC for another election. When a collective bargaining agreement is already in effect, these changes can only be made in a window between 90 and 60 days prior to the expiration of the agreement. PERC then holds another election, at which the decision of the majority of those voting prevails.

Expansion of exclusive rights through contracts

Virtually all collective bargaining agreements recognize the local union as the exclusive bargaining representative. Most contain a promise not to recognize any other union during the term of the agreement.

Some contracts include a clause excluding minority associations from any right granted to the union. These clauses go beyond the statutory requirements for *exclusive representation*. The rights granted to the union often include using school property, meeting with teachers at school, and providing in-service training. Thus, if teachers use any district property, such as e-mail or Internet accounts, to learn about another teacher organization, or if districts implement professional training through another association, the district may have violated this agreement.

The right of a union to be the exclusive representative of employees for bargaining is governed by state law. Any movement to change that status must carefully follow the law. In contrast, other rights of the union are expressly granted by individual district contracts, and should be carefully examined to see if they have a negative impact on the rights of individual teachers or the discretion of the district.

Recommendation

In matters not related to collective bargaining, school districts should ensure that contract provisions permit participation by professional education organizations other than the exclusive representative. This is especially important in the area of teacher training or professional development.

AGENCY SHOP

Summary

Agency shop agreements place school districts in the role of a collection agent for the union by taking union-designated fees directly from employee paychecks and sending the money to the association. This arrangement, although common and legal, is not necessary. Because it potentially infringes on individual teachers' rights, school districts should be careful to consider their potential liabilities for mistakes.

Analysis

Requirements of an agency shop

Most school districts have an *agency shop* arrangement in their collective bargaining contract. An *agency shop* requires all employees represented by a particular union either to join the union or to pay a fee for their representation. Union officials send school district paymasters a deduction schedule for each employee—itemized to the penny. Before employees ever hold a paycheck in their hands, the district has deducted these itemized fees and sent them to the union. This financial structure is great for the union, but not so good for teachers and school districts.

Union fees result in a large bite out of teachers' paychecks. For example, in the 97–98 school year, Shoreline teachers paid \$698 in annual union fees—regardless of whether the teachers supported the union. Fees since then have increased.

Teachers who decide not to join the union, but are required to pay for union activities, are called “agency fee payers.” Agency fee payers may have philosophical objections to union membership or disagreements with specific actions of the union. The rationale offered for this arrangement is since all employees benefit from the collective bargaining of the union, all employees should pay for it. But this situation only exists as a result of *exclusive representation*, which gives employees no other options. They are forced to be represented by the union whether or not they agree with the union's actions in bargaining, in professional development, or in politics.

Once districts have agreed to an agency shop provision, the districts are obligated under state statute to deduct both union dues and agency fees from its certificated employees.¹ Many contracts clearly state the district's duty:

In accordance with the provisions of the RCW 41.59.060, the District will withhold Association, UniSERV, WEA, and NEA dues required for members in the Association, UniSERV, WEA, and NEA, provided signed authorization slips by each member requesting such dues deductions have been presented to the District by the Association indicating the date the deduction is scheduled to begin.²

Definitions

Agency Shop: An agreement between the school district and the union under which all employees represented by the union must support it.

Agency Fee Payer: An employee represented by a union who objects to union membership. Although not required to be a union member, an agency fee payer must continue to pay for the union.

Non-Agency Shop: A district in which employees are not obligated to support the union.

If an employee does not sign an authorization form for dues to be deducted, an *agency shop* clause in the collective bargaining contract requires the district to deduct the same amount as union dues from his or her paycheck and send it to the union.³ It is the classic situation of being between a rock and a hard place. Some contracts explain this clearly:

In the event that any bargaining unit member has not provided to the District a signed authorization slip, as referred to in Section 2.1, the District shall deduct monthly from the salary of such bargaining unit member a representation fee in the amount equal to the membership dues as listed in Section 2.1.⁴

An agency fee payer can cease paying for some union activities, such as lobbying and politics. However, that requires further steps on the part of the agency fee payer, which are detailed in the Employee Rights section.

Districts without an agency shop

Although Washington state allows an *agency shop* to exist, *agency shops* are not required. The collective bargaining contract may free teachers to choose whether or not they join the union. With a *non-agency shop*, the district deducts dues only from people who voluntarily join the union. In fact, several Washington school districts have contract language that does not mandate union membership or paying equivalent fees:

The Association shall have the right to automatic payroll deduction of membership dues and fees for employees as authorized by the employee....All employees who are members of the Association shall remain members unless they opt to withdraw from membership during the last two weeks of August of any future school year.⁵

Districts should seriously consider whether a *non-agency shop* agreement like this is a possibility. Like any compelled association, *agency shop* agreements create resentment among those compelled to pay against their will. The district's role as dues collector increases the problem, leaving a teacher who disagrees with the union in a position where both his employer and his "representative" are against him.

Although Washington state allows an agency shop to exist, agency shops are not required.

Despite the problems of *agency shop*, these agreements apply to most teachers in the state. Those districts with an agency shop need to be aware of the impact these arrangements have on individual teachers and the liability the district may incur through making inappropriate deductions. Potential areas of liability include deductions made for political purposes without employee consent and deductions made in disregard of teacher's rights under an *agency shop* agreement.

Deductions for political action committees

A difficult question for districts in administering deductions is whether they are obligated to make deductions for union-affiliated political action committees (PACs). Districts generally deduct to such entities as WEA-PAC and NEA-PAC at the same time they make deductions for standard dues. The general deduction statute only requires deductions for fees and dues required for membership.⁶ The WEA cannot make PAC contributions a condition of membership or employment.⁷

Another statute requires districts, if at least ten percent of employees authorize a particular deduction, to make that deduction for those who authorize it.⁸ Since WEA-PAC enrollment is above

ten percent in a number of districts, these districts are obligated to make the WEA-PAC deductions for those who authorize the deduction.⁹ Oddly, this specific provision applies only to K–12 certificated employees. Other public employees may not use public property to make contributions to political committees.¹⁰

School districts may be violating other statutes by making deductions for political committees. Washington law prohibits the use of public facilities to directly or indirectly assist a campaign.¹¹ The statutory definition of “facilities” includes office equipment or staff time, which must be used by the school district to make a PAC withholding. A similar law in Florida was found to prohibit payroll deductions to union PACs.¹² As of this writing, the matter has not been litigated in Washington state.

The best solution to the school districts’ dilemma may be legislative. The legislature may wish to clarify state statutes on whether school districts may be required, or even permitted, to use public resources to make political deductions for political action committees. Other public employers do not have to administer political deductions; other political committees do not benefit from automatic payroll deductions from public employees. No reason exists to give WEA-PAC and NEA-PAC a special dispensation to use public facilities for collecting donations. Education association PACs should cover their own costs for acquiring political contributions, as other political entities do.

Like other political entities, education association PACs should cover their own costs for acquiring political contributions.

School districts should also be aware that if WEA-PAC or NEA-PAC enrollment is below ten percent, or if they do not have the resources to administer the deduction, they are not obligated to make political deductions from employee’s paychecks.¹³ Where either of these scenarios exists, districts should consider including clauses in their contracts clarifying that they are not obligated to make the political deductions.

Recommendations

Legislators may wish to reconsider the wisdom of requiring school districts to enforce membership in a private entity such as a labor union.

Current state law requires school districts to make deductions from teachers’ paychecks for their union dues. This places the school district in the role of a collection agency for a private entity. The conflicts this creates with the school district’s primary mission of education, and the legal complications this causes for school districts, might best be resolved by removing this obligation altogether.

School districts should not rely solely on indemnification for protection from liability in making fee deductions.

Indemnification is an agreement whereby one person promises to pay for another person’s liability. By administering payroll deductions on behalf of the union, the district is exposing itself to potential liability. If the wrong amount of dues is deducted, or the wrong use is made of the dues, the district could be sued. Some, but by no means all, districts negotiate a clause in which the union promises to indemnify the district for suits arising out of the deduction process. This means that the union, who

tells the district how to make the deduction and receives the money from it, is held financially responsible for mistakes. An example of an indemnification clause is:

The Association agrees to refund to the District any amounts paid to it in error. The District shall then reimburse the employee any sums deducted in excess of the total amount due to the Association.

The Association will indemnify, defend, and hold the District harmless against any claim made and any suit instituted or judgment rendered against the District resulting from any deduction of Association dues. The Association agrees to refund to the District any amounts paid in error because of the dues deduction provision.¹⁴

Courts in other parts of the country have found indemnification clauses like this invalid because they considered employees' constitutional rights so important that the districts could not escape liability by an agreement with the union.¹⁵ However, the law governing Washington state allows indemnification clauses.¹⁶ The United States Supreme Court has not yet addressed the issue, but the difference in lower court opinions means that districts should not rely solely on an indemnification clause to protect them from liability if an error is made in paycheck deductions. Instead, districts should undertake affirmative measures to ensure that employee rights are protected. The section on employee rights contains some suggestions.

Collective bargaining agreements should preserve employees' freedom to choose whether or not to support the union through a non-agency shop clause.

Districts should consider the option of allowing individual teachers to choose whether or not to support the union, instead of compelling all employees to contribute to an entity with which they may disagree. (Teachers' rights regarding union membership as opposed to mere monetary support are discussed more fully in the Employee Rights section of this study.) If a district does negotiate such a *non-agency shop* clause, it should ensure that it clearly addresses the obligations of the employee. An effective clause could state:

An employee may authorize deduction of membership dues from his paycheck by sending written authorization to the Association and to the District. Upon receiving written authorization from a certificated employee, the District shall deduct from the salary of that employee and transmit to the Association such dues as are necessary for membership in the Association. Nothing in this clause shall be interpreted to require any certificated employee to grant such authorization or to allow any deduction to be made from his or her salary to the Association without the employee's express written consent authorizing the deduction.¹⁷

A second clause should also clearly state when and how a current member may opt out of the union. Further, the clause should not unduly limit the time frame within which a member may withdraw:

Any employee who has previously provided an authorization for deduction of dues may revoke that authorization, effective the following September 1, by sending written notice to the Association and to the District office at any time. Such notice shall continue in effect from year to year unless the employee gives written authorization for deduction of dues.¹⁸

One district with an *agency shop* provision allows teachers who are agency fee payers to elect payment of their representation fee to a charity instead of to the union. Although state statute provides such an

option only for employees who have a religious objection to joining the union, this collective bargaining agreement extends the charitable contribution option to other non-members:

Any bargaining unit member who has a representation fee exacted against his or her salary...may elect in writing that such fee be a donation to any charitable organization so designated by the bargaining unit member.¹⁹

Agency shop agreements should protect employee rights.

If an *agency shop* provision is included in the contract, both the employer and the union should ensure that it reflects current law, including the individual employee's rights provided by statute and guaranteed under the United States and state constitutions. The next section addresses this area in detail.

EMPLOYEE RIGHTS

Summary

Because of the danger that employees will be compelled to support unions against their will, both federal and state laws grant employees significant rights to guard against overreaching by the union. Many collective bargaining contracts fail to acknowledge these rights or to give employees adequate notice of them. School districts should ensure that collective bargaining agreements protect employees' rights.

Analysis

Statutory and constitutional protections for public employees

Washington state public employees have rights stemming from both federal and state constitutional law and from state statutes. Under the United States Constitution, agency fee payers—employees who

elect not to belong to the union—cannot be compelled to pay for the political activities of the union, although they can be compelled to pay for essential union activities: contract administration, grievance administration, and collective bargaining.¹

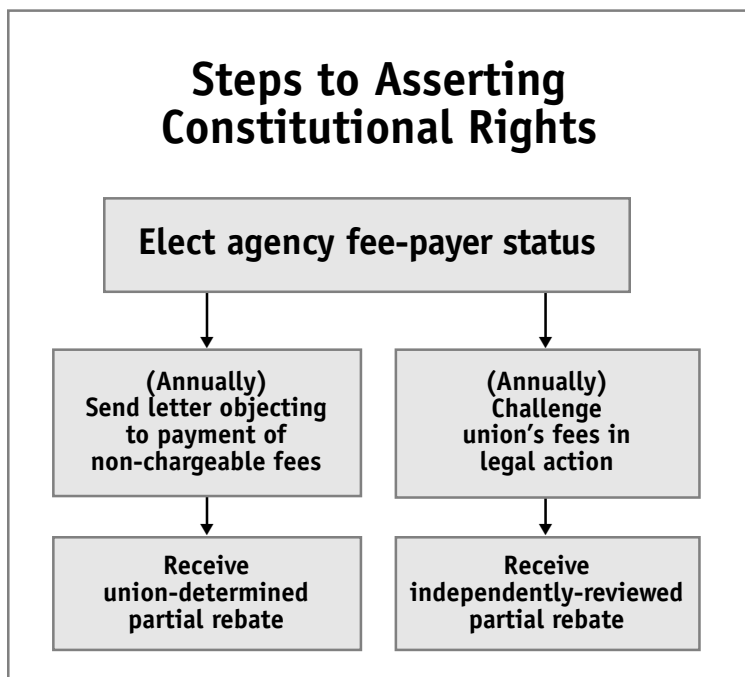
The union must inform agency fee payers that they can be charged only for essential union activities. Non-essential union expenditures, such as lobbying or political expenses, are not chargeable to agency fee payers. The union must also give agency fee payers supporting data for the items it designated as chargeable and non-chargeable.²

This means that an agency fee payer must go through multiple steps to

cease paying for lobbying, political campaigning, and other non-essential expenditures. After leaving the union, they must additionally object to paying for non-essential activities. This objection must be given in a letter within the time and format specified by the union.

If the employee disagrees with the union's determination of what expenditures are chargeable, the United States Supreme Court has ruled that the union must provide a reasonably prompt hearing before an impartial decision-maker.³ Since unions have usually interpreted this to mean a union-selected arbitrator, the Supreme Court has further clarified that employees may avoid arbitration and bring their challenge directly to court. Either way, it means the headache of a full-blown legal challenge for the employee.

Under Washington's Constitution and statutes, teachers whose religious convictions preclude union membership need not pay any dues or fees to the union.⁴ Instead, they must pay an amount equivalent



to union dues to a nonreligious charity or to a charity agreed on by both the individual and the union. The religious convictions may be the tenet of a religious organization to which the teacher belongs, or they may be sincerely held personal beliefs.⁵

Failure of contracts to protect employee rights

Even though state and federal law requires union security clauses to protect the rights of agency fee payers and religious objectors, a few contracts fail to mention that anything other than full membership is an option. For example:

The Association and its affiliates (WEA and NEA) shall have the right of automatic payroll deduction of membership dues, assessments and fees for employees. The District shall provide for dues deductions, assessment, and fees through automatic payroll authorization.⁶

Most contracts make some reference to employee rights, but do so in a manner that leaves employees without any real notice of their rights. This is an example of some common wording:

No member of the bargaining unit will be required to join the Association; however, those employees who are not Association members, but are members of the bargaining unit, will be required to pay a representation fee to the Association. The amount of the representation fee will be determined by the Association, and transmitted to the Business Office in writing. The representation fee shall be an amount less than the regular dues for the Association membership in that non-members shall be neither required nor allowed to make a political (PULSE or NEAPAC) deduction. The representation fee shall be regarded as fair compensation and reimbursement to the Association for fulfilling its legal obligation to represent all members of the bargaining unit.

In the event that the representation fee is regarded by an employee as a violation of his/her right to non-association, such bona fide objections will be resolved according to the provisions of RCW 41.59.100, or the Public Employment Relations Commission.⁷

The preceding clause is flawed in several respects. First, it implies that PAC contributions are a required part of dues, when they are actually a voluntary amount contributed above membership dues. It implies that agency fee payers must pay the full amount of dues. In reality, agency fee payers do not have to pay for any political or other non-essential expenditures of the union. In a 1998 settlement, the percentage of dues which agency fee payers could be charged was set at sixty percent for the NEA portion of dues and eighty percent for some local associations.⁸ Although this translates into savings of over a hundred dollars, employees are not given notice that they may object to the amount of the representational fee. More important, it means agency fee payers have no notice of their Constitutional right not to pay for political or lobbying activities they oppose.

Second, the clause fails to inform employees how to become an agency fee payer. An employee who wants to become an agency fee payer must first figure out the union's requirements for withdrawing from union membership before the employee can withdraw. Some contracts provide instructions on how to leave

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the union, but do so in a way that limits, rather than assists, employees in exercising their rights, by providing a narrow window in which they must act:

...authorization shall continue in effect from year to year unless a request of revocation is submitted to the Superintendent and the Association, signed by the employee, and received between August 1 and August 31 preceding the designated school year for which revocation is to take effect.⁹

Third, the earlier *agency shop* clause does not inform individuals of their right to object to union membership for religious reasons. Contracts with a clear statement that religious objectors are protected often simultaneously limit the rights of employees. For example, the contract may require religious objections to be asserted within a few days of employment, allow the union to retain the employee's money while the religious objector status is being determined, or even attempt to give the union sole authority to determine the validity of a religious objection. Some religious objection clauses also contradict the state statute by giving the union the right to select the charity or the responsibility for forwarding the dues to the charity. The state statute guaranteeing the right of religious objection provides that the charity should be mutually agreed upon and that the individual is responsible for sending the money to the charity.¹⁰

Recommendation

School districts should ensure that fee deduction clauses clearly provide protection for teachers' rights.

A well-constructed clause on dues deduction should have several elements. First, it should explain the fee deduction arrangement between the district and the union in clear terms. Second, it should inform teachers of their rights and the legal basis for those rights. Third, it should protect teachers' rights against arbitrary changes.

1. **Association Dues.** An employee may send a written notice to the Association and the District, authorizing his dues to the Association to be deducted from his salary. After receiving the authorization, the District shall deduct from the salary of that employee and transmit to the Association the dues and fees necessary for membership in the Association.

Any employee who has already authorized deduction of dues may revoke that authorization at any time, effective the following September 1, by sending written notice to the District office and Association. Unless revoked, the authorization shall remain in effect from year to year.

2. **Representation Fees.** The Constitution of the United States and laws of the state of Washington require that no member of the bargaining unit be compelled to join the Association or support its political activities. Those members of the bargaining unit who are not Association members will be required to pay a representation fee to the Association as agency fee payers. The Association will inform the district of the amount of the representation fee, which shall not include contributions to a political committee or political education. The District will deduct the

representation fee from the salary of each employee who does not have a written authorization in effect.

Each year, within thirty days after the start of school, the Association shall provide to each agency fee payer the information required by the case of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).¹¹ Such information shall 1) notify agency fee payers of their Constitutional right not to support the politics and other non-essential functions of the union; 2) provide documentation for the Association's determination of the amounts it charges to objecting agency fee payers; 3) inform agency fee payers of the process by which they may object to use of their fees on nonchargeable activities; and 4) instruct agency fee payers that they may challenge the Association's determination of which expenses are chargeable, either through the Association's arbitration process or through independent legal action.

Employees who object to supporting the nonchargeable activities of the Association shall receive a rebate from the Association for the amount of the representation fee which was not chargeable to objecting agency fee payers under decisions of the United States Supreme Court and other applicable law.

- 3. Religious Objectors.** As required by state law, RCW 41.59.100, nothing in this agreement will infringe on the rights of employees who have a religious objection to supporting the Association. The religious objection of the employee may be based on his or her personal religious convictions or the tenets of a religious body of which he or she is a member. Any employee with a bona fide religious objection may assert it by sending a letter stating his or her objection to the District and the Association and notifying them of the non-religious charity to which he or she will send the dues. The District shall cease deducting the dues, beginning the school year following receipt of the letter, or immediately if the letter is received within thirty days of employment. The employee shall provide written verification that he or she has sent the equivalent of the dues to the non-religious charity. If the Association disputes the genuineness of the religious objection or the selection of the charity, the District shall hold the dues in escrow until the Association and employee reach an agreement or the matter is decided by PERC.

Another step which should be considered by districts is one already taken by the Seattle School District: requiring the Association to send a copy of its "Hudson Packet," designed to inform agency fee payers of their constitutional rights, to all new employees. This provides employees not only notice of their rights, but also enough information about the finances of the union to make a timely, well-informed decision on whether or not to exercise their rights to non-membership.

JUST CAUSE

Summary

State law protects tenured teachers from being removed without adequate procedure. Most collective bargaining contracts expand this to require complex procedures for the discipline or discharge of any teacher. Procedural requirements should be carefully evaluated to ensure that they do not shield incompetent teachers, while protecting good teachers from unfair dismissal.

Analysis

Scope of just cause under law

Just cause limits an employer's power over its employees in two contexts: discipline and discharge. These two contexts are governed by different legal rules. *Just cause* requirements for discharge are based in the United States Constitution and the state laws granting tenure. *Just cause* for discipline, although developed by analogy to the other *just cause*, is a matter of contract and is interpreted according to labor law.

The requirement of *just cause* for discharge means that an employer must keep employing a person unless the employer follows specific procedures to discharge that employee. This rule results from a Supreme Court holding that if the government gives a person the right to continue in

a job, that employee's right to his or her job is a kind of property right.¹ If a government job is "property," then under the Fifth Amendment to the Constitution, the government cannot take it away without "due process of law." This places firing the employee in the same category with fining the employee or seizing the employee's boat. Similar procedural requirements apply.

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The *just cause* standard does not apply to all government jobs. It applies only if the government has granted the employee the property right to continue in the job. The employee could be granted this right by a statement that he or she has "tenure," or statements that the employee may be fired only with "just cause," "*sufficient*

cause," "due process," etc. This property right may be created in a statute or by contract. State statute grants certificated employees a property right in their jobs by requiring districts to rehire teachers who have worked for a certain number of years.²

Washington state's *just cause* rules provide different standards for discharge in different situations. "Provisional employees," who have worked only two years as a teacher or only a year in the district, may be let go at the end of their contract with minimal procedural requirements.³ Teachers convicted of a felony against children must be discharged immediately.⁴ In addition, a teacher may be discharged immediately if the district can show an unremediable problem that materially affects his or her performance or "lacks any positive educational aspect or legitimate professional purpose."⁵ Teacher misconduct, such as sexually offensive comments to students, would be one example of an unremediable problem.⁶ Even a teacher's physical disability may qualify, if it materially affects his or her performance and poses a threat to students' safety and welfare.⁷

Removal of an incompetent teacher

The real challenge for districts is removing incompetent teachers from the classroom when none of the above situations apply. State statute mandates that districts rehire teachers who have worked with the district for more than two years, unless the district can show *sufficient cause* not to rehire them.

Building a case for *sufficient cause* first requires that the administrator who does the teacher's annual evaluation note the problem. (See section on teacher evaluation for more detail.) The administrator must then notify the teacher in writing that the teacher's performance is unsatisfactory, and place him or her on probation for sixty days, giving the teacher a plan for improvement. During the probation period, the administrator must observe the teacher at work twice a month and write evaluations.

If the probationary period ends without improvement, the district must notify the teacher by May 15 that his or her contract will not be renewed. Following the notice, the teacher may request a hearing within ten days to contest the non-renewal. In the hearing, the district bears the burden of proof before a hearing officer that its decision not to renew the teacher's contract was justified, and that it followed proper procedure. The teacher may appeal an adverse decision all the way to the Washington Supreme Court. Furthermore, if the teacher prevails on appeal, the district may be required to rehire the teacher and pay damages for lost wages. The district may be required to pay attorney's fees and court costs, as well.⁸

The entire process is full of pitfalls for districts attempting to discharge a teacher. For example, if a probationary teacher gets sick, or if the school's calendar changes, the hearing examiner may determine that the teacher did not have time to improve in the designated sixty days. Failure to properly follow evaluation procedures or to conduct each evaluation on time could also prevent nonrenewal. Another error the district might make is not providing sufficient training, mentors, or advice.⁹ The teacher could also bring a claim against the district, alleging defamation or emotional distress, depending on the circumstances.

Removing a tenured teacher requires an average of two years for most districts, and costs between \$20,000 and \$50,000, excluding the cost of any court appeals.¹⁰ Some nonrenewals require much more in time and money. The Tukwila school district attempted to remove one teacher for poor teaching. After eight years, two firings, and \$250,000 the teacher finally resigned. The ultimate reason for his resignation was allegations of misconduct, not because he was proved incompetent.¹¹ Good or bad teaching is difficult to quantify and almost impossible to prove in a legal setting because the ultimate decisionmaker never observes the teacher in action.

Given the difficulties of nonrenewal and the fact that the principal's own conduct will be scrutinized in a nonrenewal hearing, principals are rarely willing to attempt to remove all but the worst teachers. For the marginal teachers, it is easier to let issues slide—meaning that a later administrator who attempts to remove the teacher will have to argue incompetence against years of positive evaluations. Principals sometimes avoid the problem by trading a satisfactory evaluation for a promise from the teacher to look for another job, moving the problem of the incompetent teacher to another principal and other students.¹²

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Contract expansion of just cause

Collective bargaining contracts add more layers of procedure to the statutory process, usually making *just cause* apply even to probationary employees, instead of limiting it to tenured teachers. These contract provisions do not allow a probationary employee to gain reinstatement if the school board decides not to renew his or her contract.¹³ Contract provisions can impose specific procedures on that decision which, in turn, are subject to grievance and external arbitration if violated.¹⁴ The arbitrator may penalize the district for violating the procedures, but may not reinstate the teacher.

Further, contracts generally extend *just cause* to teacher discipline, not just discharge and nonrenewal. When *just cause* is extended to discipline, the contract itself generally provides procedures for a hearing, representation, etc., for any disciplinary action:

No employee shall be disciplined without just cause. The specific grounds forming the basis for disciplinary action will be made available to the employee, and, when requested by the employee, to the Association in writing.

At the request of the employee, he/she shall be provided a reasonable opportunity to have a representative of the Association present at the initiation of disciplinary action. When a request for such representation is made, no action shall be taken with respect to the employee until the employee has been granted a reasonable time to have such representation present.¹⁵

Arbitrators judging grievance claims over teacher discipline or discharge have developed a set of standards to determine when *just cause* is met by employers making disciplinary decisions:

1. Did the [employer] give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the [employer's] rule or managerial order reasonably related to the orderly, efficient, and safe operation of the [employer's] business?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the [employer's] investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?¹⁶

A "no" answer to any of these questions will normally result in a decision by the arbitrator that the employer did not have *just cause* for the teacher disciplinary action.¹⁷

Recommendations

Collective bargaining contracts should limit the use of just cause exclusively to discharge or nonrenewal of established employees.

The state statutes limit the extent of *just cause* for a good reason: a school district needs time to evaluate a teacher's capabilities before giving him or her an automatic right to continue in the classroom. Teacher discipline is also difficult to analyze at a distance. By making teacher discipline subject to the grievance procedure, districts potentially subject disciplinary decisions to outside review. Arbitrators do not observe the teacher in the classroom, and their involvement in a disciplinary setting may serve only to antagonize the parties.

School districts should not expand the rights of *just cause* provisions beyond the statutory standard. Expanding the *just cause* provisions by contract limits the school districts' ability to remove unqualified teachers from the classroom. Instead, districts should clearly state their intention to use the probationary period:

During the first two years of employment with the District, or one year if the employee has previously been employed in a certificated position for at least two years in a Washington state school district, an employee shall be a provisional employee. Provisional employees are employed on an "at will" basis and may be terminated pursuant to RCW 28A.405.220.

It is vital that districts use the first year or two of employment to carefully evaluate a teacher's ability to do the job, while it is still possible for an incompetent teacher to be removed with minimal procedural difficulties. The short statutory period, however, makes the decision difficult, since the decision to pursue removal of a teacher must be made only a few months after the teacher has begun working in a new district. Administrators may not have time to determine whether a struggling new teacher simply needs time to "learn the ropes." It would be a shame for a potentially excellent teacher to be discharged simply because the district, limited by the state tenure law, felt it did not have time to give the teacher guidance and a second chance.

School boards should ensure that evaluators and administrators know and follow the appropriate standards for discipline and discharge.

Just cause involves a fairly elaborate set of procedures to provide teachers with notice of potential problems, an opportunity to respond, and an opportunity to be heard. If evaluators, administrators, or the school board miss any one of the required steps, they usually find themselves unable to discipline or discharge the teacher. Further, the school district may become subject to arbitration or litigation. Therefore, boards should ensure that both they and all administrators involved in discipline, evaluation, and contract renewal understand and precisely follow the procedures as they are outlined in the contract and applicable statutes.

TEACHER EVALUATION

Summary

Administrators are required to evaluate teachers annually, which gives teachers an opportunity for feedback and protects them against arbitrary termination decisions. In addition to the procedural protections already in place, many contracts allow teachers to file a grievance over their evaluation. Increasing the procedural barriers to teacher evaluation does nothing to improve student learning or teacher proficiency.

Analysis

Standards of evaluation

Each school board is responsible to “insure that the optimum learning atmosphere of the classroom is maintained.”¹ Teacher evaluations are a tool to help fulfill this responsibility in two ways. The evaluations guide individual teachers in professional development, and they provide the primary means for the district to build a case of *sufficient cause* for nonrenewal against the teacher.

The basic evaluation procedure requires the principal, or an evaluator the principal selects, to observe the teacher in the classroom at least twice a year and write an evaluation. State law provides seven areas for evaluation, which the Superintendent of Public Instruction (OSPI) has elaborated by regulation.

1. **Instructional skill.** The certificated classroom teacher demonstrates, in his or her performance, a competent level of knowledge and skill in designing and conducting an instructional experience.
2. **Classroom management.** The certificated classroom teacher demonstrates, in his or her performance, a competent level of knowledge and skill in organizing the physical and human elements in the educational setting.
3. **Professional preparation and scholarship.** The certificated classroom teacher exhibits, in his or her performance, evidence of having a theoretical background and knowledge of the principles and methods of teaching, and a commitment to education as a profession.
4. **Effort toward improvement when needed.** The certificated classroom teacher demonstrates an awareness of his or her limitations and strengths, and demonstrates continued professional growth.
5. **The handling of student discipline and attendant problems.** The certificated classroom teacher demonstrates the ability to manage the noninstructional, human dynamics in the educational setting.
6. **Interest in teaching pupils.** The certificated classroom teacher demonstrates an understanding of and commitment to each pupil, taking into account each individual’s unique background and characteristics. The certificated classroom teacher demonstrates enthusiasm for or enjoyment in working with pupils.

7. **Knowledge of subject matter.** The teacher demonstrates a depth and breadth of knowledge of theory and content in general education and subject matter specialization(s) appropriate to the elementary and/or secondary level(s).²

Districts may set stricter or more detailed standards, but may not fall below the requirements established by the OSPI. Where a district establishes its own standards, the standards should be clear, objective, and specific so that both teachers and evaluators understand what is expected. Objective evaluation standards should judge a teacher's effectiveness based on issues of proven importance and not the latest educational trend.³

Procedures for probation

The statute and regulations provide procedural protections for teachers, allowing them the opportunity to receive the written evaluation including a program for improvement and the right to attach his or her own comments.

If a teacher is found unsatisfactory in an area, he or she may be placed on a sixty-day probation, which provides an opportunity to improve. During that time, the teacher will be evaluated at least twice a month. The probationary teacher may be required to get additional training or to work with a mentor. If the teacher does not sufficiently improve during the probationary period, the superintendent can make a determination that *sufficient cause* exists for nonrenewal. There are circumstances that warrant immediate discharge without an opportunity for improvement, such as a finding of inappropriate physical conduct with a student.

Districts must be careful to follow the established evaluation procedures. Teachers need to be given notice of unsatisfactory performance and an opportunity to correct the problems—that is why the statutory protections exist. If the teacher does not improve, the school district's failure to follow correct procedures could well prevent a district from showing *sufficient cause* to terminate a teacher's employment.

Adding grievance rights to the process means outside arbitrators may make the final decision on a teacher's evaluation, rather than the district personnel.

Addition of grievance procedures

Some contracts make the evaluation process subject to the grievance procedures established in the parties' collective bargaining agreement. A grievance is a process by which the teacher or the union brings a complaint against the district. Grievance usually begins with the complaint being heard through the district's internal management structure: principal, superintendent, and finally school board. However, it often ends with binding arbitration, where a third party is brought in to impose a final decision on the parties.

When the grievance procedure applies to the evaluation process, an additional layer of procedure is added to complicate the already difficult process of teacher evaluation and removal. The teacher already has a statutory right to respond during the evaluation process and due process rights in case of nonrenewal. Adding grievance rights to the process means outside arbitrators may make the final decision on a teacher's evaluation, rather than the district personnel who have greater direct knowledge of that teacher's abilities or shortcomings.

Recommendation

School boards should limit procedural barriers to effective teacher evaluation.

Districts should not add to the contract procedures, such as the grievance process that could thwart the purposes of evaluation. For example, districts should not require all observation periods to be previously arranged with the teacher. Prearranged observation prevents an evaluator from observing the normal teaching conditions, whereas flexibility in evaluation scheduling means that the evaluator may use impromptu visits to gain a more accurate picture of teaching ability.

Another clause with potential problems is one granting teachers time to demonstrate improvement before receiving an unsatisfactory rating. The purpose of probationary status is to allow teachers time to improve. Incompetent teaching must have consequences, even if only a negative evaluation.

Grievance procedures should not apply to teacher evaluation. The teacher evaluation process already adequately protects teachers' rights. A simple clause excluding grievance can be inserted in the evaluation section:

The provisions of Article [X] of this Agreement relating to grievances shall not be applicable to the contents of teacher evaluations under this Article.⁴