Opening Negotiations – An Agency Perspective

There are two important events in any negotiation. First is how you open and second is how you close.

Put another way, what do you have to consider in the terms of the strategic, tactical and technical issues in negotiations before and as you enter the process and once you're in it, how you shut it down? This article will look at the opening phase. While this article focuses on labor relations, the principles are the same for any negotiation including alternate discipline or case settlements before MSPB or EEOC.

Part 1 addresses the conceptual approach to opening bargaining and the critical questions management must answer before bargaining anything. Part 2, will address the technical issues that impact the opening of a negotiation.

Question 1

Before you do anything else, you must do a little talking with yourself. Please be quiet about this. In a cubicle government, certain judgments may be made about you if you're not. The first question to ask is, "Why am I getting into a negotiation?"

There are a surprising number of possible answers to this question. The most common include management wanting to make a change in something that affects working conditions; management wanting to reopen an old contract to make needed or desired changes; or the union wanting to open an old agreement to get something. More emotional reasons include "the law requires it!" and "We'll file a ULP if you don't!"

Question 2

What does the Agency want out of the bargaining and who will make the necessary decisions? Make a list of goals and objectives that may be achieved and prioritize them. Get agreement from your principal(s) on these objectives and as clear an idea as you can of your charter. Your charter and the claimed management goals may change over the course of negotiation and it's the chief's job to keep careful track of those changes.

It is vital to know who will call the shots. Realistically, that may change from issue to issue. A line manager may not care or consider a very high priority how much work the Human Resources people have to do to announce a promotion but might be upset with an expanded flexible schedule provision.

If the chief negotiator works in HR, he or she may not have a happy homecoming after trading the HR Director's prerogatives. The teeing up of management decision making is an art form. When it gets done, who plays and how the lines are drawn is a more complex negotiation process than any union-management bargaining could ever be. You don't need to know a final answer before you go to the table but a range of acceptability to the owners of each decision is crucial.

Question 3

Who gets what leverage by the simple act of making a request to negotiate or, in the case of change bargaining, providing notice of the change? Whatis.com's definition of leverage: "…a frequently used business or marketing term, leverage is any strategic or tactical

advantage, and as a verb, means to exploit such an advantage, just as the use of a physical lever gives one an advantage in the physical sense."

Everybody involved gets some form of leverage in a negotiation. Leverage not only exists in a situation by virtue of the situation itself, it can be created by the ability of one or more of the parties to anticipate the other's expectations and work them. In Federal sector bargaining, leverage frequently arises from the ability of a union to delay a change, make changing something administratively burdensome or require tradeoffs between organizational units, a grim prospect in agency politics. Management often gains leverage by limiting negotiation in the exercise of a statutory right, holding up implementation of a benefit to employees to gain advantage or offering a union benefit (as opposed to an employee benefit) in exchange for a management gain.

Of course, no discussion of leverage occurs between the parties. Leverage is implied, threatened or used but rarely, if ever, discussed.

Question 4

What are the parties expectations for the negotiation? Both come to the table in hope of gaining or losing something. A demonstration of unassailable logic, unarguable correctness or even rightness or wrongness will not win the day. Get over it. I once bargained with a person who spent an entire day paraphrasing the same argument which, I believe he believed sincerely represented the right thing to do. At the end of the day, his lawyer whispered to him (but loudly enough for me to hear), "I think Bob understands what you're saying, he just doesn't agree with you." If you think the union team will fall to its knees and beg to accept your proposal because of the brilliance of your presentation, you may be in for some personal disappointments in bargaining not to mention long days at the table.

Bargaining, while exceedingly complex in its execution, may simply be defined as the shaping of the expectations of all involved. Changing expectations is neither an easily accomplished nor short-duration effort. Entering bargaining, one must expect it will take time to lower the expectations of some while raising the expectations of others.

I can't stress enough how much time and thought should go into preparing for this aspect of bargaining. Both the agency's and the union's expectation of outcome should be part of your consideration. There is a direct consequence to misreading and/or failing sufficiently to pay attention to expectations. In labor relations, you'll end up at impasse or interest arbitration. In settlement negotiation, you'll end up at hearing. Either of these may be considered a failure by the agency in many cases. While negotiating, you can steer the bus. At impasse, you hand over control, direction and frequently outcome to a statutorily established third party who rarely understands your needs and far worse, may see their role as creating a leveling process.

Question 5

What role is perceived and played by management's chief negotiator? One of the reasons the Federal unions were so eager to leap into the Clinton administration's "Partnership" theory of bargaining was to force a consensus approach on the process.

In some agencies, this resulted in many and therefore no one representing the agency, giving the leverage the unions wanted from the new process. It all sounded so positive, so attractive, so conflict avoiding. Face it. When interests differ, honest advocacy is not as hypocritical as "pie in the sky" claims that we are all in this (negotiations) together. Not

once in the 90s, or ever for that matter, did I see the union embrace a collegial approach for its side of the table. Federal unions are not democratic organizations.

A chief negotiator must satisfy a number of agendas. The trap lies in thinking you are or must be in control at all times. The smart chief identifies the most powerful players on management's side of the table and finds an approach that produces their support. Also critical is identifying the perceived roles on the other side of the table and how you might deal with them.

Question 6

Are you adequately prepared? Preparation is the crux of changing expectations. The more you know, the more you can affect the way your union counterpart is able to approach the process. Facts limit posturing. Thorough research trumps mere belief. In future articles, we'll look in great detail at preparation strategies and goals.

Question 7

What can you find out before bargaining starts? If you can, avoid a full blown bargaining session as your first contact. An informal discussion with the union president and/or designated union chief negotiator to identify and resolve process issues should be pursued, if possible.

Keep it cordial and relaxed. You're looking for hints about expectations, likely tactics and the overall approach the union plans to use. You'll also find out if there are ancillary problems such as ground rules, information requests, or other issues that can gum up the works. This meeting is not the time for posturing, threatening or demanding. You are in listening and perhaps accommodation mode on unimportant comfort items

In this part, we'll look at the technical issues that have to be faced or at least considered.

Legal Status of the Negotiation

This may sound funny but Federal Agencies don't just bargain whenever they want. There has to be an authorization to do so.

The basic authorization is the certification of the union as exclusive representative of a clearly described bargaining unit. In a new unit, the first goal of a union, after getting dues withholding, is to seek a collective bargaining agreement (CBA) governing everything allowed by law to be included. Once there is a CBA, changes in personnel policies practices and working conditions of unit employees create a bargaining duty for the Agency. This is the most common trigger. A CBA may create obligations to negotiate with reopener clauses or require certain steps be taken to renegotiate if it expires. Unions have a limited right absent CBA language to bargain during a CBA's life. However, if new issues not covered by a CBA arise, the union may request to bargain and the Agency must come to the table.

Scope

It's important to keep in mind who is going to be covered by any negotiation and to limit the negotiation accordingly. Some lazy agencies apply bargained terms to unrepresented employees including, sometimes, supervisors and managers. This may create the impression among those not represented by the union that it's looking out for them or if their situation is going to improve, they'll have the union to thank for it. Good or bad idea?

Does the Agency want its internal investigators, personnel specialists and managers more loyal to the union than to executive leadership? You be the judge.

Another issue involves multiple units.

Unless you are doing multi-unit or multi-union bargaining, keep in mind that whatever the current bargaining produces the next union in line will want more. For the most part, multi-unit bargaining is discretionary with the parties, so you cannot demand a single negotiation that covers everyone but you can leverage that outcome if you're willing to pay for it.

Relationship to the Collective Bargaining Agreement

CBAs may create bargaining duties. If it's a "Master Agreement", there are probably local supplemental agreements to negotiate and there may be the occasional tussle over whether an issue must be bargained nationally or locally. Legally, any agreement bargained during the life of a CBA becomes part of the CBA unless the parties specify otherwise. Study the "reopener" and "duration" language. Either may create issues.

Ground Rules

Ground rules may be the most contentious issue you deal with and may hold up the bargaining on other issues. Unions frequently use ground rule proposals to hold up a perceived undesirable change or the renegotiation of a perceived favorable CBA. I may take some heat for this but believe that negotiating ground rules into a CBA that covers each kind of anticipated negotiation is the much preferred alternative to negotiating them issue by issue. If this is a problem, a short term solution may be using an issue the union is hot for to nail down ground rules for the rest of the life of the CBA.

Information Requests

Information requests were a much bigger problem for bargainers before the advent of the "Particularized Need" doctrine laid down by the Federal Labor Relations Authority.

Even now, the smart agency bargainer who wants to move forward should have available as much information as needed to understand the proposal, its purpose and operation. Get the information together, if for no other reason, so you understand what's going on. Since any bargaining can result in impasse and since impasses are generally won with convincing information, it's in your interest to have as much available to you as warranted by the issue.

Agency Head Review

A little known or understood fact is that the law (5 USC 7114(c)(1)) requires that "An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency." Except for CBAs, this may be ignored in a number of agencies for a number of reasons, lack of resources being the primary claim. If you don't know your organization's take on this, find out before you enter a negotiation. The last thing you want is to be in a position to either return to the union with an unapproved deal or have to renegotiate something you believed was closed.

Signature Authority

While most of the time this is not an issue, make sure your counterpart has authority to make a deal. If not, require an authorization letter. I once was involved with a new unit.

The recognition was in the name of the national union but a local official showed up claiming to be the representative. After much teeth gnashing, a letter was produced. At the micro level, don't enter negotiations with other than the local president or other official clearly specified by the CBA without an authorization.

I hope this article has provided a little food for thought. The devil is in the details particularly in Federal labor relations. Get the details right and the rest will flow much easier.