

# TRENDS, TACTICS & TENTATIVE AGREEMENTS AT THE TABLE

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# What topics are covered in this presentation?

- I. **TRENDS - Mandatory/Permissive Subjects of Bargaining**
- II. **Tactics - Arbitrability/Award**
- III. **Tentative Agreements - Performance Pay**



# TRENDS - Mandatory/Permissive Subjects of Bargaining

DOUGLAS G. GRIFFIN, ESQ



## What are the basic rules for determining whether an item is a mandatory subject of bargaining?

- Matters only impacting wages, hours, terms or conditions of employment are mandatory.
- Matters only impacting managerial prerogatives are permissive.
- Matters impacting both managerial prerogatives and terms and conditions of employment must be balanced to determine which predominates.
- Matters involving a waiver of a union's right to bargain are permissive.



May a district proceed to alter the status quo of a subject that is an inherent managerial right before giving the union a reasonable opportunity to negotiate impacts?

- Generally, a district is only obligated to impact bargain if a timely demand for impact bargaining is made by the union which identifies specific negotiable effects on wages, hours, terms and conditions of employment.
- But, a district must afford the union reasonable time to impact bargain prior to implementation of a change which affects a managerial right. School Dist. of Indian River County v. Florida Public Employees Relations Com'n, 64 So.3d 723 (Fla. 4<sup>th</sup> DCA 2011)



Which of the following decisions have courts recently found to be mandatory subjects of bargaining?

- A. Layoff and Bumping;
- B. Multi-year Agreement; or
- C. Student Supervision Before Instructional Day
- D. Subcontracting Transportation Services;



## Best Answer: A. Subcontracting Transportation Services

- **Subcontracting Transportation Services (Illinois).** The removal or transfer of bargaining unit work affects the wages, hours, and working conditions of the unit; the District's decision to subcontract transportation services is a matter of inherent managerial authority; the issue is amenable to bargaining and Union membership would have benefited from the bargaining; and the *benefits of bargaining on the decision making process outweigh any burden imposed on the District's authority.* Community Unit School Dist. No. 5 v. Illinois Educational Labor Relations Bd., 12 N.E.3d 120, 382 Ill.Dec. 120 (4th Dist. 2014)



## Incorrect Answer: B. Layoff and Bumping

- **Layoff and Bumping (Iowa).** The decision to reduce staff in response to outsourcing is a permissive rather than mandatory subject of bargaining. Bumping procedures are a mandatory subject of bargaining so long as the State is permitted to reduce employment by bumping employees after transfers resulting from outsourcing. AFSCME Iowa Council 61 v. Iowa Public Employment Relations Bd., 846 N.W.2d 873 (Iowa 2014)
- **Layoff (Nevada).** The question of whether the City lacked the funds necessary to retain firefighters; and was, therefore, compelled to layoff firefighters is a managerial prerogative, which is not subject to collective bargaining. City of Reno v. IAFF, Local 731, 340 P.3d 589, (Nev. 2014)
- **Temporary Layoffs (New Jersey).** A layoff—including an authorized temporary layoff, or demotion in position from full to part-time status also pursuant to an approved layoff plan—remains a management policy determination of considerable heft so long as economic or other recognized rationales support its use, and is not a mandatory subject of bargaining. Borough of Keyport v. International Union of Operating Engineers, --- A.3d ----, 2015 WL 4207440 (N.J. 2015)





## Incorrect Answer: C. Multi-year Agreements

- **Multi-Year Agreements (North Dakota).** A school district may unilaterally issue a last-offer contract, but the last-offer contract is limited to contractual provisions for only the one school year under negotiation and may not contain provisions applicable to a future school year, so as to preserve a representative organization's ability to negotiate in future years. Dickinson Educ. Ass'n v. Dickinson Public School Dist., 2014 ND 157, 849 N.W.2d 615 (N.D. 2014)



## Incorrect Answer: D. Student Supervision Before Instructional Day

- **Appropriate Student Supervision (Maine).** Appropriate student supervision before the beginning of the student instructional day is necessarily a matter of significant importance to school boards during times when students are present at school. Student supervisory duties affect parent-teacher and student-teacher relations and may assist in improving transitions between periods and promoting student safety. The fact that the ten-minute requirement may touch upon teacher working conditions in some respects does not render it automatically subject to mandatory bargaining. Regional School Unit No. 5 v. Coastal Educ. Ass'n, 2015 WL 4572653 (Me. 2015)



# Tactics - Arbitrability/Award

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## What are the basic rules for determining whether a matter is arbitrable?

- As a general rule, there are three elements for courts and/or the Public Employees Relations Commissions to consider in determining whether a matter is arbitrable: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.
- A claim that an agreement to arbitrate is void for illegality should be decided by the courts and not arbitrators; but, assuming that the agreement is lawful, some jurisdictions do not recognize the more general “void as against public policy” exception to arbitrability. Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Medical Center, Inc., 154 So.3d 1115 (Fla. 2014)



## What are the general rules for determining whether an award is enforceable?

A court may vacate an arbitration award if:

- A. The award was procured by corruption, fraud, or other undue means;
- B. There was:
  - 1. Evident partiality by an arbitrator appointed as a neutral arbitrator;
  - 2. Corruption by an arbitrator; or
  - 3. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- C. An arbitrator exceeded the arbitrator's powers;
- D. There was no agreement to arbitrate.



**In which of the following situations have recently found the matter to be inarbitrable or the award unenforceable?**

- A. Award Reinstating Teacher with Third DUI;
- B. An Arbitration Over Subcontracting Instructional Services Because Vacancies Weren't Posted;
- C. An Arbitration Over Rehiring of Non-Renewed Probationary Contract Teachers; or
- D. Award Granting Retirees Health Insurance Benefits in Place at Time of Retirement.



## Incorrect Answer: A. Award Reinstating Teacher with Third DUI

Arbitrator's award reinstating teacher with third DUI conviction was not void as against public policy. Although recognizing a well-defined policy against drinking and driving under the influence, the court determined it was bound by the arbitrator's findings that Grievant was a recovered alcoholic. He no longer drank and drove. The Arbitrator found that in the months preceding the Award, Grievant had successfully attended a rehabilitation center and clearly learned from his mistakes. Blairsville-Saltsburg School Dist. v. Blairsville-Saltsburg Educ. Ass'n, 102 A.3d 1049 (Pa.Cmwlth. 2014)



## Incorrect Answer: B. An Arbitration Over Subcontracting Instructional Services Because Vacancies Weren't Posted

**Subcontracting Instructional Services.** School district must arbitrate a grievance alleging that petitioner had violated the terms of the CBA by failing to post the position to respondent's members, filling the position with an individual who was not a member of the union. In re Arbitration between Bd. of Educ. of Catskill Cent. School Dist., --- N.Y.S.3d ----, 130 A.D.3d 1287 (2015)





## Correct Answer: C. An Arbitration Over Rehiring of Non-Renewed Probationary Contract Teachers

- School Board is not required to arbitrate grievances filed in response to its policy of designating probationary appointed teachers as ineligible for rehire after being nonrenewed twice or given an unsatisfactory performance rating. Board of Educ. of City of Chicago v. Illinois Educational Labor Relations Bd., 14 N.E.3d 1092, 383 Ill.Dec. 481 (1st Dist. 2014)
- But see - Union permitted to arbitrate a grievance claiming that the Board violated the terms of the Agreement by failing to provide the teacher with clear notice of areas where improvement was needed or giving her written direction and the means for improvement strategies in correcting any alleged 'deficiencies' prior to non-renewal. W. Branch Local School Dist. Bd. of Edn. v. W. Branch Edn. Assn., 2015 -Ohio- 2753, --- N.E.3d ----2015 WL 4138885 (Ohio App. 7 Dist. 2015)



## Incorrect Answer: D. Award Granting Retirees Health Insurance Benefits in Place at Time of Retirement

Unequivocal language of MOU stating that “the health insurance subsidy in place at the time of retirement shall remain in effect until the retiree becomes eligible for Medicare” made a binding promise to retirees that the subsidy would remain at whatever level existed at their retirement. The court upheld arbitration decision determining that it was a vested right which could not be, changed by subsequent negotiations. Baltimore County Fraternal Order of Police Lodge No. 4 v. Baltimore County, 429 Md. 533, 57 A.3d 425 (Md. 2012)



# Tentative Agreements - Performance Pay 4 Years of Lessons Learned

LERENZO CALHOUN



## What were the greatest “structural” challenges?

- A. Step compression on the Grandfathered schedule.
- B. Eliminating steps on Grandfathered schedule.
- C. Incentivizing Highly Effective teachers on Performance schedule.
- D. Achieving equity for Effective teachers as compared to Grandfathered schedule.
- E. Achieving equity for Effective teachers as compared to experienced new hires.
- F. Union politics.



## What have been the greatest challenges in measuring teacher performance?

- A. Instructional Practice scores for non-classroom teachers.
- B. Student Growth scores for teachers of subjects with non-standardized tests.
- C. “Cut Scores” for Instructional Practice and Student Growth.
- D. Weighting of Instructional Practice and Student Growth scores.
- E. Heightened attention on evaluation through grievances and/or administrative hearing challenges.
- F. Union politics.



## What have been the greatest challenges at the table?

- A. Delays in finalizing Student Growth scores for Performance pay.
- B. Uncertainty of budget estimates until finalizing Final Evaluation scores based on student growth.
- C. Complexity of calculating cost of Performance schedule because every teacher has an individual salary with a variable increase based on Final Evaluation.
- D. Union politics.



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