

## Collective Bargaining and Grievances October 6, 2017

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## Background

- Collective Bargaining: “Negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, and fringe benefits.” Black’s Law Dictionary (7<sup>th</sup> ed. 1999).

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## Background

- No statewide collective bargaining law in Colorado
- National Labor Relations Act and cases interpreting it do not apply

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## Firefighter Safety Act

- SB 13-025, enacted at §§ 29-5-201, *et seq.*, C.R.S.
- Firefighters may petition onto the ballot for collective bargaining of “terms and conditions of employment,” which includes “compensation, hours, and **all matters affecting the employment of firefighters, including items related to safety**, except the budget and organizational structure of the public employer.”

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## Firefighter Safety Act

- Bargaining unit includes all firefighters **other than** the Chief or “officers in the rank or position immediately below the Chief who report directly to the Chief”

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## Firefighter Safety Act

- Obligation to meet and confer if collective bargaining not in place
- Does not apply to:
  - home rule cities that had charter language re bargaining in place when law become effective
  - Public employer with less than 24 firefighters

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### Authorizing Ordinances/ Resolutions

- Frames collective bargaining in municipalities
- Political pressure on council or board
- Scope of the document is extremely important

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### Authorizing Ordinances/ Resolutions

- Should include:
  - Composition of bargaining unit
  - Subjects of bargaining
  - Definition of management rights
  - Culmination of process
  - Timeline/contract length

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### Authorizing Ordinances/ Resolutions

- Composition of bargaining unit
  - Which ranks to include?
    - Lieutenants
    - Captains

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### Authorizing Ordinances/ Resolutions

- Subjects of bargaining (typical)
  - Wages
  - Fringe Benefits
    - E.g., leaves, uniform allowances
  - Benefits (levels)
  - Hours
  - “Personal safety”

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### Authorizing Ordinances/ Resolutions

- Subjects of bargaining (potentially problematic)
  - Discipline
  - Scheduling
  - Staffing levels
  - Fair share fees
  - Pensions
  - Health insurance plan design

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### Authorizing Ordinances/ Resolutions

- Management rights
  - Broad as possible
- E.g., Aurora charter

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## Authorizing Ordinances/ Resolutions

- It is the inherent and exclusive right of the City:
  - To direct and schedule the work of its employees;
  - To hire, promote, transfer, assign, classify, evaluate and retain employees in positions with the City;
  - To demote, suspend and discharge or otherwise discipline employees for proper cause;
  - To lay off employees because of lack of work, lack of funds, or for other legitimate reasons;
  - To determine and implement the methods, equipment, facilities, and other means and personnel by which municipal operations are to be conducted, and to take steps it deems necessary to maintain the efficiency and safety of said operations and of the personnel engaged therein; and
  - To determine its budget, organization, and the merits, necessity and level of any activity or service provided by the City

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## Authorizing Ordinances/ Resolutions

- Culmination of the process (options)
  - Council/board makes final decision
  - Advisory arbitration, council/board makes final decision
  - Binding arbitration
    - Permitted by *FOP v. City of Commerce City*, 926 P.2d 582 (1996)
  - Advisory arbitration, electorate makes final decision
  - Issue-by-issue, intermediate positions or total packages

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## Authorizing Ordinances/ Resolutions

- Timelines
  - Short negotiation period (30-45 days), *contra* school districts
  - Summer or spring negotiations for CBA beginning following year
  - Impose deadlines for arbitration and other decisions
  - Where there is an election, work backwards from ballot certification deadline
  - Maximum contract length

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## Authorizing Ordinances/ Resolutions

- Trends
  - Firefighter bargaining
    - Threats to utilize Firefighter Safety Act
  - Bargaining with non-management, non-safety employees

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## Preparing for Collective Bargaining

- General issues to consider
  - Final decision maker: council/board or manager?
  - How to handle communications with council/board?
  - Who are the comparative organizations?
  - What are the municipality's goals?
  - What are the union's goals?

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## Preparing for Collective Bargaining

- Composition of bargaining team
  - Management lead
  - Department operations
  - HR
  - Finance/budgeting (someone who can cost proposals)
- Size of team?
- CEO, Chief or elected officials at the table?

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## Preparing for Collective Bargaining

- Collect financial information
  - Current budget situation
  - Economic forecasts
    - Financial presentation may be needed for bargaining or arbitration
  - Cost of living indices
  - Bargaining unit information
    - Bargaining unit salaries
    - Cost of 1% (with and without roll-up)
    - Cost of steps

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## Preparing for Collective Bargaining

- Collect comparative information (start early)
  - Wages
  - Fringe benefits
  - Is the data truly comparative? Watch out for anomalies
- Create draft proposals

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## Preparing for Collective Bargaining

- Create ground rules (standards) addressing:
  - Schedule and number/length of sessions
  - Designation of chief negotiator
  - Dealing with the media
  - Union communication with council/board
  - Recording negotiations
  - Whether union team will be paid for bargaining
  - Order of presentation

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## Styles of Collective Bargaining

- Traditional bargaining
  - Parties trade proposals and compromise
  - More formal, typically only Chief Negotiator speaks on the record

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## Styles of Collective Bargaining

- Interest-based bargaining (“IBB”)
  - Informal group discussion
  - Identify issues (what is the problem/need?)
  - Identify interests (what do the parties care about?)
  - Brainstorm options
  - Develop standards for judging options
  - Select solution
  - Caveats
    - Typically requires training
    - Difficult for financial issues

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## Collective Bargaining Agreements

- Content driven by authorizing document
- Typical coverage:
  - Recognition/no strike
  - Management rights
  - Dues checkoff/fair share
  - Union anti-discrimination/retaliation
  - Discipline (if not prohibited)

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## Collective Bargaining Agreements

- Typical coverage:
  - Overtime
  - Wages
  - Insurance contributions (if not plan design)
  - Pension contributions (if not plan design)
  - Promotional process
  - Layoff and recall
  - Vacation

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## Collective Bargaining Agreements

- Typical coverage:
  - Sick leave
  - Holiday
  - Other leaves
  - Grievance process
    - Restricted to alleged violations of the CBA
    - Culmination (council/board decision, advisory arbitration with council/board decision, or binding arbitration)

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## Negotiations Trends

- Longer, more drawn-out negotiations with more sessions
- Union interest in negotiating scheduling, shifts, and discipline
- Police Officer Bill of Rights (FOP)
  - Detailed proposals regarding leave and investigations
- Lots of disputes regarding proposal costs
- Mediator assistance (e.g., FMCS)

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## Fact-finding Arbitration

- Usually ramps up quickly
- Presentation of why the city/town/district's final offer on each subject is more appropriate
- Generally battle of the experts on finance, HR, and department management issue
- Closing arguments, typically in a brief timeframe

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## Grievances

- Timing requirements
- Substantive limitations
- Typically shouldn't let grievance evolve through the process - argue at arbitration that union arguments were waived
- Documents exchanged during process will be used later, possibly in arbitration, typically chief or city manager makes some statements, grievance hearings are sometimes recorded

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## Grievances

- Arbitration - informal, subject to Colorado Arbitration Act, permits arbitrator to allow discovery
- Arbitrator selection process - careful who you choose!
- Each sides submits evidence supporting arguments re agreement violation
- Settlements - may be precedential if not otherwise specified

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## Grievances

- Arbitrability argument
- Waiver by attending arbitration – split authority
  - *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1098 (Colo. App. 2009) (interpreting the similar Federal Arbitration Act and indicating a district court may review a preserved arbitrability objection following the objecting party's participation in substantive arbitration)
  - *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153, \_\_\_ P.3d \_\_\_ (participating in an arbitration waives arguments about the existence of the underlying contract on appeal)

## Grievances

- Post-arbitration remedies
  - If no binding arbitration, typically can file a lawsuit for breach of contract after exhausting administrative remedies
  - If arbitration is binding, can file a lawsuit to overturn decision for only certain limited reasons under the Colorado Arbitration Act (sec. 13-22-23, C.R.S.)
    - Corruption, fraud, or other undue means
    - Evident partiality or misconduct by arbitrator
    - Failure to postpone after sufficient cause shown
    - Arbitrator exceeded her powers
    - No agreement to arbitrate
    - Arbitration conducted after improper notice

## Grievances

- Decision can be modified under sec. 13-22-224, C.R.S. if:
  - There is an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
  - The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
  - The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

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