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# The ADVOCATE

Office of  
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The staff of the Cayuga-Onondaga BOCES Office of Personnel Relations wishes you and your family the best of the holiday season and a very happy new year.

## IS A U-TURN PERMITTED IN COLLECTIVE NEGOTIATIONS?

You are the CSO in a school district in which the state is proposing a substantial cut in your state aid for the current and following school year. You are presently in negotiations for a successor contract for teachers and non-teachers. Suppose you have met several times with the unions and have offered them a three-year package consisting of an 8% wage increase in each of the three years. Your school board wants to reduce your authority with regard to salaries to a two-year package with no more than 6% each year. You are meeting right now with your board and you are scheduled to meet with the teachers' union tomorrow. Is there any guidance that you can offer the board at this juncture as to what problems are created by this change in direction?

Aside from the obvious negative reaction from the unions, the framework of the Taylor Law at §209-a provides a mechanism for the unions to litigate this management posture. In this situation, you can rest assured that the unions will probably file an improper practice against the district charging the employer with a failure to bargain in good faith. Good faith has been defined as requiring:

"... both parties [to] approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's word and deeds; and were there is a variance between the two, experience would dictate that greater reliance to be placed on the latter. Thus, whether one had approached the negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard. This

determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct." Southampton PBA, 2 PERB ¶3011 (1969).

This definition is a fine pronouncement but what has it meant in actual practice? If, during negotiations, you have already agreed upon six or seven items which were in the previous agreement it is clear that neither party may repudiate these partial agreements unless there is a "material change in circumstance." Peekskill City School District, 16 PERB ¶3065 (1983). In Peekskill the district returned to the table after a five-month lapse in bargaining and attempted to repudiate several partial agreements that had been "signed off." Without any showing that there was a material change in circumstance, the employer's repudiation of the partial agreements was not justified and constituted an improper practice.

Well, what is a material change in circumstance? We know that if a new law is passed, eg: one that allows negotiation of an agency fee or one that expands or limits the scope of bargaining, this is enough of a material change to allow the repudiation of an agreement. New Paltz Central School District, 11 PERB ¶3057 (1978), Peekskill City School District, supra. The Peekskill decision also contains the following language:

"The withdrawal of a partial agreement may be justified under certain circumstances. For example, changed economic circumstances may justify withdrawal from a partial agreement before full agreement has been reached where there is no evidence of an intention to frustrate the reaching of a final agreement." Clinton Foods, Inc., 112 NLRB 239, 36 LRRM 1006 (1955).

In some negotiations, ground rules are agreed upon pertaining to "individual item bargaining" as opposed to "package bargaining." Typically, in individual item bargaining the parties agree to sign agreements on individual items or issues as they are resolved in the process of a negotiating session. In this setting a party may not be able to repudiate these agreements as they have been removed from bargaining and it is improper to resurrect them. Peekskill City School District, 16 PERB ¶4582 (ALJ, 1983); Schenectady Community College Faculty Assoc. 6 PERB ¶4503, aff'd 6 PERB ¶3027 (1973).

This differs from a package bargaining arrangement where each issue may be negotiated between the parties and the "signed off" items are part of a tentative package. The distinction is that items tentatively resolved under a package bargaining arrangement may be reopened upon failure to achieve agreement on the complete package. If a complete agreement is reached, then continued negotiation does not constitute an improper practice and a party is permitted to make new or revised proposals

during negotiations prior to impasse. Peekskill City School District, 16 PERB ¶4582 (ALJ, 1983); Yonkers Federation of Teachers, 8 PERB ¶3020; Salamanca Police Unit, CSEA, 12 PERB ¶4503, aff'd 12 PERB ¶3079 (1979).

As a general rule, the parties are free to offer proposals and counterproposals and to negotiate up and until impasse. At impasse, if either party then expands proposals, it may be guilty of an improper practice as it may be perceived that such bargaining is designed to frustrate the bargaining process.

Likewise, before any agreement on an issue has been reached, an employer or union may change its proposals, here by decreasing or increasing the salary proposal and decreasing or increasing the years covered by the agreement because there has been a material change in the circumstances. Draper Teachers Assoc., 18 PERB ¶3027 (1985). The Draper case is interesting as the teachers initially demanded a three-year contract with increases of 14%, 12%, and 10%. Two months later the teachers demanded a one-year contract with salary increases ranging from 14% to 25% plus increments and tuition waivers. The district filed an improper practice charging that the substantial increase in the demand was a prima facie case of bad faith negotiations which could only be overcome by the teachers showing that this increase was justified by a material change in conditions. The improper practice charge was dismissed because the increased demands were justified by the planned consolidation between the district and two other schools whose existing salaries were very low and because there was no evidence that the union lacked a sincere desire to reach agreement. While the merger talks were not new, they were much more serious at the time of the teacher's revised salary demand.

In another case, an employer was allowed to make new or revised proposals prior to impasse in response to arbitration awards regarding entitlement to certain leaves. Saratoga Springs, 17 PERB ¶3058 (1984). PERB ruled that the adverse arbitration awards represented a material change in circumstance justifying a new or revised proposal. However, a party cannot change proposals to the degree that the new proposals nullify all prior negotiations between the parties. After some informal meetings between the parties, a union submitted 122 new proposals and the village employer said "nothing doing!" The union filed an improper practice charge alleging that the village was not negotiating in good faith. The parties were not at impasse. PERB found no improper practice and stated the village's actions were justified in this case.

Where the parties are not yet at impasse, an expansion of demands or the introduction of a new demand is not per se prohibited. For example, a material change in circumstances may justify the submission of new or revised demands to meet unanticipated consequences ...

There are no such extenuating circumstances in the instant (this) matter. Incorporated Village of Old Brookville, 20 PERB ¶4554 (1987).

(Now, back to the original question with regard to cuts in the state aid to schools.) Can the projected loss of state aid be reasonably construed as a material change in circumstance in order to justify a reduced wage offer. Before you attempt to answer this you must remove the projected loss in aid from the realm of speculation. Is there really going to be a cut and how much? Is the cut substantial enough to be an extraordinary event? Where is the District in negotiations? Has the District already agreed upon salary and terms pertaining to the duration of the agreement? Is the District at impasse? Assuming you can successfully answer these questions, you then have to analyze the union's reaction and its response to any change in proposals.

Faced with a genuine and extraordinary loss of state aid which heavily impacts the district's budget, and, where the parties have not agreed to a salary settlement either by "item bargaining" or by "package bargaining," where there are genuine attempts to reach an agreement, PERB case law supports the proposition that an employer can change its bargaining position on salary and length of contract duration.

#### THE SHIFTING SANDS OF TIME

A recent arbitrator's award in the Penn Yan Central School District raises and answers some interesting questions in regard to a health insurance clause contained in the teacher contract. In the summer of 1989, a contract containing a provision for a Flexible Spending Plan (FSP) which was to be at no cost to the District was signed between the teachers' association and the District. An FSP is a tax shelter which basically allows an employee to set up an account with Blue Cross and Blue Shield (BC/BS) or other FSP administrator. Under an FSP, an employee may set aside a certain amount of his or her income to pay uninsured medical expenses or even child day care costs. Inasmuch as the income set aside in an FSP is not subject to taxation, the FSP itself is subject to Internal Revenue Service (IRS) regulations.

In any event, when the Penn Yan teaching staff returned in September of 1989, they were advised by the District that enrollment in the plan could not begin until the computers were programmed to accommodate payroll deductions for the FSP. When these logistical problems were worked out, BC/BS advised the District that an IRS regulation pertaining to newly established FSPs changed. One effect of the new regulation was to increase the District's exposure for the payment of medical bills that were otherwise uninsured under the normal health insurance plan. To illustrate, prior to the regulation change, an employee could, for example, set aside \$2,000 of his/her income toward the FSP by