

Federal Bargaining Endgames A Management Perspective

You may find, in many negotiations, that your management will begin to ask you, "When will you make an end to it?" as time and resources disappear into bargaining's black hole. Your career may require a different answer than a truculent "when it is finished!"

Bargaining Closure

Negotiation can end in three ways, agreement, a settlement imposed by an outside party or the dissolution of either the Agency or the union. While you might wish for option three a lot, it is, by far, the least likely to occur. To make things easier, I'm going to stick with term negotiations in this series. Contract bargaining is usually the most complex to close so we'll follow that process. At the end of Part Four, we'll look at I&I and Midterm vagaries that usually change the way those processes are brought to closure.

Getting In, Getting Out

Before bargaining starts, perhaps the two most important questions needing a definitive answer are: How do we open the negotiation and how do we close it?

First timers and dilettante executives who haven't done it before want to leap in and get to the substance of it all as if there is such a thing. When I was a schoolteacher and sitting on the other side of the bargaining table (when I became a Fed and an Agency rep, I stopped getting invited home to dinner by my Irish, New Jersey, blue collar family), the teacher's union I was part of was considering a strike. At the meeting of the executive committee to recommend a strike vote or not, the young turks, usually unmarried and childless, wanted to teach the school administration a lesson by walking out.

A teacher union official who had seen it all told the committee that walking out was easy. He went on to add that getting people back after they had been payless for a period of time was more difficult. You had to be sure, he said, that the strike would produce a greater benefit later than a less satisfactory agreement now. If not, the elected officials that recommended the strike would be tossed from office soon after.

Of course there's no strike in Federal labor relations but the fortunes of Agency negotiators who lead management into an unending and apparently unendable morass are not likely to prosper.

Risks and Rewards

Bargaining is the constant shaping and reshaping of expectations.

Nothing good happens very fast and the end of bargaining usually puts into sharp perspective the differing interests of the parties on unresolved issues. However exhausted you and your organization may be by the bargaining process, remember that closing is the time when most is lost or gained.

If Agency management's position is willing to do anything to get out of a negotiation, they are sure to come out both feeling and being the loser. Woody Allen was right when he said, "Eighty percent of success is showing up." Smart negotiators prioritize bargaining by deciding what is essential to get, keep or avoid; what is helpful to get, keep or avoid; and what, on balance, doesn't really matter one way or the other. When negotiations come to

the point that almost all the helpful and unimportant issues are resolved and most of what's left are the essentials, it's time to start getting serious about the endgame. In chess, you are in the endgame after most of the pieces have been removed from the board. The same applies in bargaining. The endgame is the riskiest and perhaps the most rewarding part of bargaining for everyone. Your preparation, if done well, has led you to this point. Agencies can often choose the endgame as they have the leverage of concession. How and when it's used can dramatically affect the endgame.

Four Essential Processes

Four discrete processes may be employed to end bargaining:

- Agreement between the parties with no outside involvement
- Agreement after mediation by the Federal Mediation and Conciliation Service
- Agreement after mediation at the Federal Service Impasses Panel (the Panel) or by an interest arbitrator
- Imposition of disputed contract language by the Panel or an interest arbitrator

Each process has its own life. Approaches to each must be carefully considered and constructed. In succeeding articles we'll look at how each works. Part 2 will cover closing without third party assistance. Part 3 will work through a resolution mediated by the Federal Mediation and Conciliation Service (FMCS). Part 4 will address the Panel and interest arbitrators. So please stay tuned.

In this part, we'll discuss reaching an agreement between the parties with no outside involvement.

This is an article about techniques. Your success will largely rise or fall on your reading of your counterpart on the other side of the table and that person's ability to make a deal or sell one to those who can.

First Things First – Are You Ready to Close

Sadly, I learned most lessons the hard way, either by my own mistakes or watching close friends and colleagues making them. I'm comforted by Oscar Wilde who said, "Experience is the name every one gives to their mistakes." In any case, I once made the mistake of signing off on what I thought was the last outstanding language in a contract negotiation. I was in a hurry to get done and move on. When I said to the union's chief that I was glad to be done, he brought forth two pieces of his language that had been tabled months earlier. In the 25 years since that day, I've never bargained without a detailed proposal and counterproposal spreadsheet showing the status of each piece of language that entered or went off the table.

Attached is an [End of the Bargaining Checklist](#). The checklist is my attempt to cover closure issues that must be dealt with or planned before you start to close a negotiation. Hope you find it helpful.

Next Step – Negotiability

When I teach bargaining, I tell the class that negotiability like impasse is a BAD WORD that should never leave your lips at the table even now. Take a bargaining day and tell the union you have "problems" with whatever language you believe violates law, government-wide rules, good taste, etc. Explain in detail why you believe that and provide specific case language NOT citations. They should get the message that should the parties end up at the

panel you will raise the issue of the language's legality and therefore the jig is up on that language.

Next Step – Propose to End Illegal Language (if any) in the Current Agreement

Once a contract expires for sure, and perhaps always, illegal language may be declared to violate law. An interesting tactic is to sever this language from the table by putting the union on notice that on a given date certain contract provisions will no longer be honored. If the union ain't too smart, it'll file a ULP instead of requesting I&I bargaining on the change. As Napoleon Bonaparte said, "Never interrupt your enemy when he is making a mistake."

Next Step – Get the Executive Decision Maker(s) On Board

It's usually senior management that is bugging the Chief to get the contract done. Whether or not that's the case, make sure they know you're trying to end the show and that you have discretion to make a deal within certain limits or access to those who do as needed. Let them know that endgames require careful attention at certain times and advise them that you will give them as much notice as possible of those times. If they are lethargic about ending bargaining, take all that A/L you have been saving up and do three weeks in southern France before it gets too hot and while the French kids are still in school (Dream on). Come to them with a plan and a timeline that you know you can stick too or improve.

Intra-Organizational Politics

Make sure you know

- Who can finally approve any deal.
- Who will influence the decision-maker and get to them.
- Who your supporters are.
- Who might oppose a given deal.
- What special interests exist.

I was once involved in the renegotiation of a master agreement. There was an attorney present representing the general counsel. While she was helpful throughout the process, it surfaced near the end that her agenda was to prevent the application of certain union proposals to Agency attorneys. To satisfy the GC, it ended up that the Chief had to offer an article setting specific and different provisions for the lawyers on a number of issues.

Next Step – Decide What's Important

A big part of the endgame is moving on issues that earlier you wouldn't have budged on. But the end's a time to figure out what is essential to get, keep or avoid; helpful to get keep or avoid; or insignificant one way or the other. I've included a [Proposal Valuing Worksheet](#) to help get you started.

Closing Moves #1 – Package the Junk

Packaging is painful. It takes a stiff spine so start with the junk. Put together all the stuff your valuing exercise has determined to be insignificant and make some movement providing they do. The way you construct the package will send the message. You may also in this process, uncover something that you didn't know was important to them. If so, that's great. You can move the package based on that. If you handle the Junk smartly, you'll probably find out whether there's a possibility of ending the bargaining without outsiders. By the way, put no union institutional issues in with the junk to sell it. Hold for later and see

below.

Closing Moves #2 – Package the Next Level Stuff

If you were successful, start packaging and offering progressively more difficult subjects, saving the toughest for last. I know how terrible this sounds but I have seen very few Federal negotiations in which union institutional issues had a lower priority for the union than a unit employee benefit. The very last the union wants to do is spend dues money so push proposals that cost them and they'll usually rise to the deal.

Closing Moves #3 – Package It All

Move toward a "closing" package that makes it possible for both of you to both agree to a deal and walk away claiming success. All the important stuff should either be closed earlier to your satisfaction or on the table for the "Deal". Obviously, events will be unique from one set of bargaining to another so without knowing your specifics, I can go no further.

However, if you are able to engineer the process to this point, whether the union buys the deal or not, you are in a much better position if the process goes to the next step.

In this part, we'll discuss reaching an agreement between the parties with the assistance of the Federal Mediation and Conciliation Service (FMCS).

Federal Sector Mediation is Unique

It's important to start with a basic understanding that the mediation process in the Federal sector is way different from the way mediation operates under the National Labor Relations Act and Taft Hartley amendments in the Private sector.

In the private sector, both union and management facing the often disastrous prospect of a strike, see the mediator as a welcome participant in a process that can head off a very bad outcome. All of the human and political issues that can complicate bargaining are present in the private sector and the mediator offers an array of tools that create opportunities for face saving, blame passing and "see what they made me do" posturing for the players after the deal is made. Since similar immediate consequences don't exist in Federal sector bargaining, mediation lacks the same punch and the mediator's usual bag of tricks, so effective in private sector mediation, is not only ineffective but can appear ludicrous when used in the Federal sector (at least to Agency participants).

It is common to hear private sector mediators, labor lawyers, college professors and the like ridicule bargaining in the Federal sector. I've always thought this odd since money is the simplest of concepts in that we all know we want more of it. However, complexity perfectly describes the convoluted schemes to pay inspectors overtime that the former Customs Service and NTEU wrestled with in their negotiations. And, by the way, mediators in those bargaining impasses involving Customs and NTEU were likely not even to "get" the issues and so passed the matter on to the Federal Service Impasses Panel (Panel) or an interest arbitrator like a super-hot spud.

We have to deal with FMCS in the Federal sector. The Panel will not take jurisdiction of an impasse unless the mediator involved tells them that the parties are truly at impasse. If we must do so, let's at least see if there's some advantage to be had from the process.

Making Federal Mediation Useful

Early on, as a Fed, I had the opportunity to spend an evening (neither of us could get a plane out of town) with a mediator from FMCS (politely referred to as "Commissioner"). We had spent the last few days together in a mediation that failed to result in an agreement. He was very well thought of and has a reputation as a fair person. At some point in the evening, I mentioned that and he laughed.

I asked what was funny and he said that he earned his pay for not caring, so if people thought he cared, he was failing. He went on to say something that stayed with me ever since. He said that the only thing he really cared about was 72, which was par for his favorite golf course. He said he spent the time at bargaining planning to beat par. I asked if he was serious and he said, "it's my job to get a deal, I don't care if it's a good deal for one or a bad deal for the other. They are adults and if they make a bad deal shame on 'em." He then said, "I'm there to be used. If someone is smart enough to use me and a deal results, I get to go back to the course, if not, I might actually have to work." I assumed he was calling me dumb because no deal resulted from the mediation, despite his best efforts.

The lesson wasn't lost on me and from then on, I considered mediation in two ways. First, if we were not going to get the union to agree voluntarily, I used mediation to try out my impasse arguments in a dress rehearsal seeing whether they passed the laugh test and what objections surfaced. Second, if I thought we might get a voluntary agreement, I spent a lot of time trying to figure out how could I use the mediator to help sell the deal I had in mind.

At this point, some (perhaps most) of you are saying that the dinosaur is revealing himself. That Gilson, never having read Fisher or Urey, is captured in the amber of confrontational, positional bargaining and not the enlightened way of sharing concerns and brainstorming solutions together. Yep, you're right. Or perhaps what I've learned is that "nice" can work but that when you're at impasse, baser instincts emerge and you better have more than one tool in the box.

No matter, the truth is that neutrals don't care, institutionally, so you better. When whoever pays you asks about results or what you did, contractually, to make a supervisor's job easier, they probably don't want to hear that while you may have gotten unfavorable language, your relationship with the union is now wonderful.

Planning for Mediation

Don't expect the mediator to pay much attention to detail. They generally believe that deals are made at a "macro level". If details are important, and they usually are in the federal sector, keep your "micro" detail in play and encourage the mediator to go forth and sell the macro. Help them by beating to death how big a concession the "macro" deal represents.

Don't try to convince the mediator. Who cares what a mediator thinks? Give the mediator information and tools they can use to sell the deal you want them to sell. Cooperate extensively as long as things are flowing the way you want. If not, be smart enough to caucus and come up with new ideas.

If you draw the "condescending, I've seen it all and this is small potatoes" mediator and you want to get a deal, do everything to feed their need to show how smart they are while letting them draw you into the deal you want. If you draw the person who is willing to be used (within limits) to sell the deal, as they say, use 'em till you use 'em up. If the mediator is savvy and smart, don't insult their intelligence, they'll catch your plan and will likely help you move to a deal particularly if the union is all about the justice of their cause rather than

moving forward.

If you're crazy enough to think that a "just between us" will be honored, send me your wallet today.

Mediators have a very short attention span. Either start with small bites one-at-a-time and build to bigger things or drop an early comprehensive package and help the mediator float it. In this regard, always bring some things the union wants but you don't care much about to give the mediator some successes and therefore momentum.

There are no free deals. If you are seeking to engineer a contract at mediation, come to mediation with something that will close the deal. If you're just selling the same old stuff you were before mediation, don't expect either the union or the mediator to get very excited. Make sure when you surface the "closer" that the mediator knows it's a closer and not just more incremental movement.

Mediators are predictable so come ready for and anticipate their use of trial balloons, separating the parties, shuttle diplomacy, packages, time pressure. By the way, mediators may try the old tactic of extended sessions to "wear down" the parties. I've enjoyed greatly watching the union's absolute apoplexy at the prospect of having to stay at the table while off the clock. In every negotiation in which I saw a mediator try this, instant excuses related to child care, car pools, and the like surfaced even if the mediator gave notice in advance.

Please don't whine about how much you have given up until now to reach an agreement. Have you no shame! If you do this the mediator will figure you for a fool and maybe decide to help the union by pressuring you to make the deal. Everyone with any sense assumes that you are smart enough to cover your Agency and wouldn't have agreed to anything it wasn't in your interest to buy.

A simple "no", in essence, fires the mediator. If you want to be more subtle, float a lot of deals and increase what you're offering but make it well short of what the union expects. You'll end up at the Panel and the mediator will go out reporting how cooperative you were. You might even end up an officer in the Society of Federal Labor Relations Professionals (SFLRP)

Food for Thought

A friend of mine, a highly experienced Agency bargainer believes that the Romans defined FMCS Mediators best. "They tell people what to do it; they tell people how to do it; they claim they know the best way to do it; they even watch people do it; but, they can't do it themselves." Of course, the Romans were describing the eunuchs who hung around the power players of that time.

In this part, we'll discuss using the assistance of the Federal Service Impasses Panel (Panel) or an interest arbitrator to end the game.

Interest Arbitrators

Let's get interest arbitrators out of the way before we discuss the panel. In the 1990s, interest arbitrators were all the rage in Federal labor relations. On the management side, it was widely believed that either the politicals were partnering (read giving away the store) or the Panel (viewed as Clinton's happy warriors) was. Agency career leadership, if driving the

bus, believed the agency was better off going to someone they paid for if the union agreed to go along. The unions, for their part, often believed they might get even more from an arbitrator if the political weren't particularly helpful and the Panel appeared too uptight for their taste.

When you buy a service, you can buy what you want. So remember that if the union suggests an interest arbitrator. You want to use "last best offer or offers?; Med-Arb?; or a coin toss? You came to the right place. You can get a list from FMCS or from the American Arbitration Association. You can tell the referrer that the case is interest is NOT grievance arbitration and that you want someone with Federal interest arbitration experience. Your list won't be long; there are not that many who have done more than one case.

There is one problem. These folks need to get hired in an agreement between the parties. Baby splitting, a la Solomon, is always a worry or maybe that's what you're hoping for. Arbitrators are indeed arbitrary and that's the risk you run. There's another issue to keep in mind. If you bypass the Panel and choose an interest arbitrator, you will lose the right to Agency head review. Otherwise, go for it.

Dealing with the Panel

Some things you may not know about the Panel. It is composed of up to seven Presidential appointees who serve at his pleasure (or at least used to before Pelosi & Co.). These political appointees share a single FTE. There's an Executive Director and currently two professional staffers. That's a pretty small crew to get out the work and may certainly contribute to the speed in which a case is cleared. So write to whoever you can write to to get the Panel more staff. (Joe, you owe me a beer for this!)

The Federal labor law arguably makes the Panel the most powerful Agency in Federal labor relations. By law, the Panel may take whatever actions it deems appropriate to resolve an impasse and any order consistent with law is final and binding on the parties (unless they agree otherwise, a highly unlikely prospect).

So what's the difference between the Panel and an interest arbitrator? Simple. The arbitrator must do the parties bidding, the Panel may do as it pleases. So, what pleases the Panel? It depends. The parties can jointly request an approach to resolving an impasse whether med-arb, last best offer, coin toss, etc. but the Panel will decide after it reviews the case, what it believes will work best.

If you want to go to the Panel, there is a [form to fill out](#). Read this form very carefully. You'll notice the form doesn't ask what great sacrifices you've made to get an agreement thus far. The Panel doesn't care as we mentioned in an earlier article about mediators, so don't whine. Put your efforts into convincing them your arguments are better than those of the union.

Mediation/Arbitration – The Old Panel Standby

The Panel loves med-arb. Why? It works. If you are at mediation with FMCS a simple no, repeated monotonously, fires the Commissioner. Not so with the Panel. If a Panel member or staffer has been assigned to your impasse and is engaged in mediation, no is a very bad word. Remember that this person, after all issues are discussed and deals made, is authorized to dispose of what is left as the Panel, in its unique authority, deems appropriate. My advice is that you be very respectful and apparently cooperative in any dealings with this person. I've never heard even rumors of the Panel upsetting an

arrangement made by one of it's med/arbiters. Below we'll talk about arguments to make.

Final, Last Best, and Best and Final Offers

The above are all the same thing and a sometimes used vehicle to end the dispute. The parties prepare their best offer on a piece of language, a section, article or all remaining issues and the Panel picks. For a look at how this works and a spirit lift, if you're a management representative, take a look [at this case](#) involving the Centers for Medicare and Medicaid Services, an HHS Agency. In this case, the Panel gave each party no more than one page upon which to state its case for each article. It's alleged that the Agency set borders of less than .2 inches all around and used 8 point ariel typeface. If true, I pity the poor Panel folks who had to read the arguments with an electron microscope. Let me know if this story is true.

Ten Critical Arguments to Make Before the Panel

Sometimes the Panel and interest arbiters give us the benefit of their reasoning and the arguments they found convincing. Over the years, I've managed to garner the following. Make whatever and as many of these arguments as your case warrants. All of them cut both ways, in your favor and against. So not only must you make yours, but you must counter theirs.

1. Demonstrated Need

- a. Proof of Problems
- b. Conflicting Rules and Practices
- c. Impact of Change
- d. Scope and Effect
- e. Health or Safety

2. Mission/Work Effect

3. Productivity Effect

4. Workforce Benefit

5. Comparability or Prevailing Practice

- a. Same or Similar Agency
- b. Similar Environment in Govt.
- c. Federal Service
- d. Similar Industry Environment

6. Consistency with Law, Regulation

7. Cost

- a. Absolute
- b. Versus Defined Benefit
- c. Versus Administrative Ease
- d. Versus Productivity Gain

8. Practicality

9. Effect on Organization

10. Clarity and Specificity of Language

Some Final Thoughts

Ending bargaining requires a plan. Most would agree that your plan for entering a negotiation and for getting out of it should be developed, at least in draft, before you ever

sit down with the union. All of this is serious business no matter how much I may make light of it. I can afford to. I'm not responsible for a negotiation right now. Please do not think that this series is anything but a glimpse at the process. Hard work and hard thinking must go into it. Finally, may the good Lord save you from the involvement of well meaning politicals, ideologues of any stripe, so called experts, and other dilettante. No two negotiations nor endgames are the same, so the best advice that can be offered is that you prepare thoroughly, proceed carefully and gloat privately if you are successful.