



Difficult Negotiations

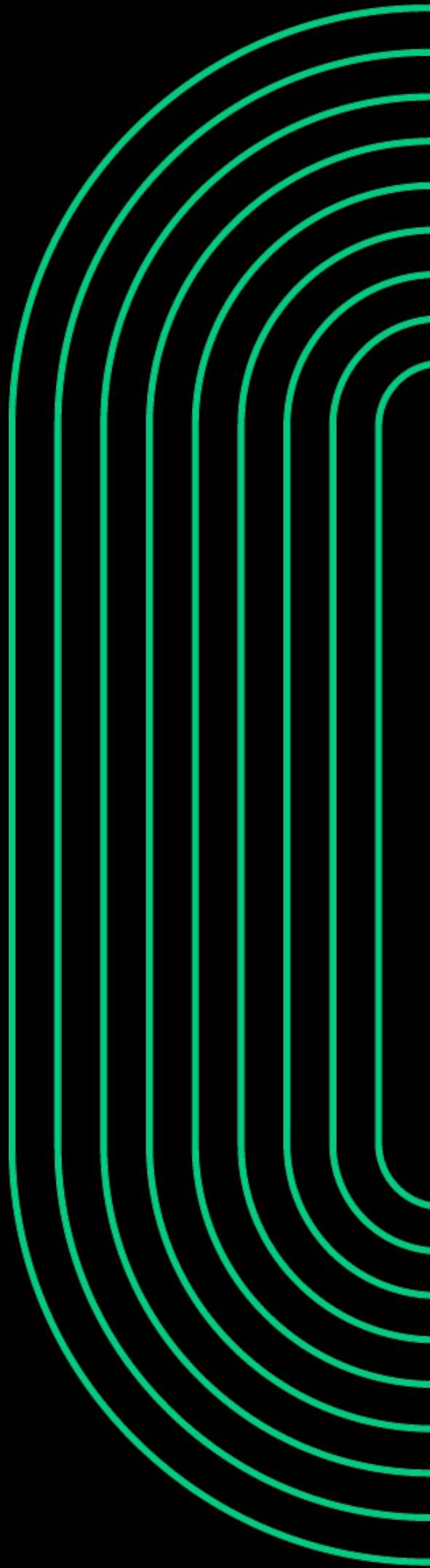
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Learn
something new
every day

- **Duty to Bargain**
- **Difficult Collective Bargaining and the Board of Education**
- **MERC Tools for Resolving Difficult Negotiations**
- **What is Impasse?**

I. Duty to Bargain



Duty to Bargain (MCL 423.215)

- The Public Employment Relations Act (PERA) imposes on a public employer a duty to bargain collectively with the representatives of its employees and to enter into collective bargaining agreements with those representatives.
- To bargain collectively, means to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written agreement, ordinance, or resolution incorporating any agreement reached if requested by either party.



No Requirement to Agree to a Proposal

- The obligation to bargain collectively **DOES NOT** compel either party to agree to a proposal or make a concession.

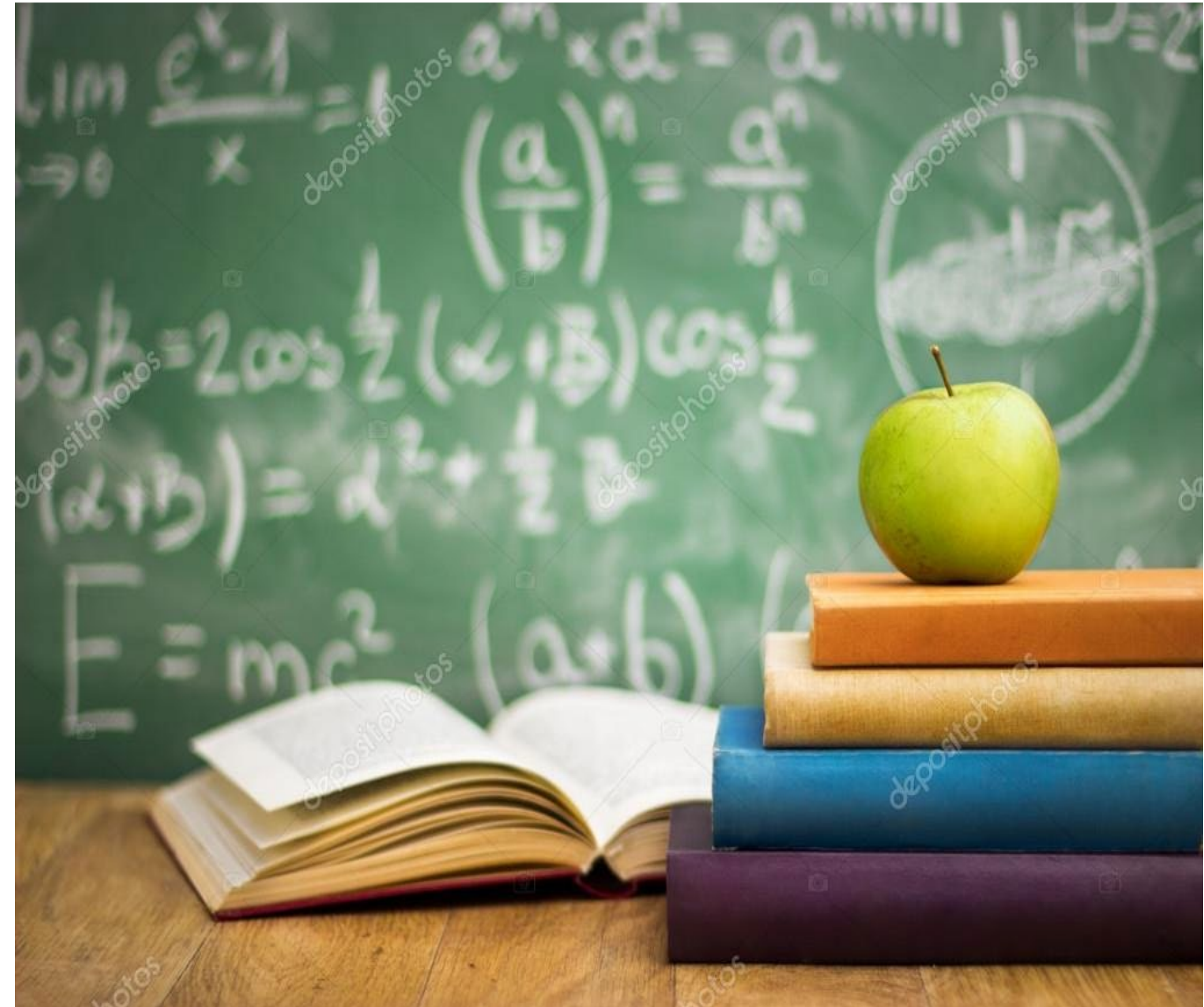


II. Difficult Collective Bargaining and the Board of Education



Board of Education Approval

- The District's ability to negotiate a collective bargaining agreement is dependent on the Board of Education's approval.
 - Ultimate power of decision-making rests with the Board of Education.
- It is vitally important to review the District's needs and objectives in collective bargaining with the Board of Education.
 - This means the Board must understand the legal, political, financial, and other practical limitations that will impact the negotiation process.



District's Negotiation Team Must Protect its Flank – the Board

- During difficult negotiations, the union will attempt to involve the Board.
- If the union does not perceive that it is accomplishing its objectives at the collective bargaining table, it will:
 - seek to influence the Board;
 - contact individual Board members;
 - show up at Board meetings in masks;
 - use public comment;
 - use media;
 - use other tactics—crisis team.
- If the District's collective bargaining team does not obtain and retain the commitment of the Board to its collective bargaining objectives, then the collective bargaining negotiations will not be successful.

Educate the Board

- When involving the Board in establishing objectives and commitments, it is very important:
 - To educate the Board on the importance of the financial parameters that the Administration has identified that must be achieved in collective bargaining.
 - For the Administration to educate the Board on the importance of language issues, and this will be especially important in collective bargaining that starts in 2024 with the repeal of the mandatory subjects of bargaining.
 - To demonstrate that the District's proposals on salary and wages compare favorably with other similarly-situated school districts.
 - If changes are desired in terms and conditions of employment that are not financially related, it will be important to ensure the Board understands the purpose behind the Administration's bargaining positions.
 - To explain to the Board the process of collective bargaining, including the need for mediation and even possibly, fact-finding.

Strategic Communications Plan – The District Should be the First to Frame the Issues

- As part of this process, successful collective bargaining negotiations will likely depend on establishing a strategic communication plan.
- One union tactic is to state that either the Board will change its bargaining position, or the union will change the Board.
- Accordingly, how stakeholders in the school community see and think about the negotiations may likely determine which side is successful.
- Proactive communications strategy that allows the District to frame issues, such as financial realities and the importance of holding staff members accountable to the Board's policies and objectives, will be critically important.
- On the other hand, reactive communication strategy that allows the union to frame the issues, will be very detrimental to bargaining.

Strategic Communications Plan – The District Should be the First to Frame the Issues

- In reviewing anticipated bargaining strategy and tactics to pressure the Board during negotiations and prepare the Board, the following points should be addressed:
 - Acknowledge conflict may be necessary and even positive to develop meaningful collaboration. Conflict may be necessary to compel collaboration, and in this theme, it is the Board, not the union, that represents the interests of the students.
 - It is important to educate the Board and the community that one of the tactics unions may deploy is to attack the District leadership and the District's collective bargaining team.
 - A strategic community plan should anticipate that the union may ultimately attack the Board of Education or Board members who support the negotiation team's objectives. Attacks may involve verbal attacks upon Board members personally and publicly.
 - An appropriate response by the Board is to support the District's leadership and the District's collective bargaining team.

Update the Board

- As part of this process, it will be important to establish a regular procedure to review with the Board, the progress of negotiations in light of ongoing developments and to modify the District's strategy or bargaining parameters as needed.
- Remember – review of collective bargaining strategy can be done in a closed meeting. MCL 15.268.
- When there is a significant development that affects bargaining, then the Board should be updated.
- After the District's collective bargaining negotiation team communicates a proposal and provides sufficient time for the union's collective bargaining team to respond, typically at least 7 days or more, it is possible to communicate a District's bargaining proposal. The negotiation team's bargaining proposals should be developed with the idea that they may need to be publicized not only to the Board but to the community at some point.
- It is very important to be aware of the unfair labor practice of direct dealing, which prohibits an employer from circumventing the union's representatives and the collective bargaining team in communicating directly to employees. However, if a District collective bargaining negotiation team simply publishes a proposal that was presented at the bargaining table, without any editorial comment, this is allowable.



Communication of Bargaining Proposal



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- It is very important to be aware of the unfair labor practice of direct dealing, which prohibits an employer from circumventing the union's representatives and the collective bargaining team in communicating directly to employees. However, a District's negotiation team can publish a proposal that was presented at the bargaining table, without any editorial comment, provided the union's negotiation team had an opportunity to respond.

III. MERC Tools for Resolving Difficult Negotiations



A. What Happens When the Collective Bargaining Agreement Expires?

- During prolonged negotiations, one of the union's favorite rhetorical arguments is that employees are being forced to work without a contract.
- When the collective bargaining agreement expires, really, nothing happens. Under PERA, a public school district must continue the status quo with terms and conditions of employment.
- There are only a few exceptions to maintaining the status quo:
 - The school employer can revoke binding arbitration for grievances that arise after the collective bargaining agreement expires, but there is still an obligation to process these grievances through the grievance process up to the arbitration step. *Ottawa County v Jaklinski*, 423 Mich 1 (1989).
 - A contractual provision requiring the District to collect union dues can be revoked after the collective bargaining agreement expires.
 - Section 10 of PERA, MCL 423.410, has been changed to allow unions to negotiate over dues collection. This will become an important issue and will also provide leverage to the District's collective bargaining team since this will be a very important financial goal for the union.

Permissive Subjects of Bargaining

- If a collective bargaining agreement contains permissive subjects of bargaining, such as, for example, a firm commitment to employ a certain number of staff members, which is a non-mandatory subject of bargaining, then this provision would expire at the termination of the collective bargaining agreement.

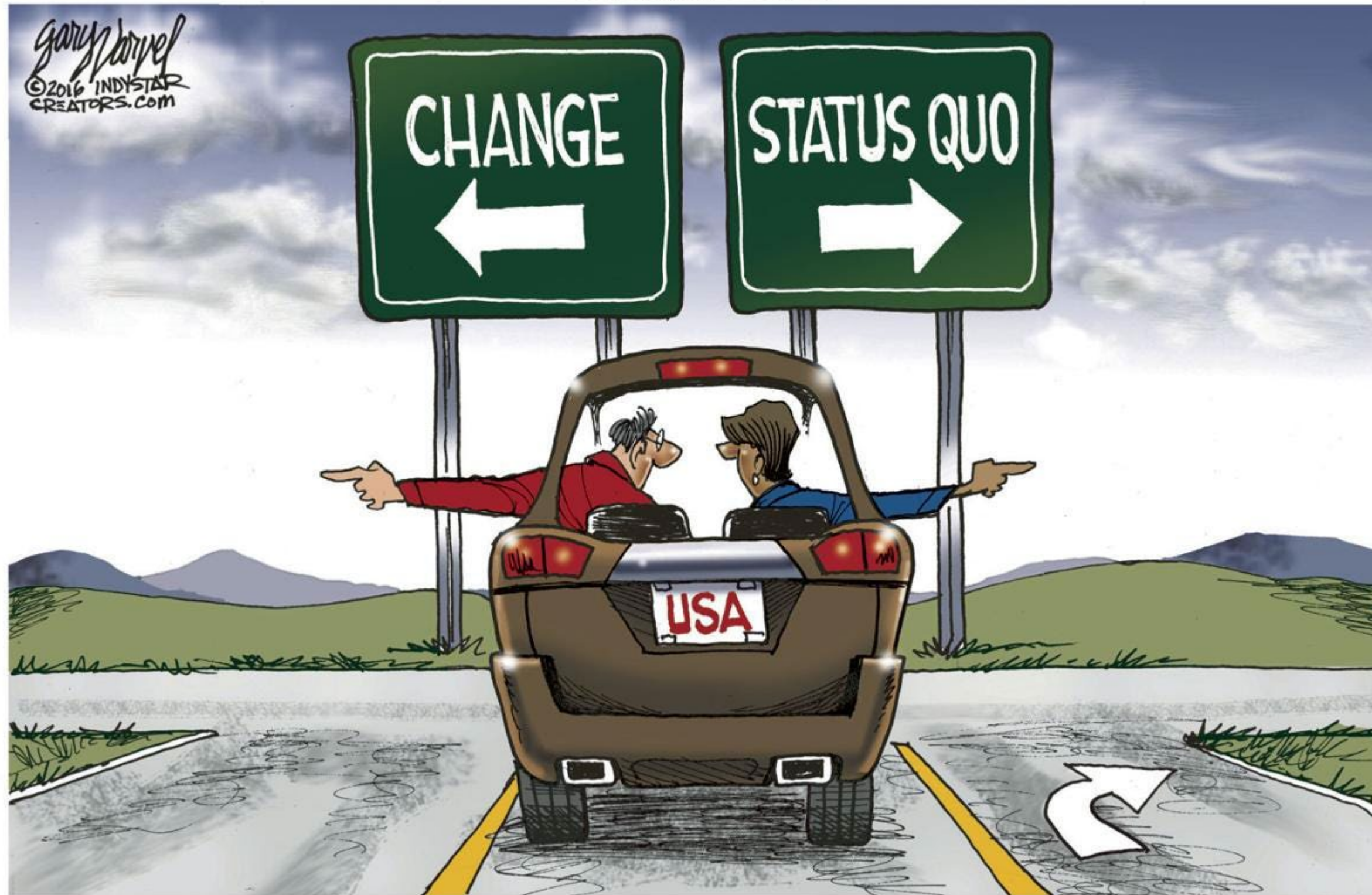


B. Public Act 54

- Public school districts must be mindful that they will no longer have the important tool of Public Act 54 which prohibited any increases including retroactive increases in compensation and benefits until the successor collective bargaining agreement was in place.
- As for compensation, this change is very significant. Staff members' compensation is based on a three-legged stool:
 - The first leg is the amount of increase, if any, that will be applied to the salary schedule.
 - Step increases.
 - Increase in benefits such as insurance costs.
- Without PA 54, step increases will become automatic unless the contract states otherwise. Likewise, increases in insurance rates will become automatic unless the contract states otherwise.



C. When Can a District Change the Status Quo of Employment Terms and Conditions?



- There are only 2 circumstances under which a public school district can change the status quo in terms and conditions of employment:
 - Through mutual agreement in reaching a successor collective bargaining agreement through collective bargaining negotiations.
 - If the parties reach impasse, then the employer can make unilateral changes based on its final best offer.

D. Mediation

- What other tools to achieve impasse and/or a successor collective bargaining agreement if the parties are unable to reach an agreement through collective bargaining negotiations?
 - The parties can request the assistance of a state appointed mediator. At the outset of negotiations, the school district should notify MERC on the proper form about the expiration of the collective bargaining agreement. MERC will assign a number which means that a State mediator will be assigned when either side requests mediation.
 - A mediator is a facilitator and not a final decision-maker. The mediator has no binding authority.
 - The advantage of mediation is that parties can make a mediation proposal or make a proposal through the mediator without changing its formal bargaining position.
 - Any proposals exchanged through the mediator cannot be used as evidence in any legal proceeding, especially in connection with unfair labor practices.

E. Fact-Finding

- The parties can request fact-finding pursuant to MCL 423.25.
- Either party can request fact-finding.
- The commission on its own motion can institute fact-finding if matters and disagreement between the parties may prove more readily settled if the facts involved in disagreement are determined to be publicly known.



Fact-finding Procedure

- The procedure for fact-finding includes the following:
 - The filing of a fact-finding petition with MERC.
 - The other party has 10 days from its service to file an answer to the fact-finding petition.
 - The commission appoints from a panel of fact-finders a fact-finder to hear the parties' dispute.
 - The appointed fact-finder is to conduct a prehearing conference within 15 days after their appointment which may be conducted by telephone. This prehearing conference establishes a hearing date, whether a hearing is necessary, and whether brief and exhibits will be filed by the parties.
 - In theory, a fact-finding hearing is to be limited to 2 days but may be extended for good cause.
 - The fact-finder may grant subpoenas, subpoena witnesses, administer oaths, examine witnesses and receive relevant testimony and evidence.
 - No official record is made of the fact-finding proceeding unless the parties request one which the party/parties are then responsible for payment.

Fact-finding Procedure

- The fact-finder has the discretion to remand the parties back to the bargaining table with a mediator if the fact-finder believes it may be conducive to obtaining a full or partial agreement.
- After the fact-finding hearing, including filing of post-hearing briefs, the process is to conclude 90 days after the hearing commences.
- After the 90 days, within 30 days after the close of the record or additional time as MERC may permit, the fact-finder files a report making recommendations on the material issues presented at the hearing.
- Upon motion of a party or upon the commission's own motion, it is possible the commission can expedite the fact-finding proceedings and issuance of a fact-finding report.
 - Prior to reaching a decision to expedite a fact-finding proceeding and report, the commission is to consider the parties' positions and circumstances.

Fact-finding Procedure

- After the fact-finder issues the fact-finder's report, then the parties are obligated to bargain for a reasonable time over the fact-finder's report.
 - MERC case law establishes that 60 days following the fact-finder's report is minimally considered a reasonable time to negotiate over the fact-finder's report.
- This means that in considering a timeline to impasse, if mediation and fact-finding is used, the school district must consider these timelines and the 60-day negotiation period. If the parties are still at impasse after 60 days of negotiations, then the employer can unilaterally impose changes based on its final best offer.
- However, during this entire process, including during the 60 days, the employer still has an obligation to bargain in good faith. If there is evidence that the employer has not bargained in good faith, then participation in mediation, the fact-finding process and even 60 days post collective bargaining negotiations will not preclude MERC from finding that an employer had improperly implemented unilateral changes to the terms and conditions of employment in bad faith. See, *Oakland Community College*, 2001 MERC Lab Op 273.

F. Additional Mediation

- Alternative procedure to fact-finding MCL 423.207(a) – additional mediation.
- There is an alternative process to fact-finding contained in section 7(a) of PERA which has been seldom used. This applies only to public school employers.
- If the parties mutually agree that an impasse has been reached in collective bargaining between them, the parties may agree to participate in additional mediation.
- If the parties agree to participate in additional mediation, then not later than 30 days after the date of impasse, each party appoints one individual to represent the party in mediation, and then those two representatives select through a mutually-agreed process a neutral third party to act as the mediator. The mediator and the two representatives are to meet to attempt a recommended settlement of the impasse.

Additional Mediation



- Not later than 30 days after the appointment of the neutral mediator, if the representatives of the parties mutually agree on a recommended settlement of the impasse, then the representatives shall present the recommended settlement to the parties for approval.
- If one or both parties fail to ratify the recommended settlement within the 30-day time limit, then the public school employer may implement unilaterally its last offer of settlement made before the impasse occurred.
- Both parties share equally in expenses of mediation conducted under section 7(a).

G. Importance of Time

- As the public school plans its collective bargaining process, it is very important to consider the element of time, which is always a significant factor in any negotiations.
- In theory, if the public school employer is granting increases to compensation and benefits, then time is on the side of the public school employer.
- On the other hand, if the public school employer is seeking concessions, especially with respect to compensation and benefits, or as anticipated with respect to important language issues in light of the repeal of the prohibited subjects of bargaining, then time is NOT on the side of the public school employer.
- Time can be very important in planning a collective bargaining process that intends to use the tools of mediation and especially fact-finding.
- Time can be very important in establishing an impasse in negotiations.
- Interest-based bargaining may be detrimental in concessionary bargaining when time is of the essence.

IV. What is Impasse?



What is Impasse?

- Impasse is one of the most difficult concepts in labor law. The determination whether impasse exists is made on a case-by-case basis, considering the totality of the circumstances and the entire conduct of the parties. Among the primary factors reviewed as to whether a valid impasse exists, or whether there has been a reasonable period of bargaining, whether the parties' positions have become fixed, and whether both parties are aware that the positions have solidified. *Capital Area Transportation Authority*, 36 MPER P17 (2022).
- The party asserting the existence of impasse, which is usually the public employer, bears the burden of establishing that impasse has been reached.
- To establish this burden, it is usually beneficial to show that further bargaining is futile. Other factors that are considered include length of bargaining, participation in mediation, continued flexibility or movement, and whether a business necessity exists. However, as will be shown below, business necessity is not determinative.

MERC

- MERC will scrutinize the employers bargaining conduct for unusually harsh, vindictive, or unreasonable proposals that are clearly designed to frustrate the bargaining process.
- MERC will look for surface bargaining which includes, but is not limited to, refusal to execute a written contract embodying the agreement, making unilateral changes prior to impasse, and delaying tactics – refusing to schedule sessions, cancelling sessions, showing up late for or wasting time at sessions, or promising but failing to provide proposals.



Is Mediation Required to Establish Impasse?

- Mediation is not necessarily required but it is usually useful. It is risky to declare impasse without going through mediation. However, in one 1996 MERC case, *Ida Public Schools*, 9 MPER P27062 (1996), Ida Public Schools declared impasse after only 4 bargaining positions.
- It declared impasse because of financial difficulty and wished to impose a wage freeze for all of its employees.
- The school district maintained its position through each of the four bargaining sessions, and it promptly responded to the union's requests for financial information. Even though the union knew of the district's position, the union did not offer a wage proposal or any counter proposal until after the employer declared impasse.

The Importance of Financial Emergency



- Financial exigencies can weigh heavily in determining impasse. In another case, *Wayne County (Attorney Unit)*, 8 MPER P26049 (1995), the commission found that Wayne County's declaration of impasse and implementation of a wage freeze were appropriate after 4 bargaining sessions when the employer was faced with financial difficulties and would soon need to begin paying additional money for step increases.
- The *Ida* and *Wayne County* cases, however, are outliers. The safest legal approach is to pursue all MERC tools before declaring impasse, including mediation and even fact-finding.

Example of Impasse

- A recent example of a successful impasse even with the current commission is captured in the case of *Capital Area Transportation Authority*, 36 MPER P17 (2022). MERC adopted the Administrative Law Judge's recommended dismissal of an unfair labor practice that challenged the Capital Area Transportation Authority in Lansing's declaration of impasse.
- The parties participated in 70 bargaining sessions over a period of 18 months. They participated in mediation and fact-finding. They bargained 60 days after the appointed neutral fact-finder's report. Considering the employer's behavior as a whole, MERC concluded that the employer's reasons for its bargaining positions were not illogical to warrant an inference that it intended to frustrate the bargaining process. There was no evidence that the employer committed any other bargaining misconduct prior to its declaration of impasse.

Example of Failed Impasse

- In contrast, another recent case is an example of a failed impasse, *City of Detroit, 37 P6 (2023)*. This case involved collective bargaining negotiations between the City of Detroit and the Amalgamated Transit Union representing the City's transportation employees.
- The employer declared impasse in an effort to change weekly pay periods to bi-weekly pay periods.
- The Commission found that the employer's announced change was a *fait accompli*, and the employer refused to bargain with the union before it implemented its change. The City had not requested mediation before implementing its impasse decision.

Can You Declare Impasse Over One Issue?

- The general rule is, when parties are negotiating an entire contract, an employer cannot normally isolate a single issue and declare impasse on that issue.
- There are exceptions where the employer has engaged in collective bargaining negotiations on a single issue and the parties have reached impasse on that issue, if immediate action is *required*, then the employer can implement.
 - One clear example is calendar negotiations. MERC has generally ruled that if the parties are still negotiating a contract in late July/early August, the school district is free to declare impasse on the calendar and publish at least a portion of the calendar, so the school community knows important dates with the beginning of school and beyond. *Kentwood Public Schools, 17 MPER P67 (2023)*.



How Does a Public School Employer Implement an Impasse Decision?

- Normally, we recommend that a Board of Education declares impasse through adoption of a resolution and directing the administration to implement all or part of its final best offer. As another option, the Board can delegate this authority to the Superintendent or the Board President through a motion .
- In implementing its final best offer, the employer is not obligated to implement the entire offer. The employer can choose which parts of a final offer it may implement.
 - For example, if the offer includes improvements or increases in compensation and benefits, the employer is not required to implement that part if it wants to implement other parts of the final offer that deal with language issues.

What Happens to Collective Bargaining After Impasse is Declared?



- Collective bargaining does not end with impasse and implementation of all or part of a final offer.
- The employer still has an obligation to continue collective bargaining negotiations with the collective bargaining agent.
- It is conceivable that the parties may reach a second or even multiple impasses.
- Collective bargaining must continue until the parties reach a successor collective bargaining agreement.

How Does a Public School Employer Reach a Final Best Offer?

- To establish impasse, it must be shown that the parties' positions have become inflexible and solidified.
 - This means that the employer cannot constantly change its formal bargaining position. Every change in a formal bargaining position reflects flexibility and suggests that the parties' position has not become solidified.
- If the pre-collective bargaining planning anticipates difficult negotiations with mediation and fact-finding, it will be important to hold reserved bargaining positions to show movement as the negotiations progress, but at some point, it will be necessary to become fixated on a final best offer position.
- Remember in mediation, it is possible to alter a firm final best offer through the mediator without compromising or affecting a formal table position.

How Does a Public School Employer Reach a Final Best Offer?

- Another technique is to condition a change in position on acceptance and/or ratification by a certain date. If the new proposal that is conditioned on acceptance by a certain date is rejected or the union makes a counter proposal, or the new proposal is not accepted or ratified by the stated date, then the employer's bargaining position reverts back to its previous proposal.
- Another technique is that if it is anticipated that fact-finding may be necessary, the employer can condition a proposal on the avoidance of fact-finding making clear that if fact-finding becomes necessary, then the employer reserves the option to subtract the cost of fact-finding from its final offer.
- Finally, a change in economic conditions can justify a change in a collective bargaining position even regressive bargaining. For example, an unanticipated drop in enrollment would likely serve as a changed economic condition.

Conclusion

- With many changes and repeal of Public Act 54 prohibited subjects and statutes that favored public school employers, collective bargaining in 2024 and beyond will become much more difficult and certainly more challenging.
- It is vitally important to plan the negotiations, Board communications and school community communications.
- It is important to be mindful of the tools available under PERA to reach a successor collective bargaining agreement and/or to preserve the school district's ability to maintain financial integrity, and to hold staff members accountable to Board policies and objectives of the school district to ensure that excellent instruction is delivered to the district's children.

QUESTIONS?



Thank You



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