DOWNLOAD PDF PERMISSIVE BARGAINING AND CONGRESSIONAL INTENT

Chapter 1 : Chapter RCW: PUBLIC EMPLOYEES' COLLECTIVE BARGAINING

Bargaining over the composition of the bargaining unit is a permissive subject of bargaining. Either side may make proposals that are permissive and not mandatory. But, either side may refuse to bargain over permissive subjects and the opposite party cannot then go to impasse.

A collective bargaining agreement is the ultimate goal of the collective bargaining process. Typically, the agreement establishes wages, hours, promotions, benefits, and other employment terms as well as procedures for handling disputes arising under it. Because the collective bargaining agreement cannot address every workplace issue that might arise in the future, unwritten customs and past practices, external law, and informal agreements are as important to the collective bargaining agreement as the written instrument itself. Collective bargaining allows workers and employers to reach voluntary agreement on a wide range of topics. Even so, it is limited to some extent by federal and state laws. A collective bargaining agreement cannot accomplish by contract what the law prohibits. For example, a union and an employer cannot use collective bargaining to deprive employees of rights they would otherwise enjoy under laws such as the civil rights statutes Alexander v. Collective bargaining also cannot be used to waive rights or obligations that laws impose on either party. For example, an employer may not use collective bargaining to reduce the level of safety standards it must follow under the occupational safety and health act 29 U. Furthermore, the collective bargaining agreement is not purely voluntary. Moreover, unlike commercial contracts governed by state law, the collective bargaining agreement is governed almost exclusively by federal labor law , which determines the issues that require collective bargaining, the timing and method of bargaining, and the consequences of a failure to bargain properly or to adhere to a collective bargaining agreement. The NLRA has been amended several times since , most notably in , , and The NLRA governs labor relations for businesses involved in interstate commerce only; thus, it does not protect the collective bargaining interests of all categories of workers. The NLRA also does not protect certain types of workers, such as agricultural workers, independent contractors, and supervisory and managerial employees. But other federal and state laws often provide protection for workers not covered under the NLRA. For example, federal government workers enjoy the right to bargain collectively under the Civil Service Reform Act of , which is patterned largely after the NLRA and enforced by the Federal Labor Relations Authority. Plus many states have adopted statutes similar to the NLRA that protect the rights of state and local government workers to bargain collectively. Sections 8 a 5 and 8 b 3 of the NLRA define the failure to engage in collective bargaining as an unfair labor practice 29 U. Law of Collective Bargaining The law of collective bargaining encompasses four basic points: Those certain subjects, called mandatory subjects of bargaining, include wages, hours, and other terms and conditions of employment. The employer and the union are not required to reach agreement but must bargain in good faith over mandatory subjects of bargaining until they reach an impasse. While a valid collective bargaining agreement is in effect, and while the parties are bargaining but have not yet reached an impasse, the employer may not unilaterally change a term of employment that is a mandatory subject of bargaining. But once the parties have reached an impasse, the employer may unilaterally implement its proposed changes, provided that it had previously offered the changes to the union for consideration. Once a valid representative has been selected, even workers who do not belong to the union are bound by the collective bargaining agreement and cannot negotiate individual contracts with the employer J. As a corollary, the employer may not extend different terms to any workers in the bargaining unit, even if those terms are more favorable, unless the collective bargaining agreement contemplates flexible terms Emporium Capwell Co. Western Addition CommunityOrganization, U. During that year, the employer may not refuse to bargain with the union on the ground that the union does not represent a majority of employees. After that year expires, the employer may rebut the presumption that the union represents a majority of employees by showing either that the union in fact does not enjoy majority support or that the employer has a good faith doubt founded on sufficient objective evidence that the union has

lost majority support NLRB v. Curtin Matheson Scientific, U. In cases where the employer doubts that a union enjoys majority support, the employer may "anticipatorily withdraw" recognition of the union by insisting on a collective bargaining agreement that will terminate with the end of the certification year Rock-Tenn Co. Similarly, a successor employer may not simply refuse to recognize the union for bargaining purposes. Instead, courts have required successor employers to recognize the incumbent union if "substantial continuity" exists between both employers NLRB v. Burns Security Service, U. To determine whether there is substantial continuity, courts will consider, among other factors, whether both employers are engaged in the same business, whether the employees perform substantially similar tasks under both employers, whether the customer base remains much the same, and whether the successor employer continues to use the same industrial or business processes as its predecessor Frye v. Specialty Envelope, 10 F. Mandatory Subjects of Bargaining Although the parties need not bargain over every conceivable topic, they must bargain in good faith over mandatory subjects of bargaining, which include wages, hours, and other "terms and conditions of employment" 29 U. Because these mandatory subjects are very broad, courts over the years have attempted to set standards for determining whether a specific bargaining topic is mandatory. Pittsburgh Plate Glass Co. If one party wishes to bargain over a mandatory subject, it is an unfair labor practice for the other to refuse. Other topics are permissive subjects of bargaining, and it may be an unfair labor practice for a party to demand bargaining over them NLRB v. Wooster Division of Borg-Warner Corp. Thus, although the parties must bargain to an impasse over mandatory subjects of bargaining before implementing unilateral changes, they may change permissive subjects unilaterally without bargaining and cannot be forced to bargain over such changes. Although most of the decisions an employer makes will affect employees, not all are mandatory subjects of bargaining. Some decisions, such as advertising and product selection, bear such an indirect relationship to and have such a minimal effect on the employment relationship that they are almost certainly only permissive subjects of bargaining. Other decisions, such as those regarding hiring, layoffs, and plant rules, are so directly relevant to the employment relationship that they are almost certainly mandatory subjects of bargaining. Still other decisions are not aimed at the employment relationship but have a sizable effect on it and are thus difficult to categorize as permissive or mandatory bargaining subjects First National Maintenance Corp. The Supreme Court has attempted on several occasions to define the scope of mandatory bargaining for this third category of management decisions. First, subcontracting falls within the literal meaning of the NLRA phrase "terms and conditions of employment. Third, other employers in the same industry have addressed contracting out in the bargaining process, rather than leaving it to managerial discretion. Justice potter stewart added in his concurrence that subjects that "lie at the core of entrepreneurial control," such as decisions about "the commitment of investment capital and the basic scope of the enterprise," are not mandatory subjects of bargaining. Accordingly, under this Fibreboard-First National Maintenance framework, most significant economic decisions, such as plant shutdowns, layoffs, and relocations, are not mandatory subjects of bargaining, even though the employer must engage in "effects bargaining" as a result of them. Duty to Bargain in Good Faith During the bargaining process, the parties are not required by law to reach agreement. They must, however, bargain in good faith 29 U. Although good faith is a somewhat subjective concept, courts will look to the entire circumstances surrounding bargaining, including behavior away from the bargaining table such as pressure and threats NLRB v. Billion Motors, F. Most authorities agree that an absolute refusal to bargain constitutes bad faith Wooster. The NLRB and the courts that review and enforce its orders are unwilling to substitute their judgment for that of the parties and will not judge the content of collective bargaining agreements NLRB v. American National Insurance Co. In addition, the use of "economic weapons" such as pressure tactics, picketing, and strikes to force bargaining concessions is not necessarily bad faith bargaining NLRB v. The refusal to comply with an information request may constitute bad faith. For example, in NLRB v. However, a refusal to provide requested information is not necessarily an unfair labor practice. For example, in Detroit Edison Co. Unilateral Changes During the time a collective bargaining agreement is in effect, the employer may not change a working condition that is a mandatory subject of

bargaining, without first bargaining with the union 29 U. Even after the collective bargaining agreement expires, the employer must maintain the status quo and may not unilaterally change mandatory subjects of bargaining, until the parties have reached an impasse Louisiana Dock Co. Once good faith negotiations between the parties "exhaust the prospect of concluding agreement," the parties have reached an impasse, and implementing unilateral changes in working conditions does not constitute an unfair labor practice NLRB v. Plainville Ready Mix Concrete Co. A pre-impasse unilateral change to a mandatory subject of bargaining generally constitutes an unfair labor practice, even though employees may regard the change as beneficial. According to the Supreme Court, unilateral changes minimize the influence of collective bargaining by giving employees the impression that a union is unnecessary to achieve agreement with the employer. One area of ongoing conflict between unions and employers concerns when wage increases constitute mandatory subjects of bargaining. In Acme Die Casting v. As of , the U. Supreme Court had not resolved this issue of whether wage increases were mandatory subjects of collective bargaining, so the federal courts of appeals have developed rules of their own to govern this question. Where an employer does not exercise discretion in determining the timing or the amount of a wage increase, then the issue of wage increases is a mandatory subject for collective bargaining. Moreover, even if an employer exercises a certain amount of discretion in determining wage increase, such as an annual increase to cover the costs of living, this fact does not prevent the wage increase from becoming a mandatory subject if the company has a longstanding practice of granting such pay increases. Once the parties have reached an impasse, the employer may implement unilateral changes to mandatory bargaining subjects as long as it has previously proposed those changes to the union NLRB v. Economic Effects in a Global Environment.

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Permissive subjects include, for example, adding supervisors or agricultural workers to a bargaining unit, displaying the union label, or settling unfair labor practice charges. Insist to impasse on an illegal subject of bargaining, or include an illegal clause in a collective-bargaining agreement.

You are here File 2: Opinion of Member Pope File 2: The majority finds that the proposals at issue are permissive, rather than mandatory, subjects of bargaining because they would require the Agency to waive a statutory right. Majority Opinion at For the following reasons, I disagree. However, in addressing whether particular proposals relating to rights rooted in the Statute are mandatory or permissive subjects of bargaining, the Authority, applying principles enunciated by the Court of Appeals for the District of Columbia Circuit, employs a different test, which examines the nature of the rights at issue and the policy issues implicated by requiring bargaining over a particular subject. Applying the proper test, I would find that the parties are required to bargain over the proposals. The Authority had held that parties must bargain over the scope of the grievance procedure and may insist on a particular proposal to impasse. The Authority reasoned that the Union had a unilateral right to negotiate with "an agency," and that permitting an agency to insist on more than one agreement would allow it to turn itself into more than one entity. The Authority stated that "there are certain features of collective bargaining that any party may rely [v59 p] on" and that "[o]ne such feature is that the basic bargaining relationship is between one union and one employer. The doctrine is not based on a unilateral right but on promoting "stability and repose" and "a respite from unwanted change to both parties. The doctrine is linked to mutual interests, not unilateral rights. As a matter that relates to the mutual rights and obligations of the parties, the "covered by" doctrine is similar to the scope of the grievance procedure, found to be a mandatory subject of bargaining in AFGE. Further, as a policy matter, the second prong of the "covered by" test, which is at issue here, is particularly appropriate for negotiations. In this connection, the second prong of the test provides that parties may not demand bargaining over matters that are "inseparably bound up with, and, thus, plainly an aspect of" an agreed on contract term. Decision at 4, quoting U. Moreover, like reopener proposals, finding the proposals here within the scope of mandatory bargaining would enhance stability of bargaining relationships by encouraging parties to enter contracts with longer durations. In this regard, in the private sector, reopener proposals -- which, by definition, seek bargaining over matters that are "covered by" a contract -- are both common and considered mandatory subjects of bargaining. Reopener proposals have been found negotiable under the Statute, also. In fact, the instant proposals have a more limited effect on the stability of contracts than many reopener proposals. In this connection, while reopener proposals may seek to reopen a contract as to entire subjects, the instant proposals would permit reopening only as to those aspects of subjects that are not expressly addressed in the contract. In addition, it is reasonable to expect that requiring parties to bargain over the instant proposals would further, not impede, the policies the "covered by" doctrine balances: In this connection, the proposals would encourage parties to reach more comprehensive collective bargaining agreements, and make the intent of those agreements more clear, which could result in fewer disputes as to meaning and application. In these circumstances, I would find that public and private sector precedent supports finding them within the duty to bargain. For the foregoing reasons, I would find the proposals to be within the duty to bargain. That is, the statement was mere dicta. This may indicate that the majority would consider reopener proposals also to be permissive, a result that would, in my view, seriously undermine effective collective bargaining.

Chapter 3 : File 2: Opinion of Member Pope | FLRA

Permissive Topics of Bargaining. the final result will rest with the judicial system in interpreting the labor relations statute and the intent of Congress as.

By letter previously acknowledged, you requested our opinion on two questions, which we paraphrase as follows: We begin by reviewing the legal background regarding mandatory, permissive, and illegal subjects for collective bargaining. We then describe how state law treats collective bargaining over health [original page 2] and retirement matters, construing RCW Laws of , ch. The new chapter, RCW See generally RCW City of Pasco, Wn. What category a subject falls into is initially a question of statutory interpretation. There is extensive case law interpreting whether specific subjects fall within these terms. Nonmandatory or permissive subjects typically comprise those management prerogatives that do not affect wages or hours, or that are considered remote from the terms and conditions of employment. We start by reviewing the text of these two statutes. The first statute, RCW The statute goes on to describe subjects that do not fall within the mandatory category. In relevant part, RCW The second statute, RCW Our analysis starts with the plain language rule of statutory construction. The plain language of RCW The words used in the statute squarely address the two subjects of your questions. We reject that interpretation first based on the language of subsection. These words do not purport to define permissive subjects. But to say that something is not a mandatory subject of bargaining is not to say that it is necessarily a permissive subject. Therefore, we do not read subsection. On a related note, we considered how subsection. We also considered whether subsection. We reject this construction because subsection. Under these words, we construe the five subjects set forth as subsections within section. This is also confirmed by the statutory context. The context confirms that subsection. Accordingly, we cannot construe subsection. This consideration does not change our interpretation because the two words are closely related. Therefore, at most, retirement plans are components of the retirement system. That distinction has no bearing on our conclusion that [original page 6] RCW The language in subsection. As noted above, subsection. The history of this statute suggests that it was added to remove doubts. On the final passage in the Senate, a last-minute amendment added subsection. See Senate Journal, 57th Leg. This suggests that subsection.