



HUMAN RESOURCES REFERENCE MANUAL

**Chapter 6
Labor Relations**

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HUMAN RESOURCES REFERENCE MANUAL

Chapter 6 Labor Relations

Learn how a city can maintain its management rights and engage in effective and legal labor relations and bargaining practices. Understand the basics of union organizing, negotiating union contracts, and working through mediation, interest arbitration, or strikes. Links to model contract language for a police unit and a city hall unit. Please note this manual lists unpublished court of appeals decisions. Unpublished decisions are not considered precedential but are included because they illustrate how the law has been applied in certain factual settings.

RELEVANT LINKS:

Handbook, [Local Government in Minnesota](#).
[Minn. Stat. ch. 410.](#)
[Minn. Stat. ch. 411.](#)
[Minn. Stat. ch. 412.](#)
[Minn. Stat. ch. 413.](#)
[Minn. Stat. ch. 414.](#)

Handbook, [Elected Officials and Council Structure and Role](#).
Handbook, [City Administrative Staff](#).

[Minn. Stat. § 13D.03.](#)
LMC information memo, [Meetings of City Councils](#).

I. Appointing authority and type of government

Minnesota has two basic types of cities—statutory cities, those operating under the statutory city code; and home-rule charter cities, those operating under a local charter. Whether organized under state statutes or a home-rule charter, the city council has to make important decisions regarding how it distributes responsibilities to a variety of offices.

Without specific statutory or charter authority, a city council may not delegate its discretionary administrative power. This includes the responsibility for hiring and firing personnel, determining working conditions, setting salaries, and establishing personnel policies.

Ministerial responsibilities, including the day-to-day supervision of employees, however, may be delegated to an officer or committee. Negotiating a union contract (also called a labor contract or collective bargaining agreement) is a ministerial function and can largely be delegated to an officer or committee, or even contracted out to a labor attorney.

The city council cannot close a meeting to conduct actual labor negotiations. It may, however, discuss labor negotiation strategy in a closed meeting, such as the size of wage increases and other benefits it will offer to union groups, what types of contract language it wishes to obtain, etc. The council may hold one or more closed meetings to:

- Consider or develop its labor negotiations strategy.
- Discuss negotiation developments.
- Review labor negotiation proposals.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

LMC information memo,
[Meetings of City Councils.](#)

[AFSCME v. City of St. Paul](#),
533 NW 2d 623 – (Minn. Ct.
App. 1995).

[Minn. Stat. § 179A.07, subd.
2.](#)

[Minn. Stat. § 179A.20, subd.
2.](#)

[Bicking v. City of
Minneapolis](#), A16-1379,
(Minn. 2017).

[Minn. Stat. § 179A.20, Subd.
5.](#)

The city council must pass a motion by majority vote in an open meeting in order to have a closed meeting. The time of commencement and the place of the closed meeting must be announced at the public meeting. In addition, a written roll of the members attending the meeting must be kept and made available to the public after the closed meeting.

Closed meetings must be tape recorded, and the tape must be preserved for two years after the union contract is signed. Significantly, the tapes must be made available to the public (including members of the union or the union itself) after all labor contracts are signed by the city for the current budget period. Accordingly, tact and discretion should be utilized in these closed meetings and those present should consider that their statements will ultimately be publicly available and subject to disclosure.

Delegated labor negotiations, when successful, result in what is commonly called a tentative agreement. It is a tentative agreement because the council must make the final decisions and approve any union contract before it is legally binding upon the city. For example, a city may generally reconsider a tentative agreement on the basis of new information without committing an unfair labor practice. Likewise, the union negotiating team will present the tentative agreement to the members of the bargaining unit for formal approval. This formal approval is called ratification.

In negotiating union contracts, it is important for the city's representative to understand the subjects that must be negotiated. It is equally important for the city's representative to understand which subjects do not need to be negotiated. This latter point is particularly important as a city may forever negotiate away management rights in areas it does not need to by choosing to bargain on these permissive issues. A city has an obligation to meet and negotiate with a union on grievance procedures and the terms and conditions of employment. It is also important for the negotiator to be familiar with the city's charters, ordinances, and resolutions. Union contracts may not be in conflict with state law or rules promulgated under law, city charters, ordinances, or resolutions (provided that the rules, charters, ordinances, and resolutions are consistent with the Public Employment Labor Relations Act). For example, a city may not enact a charter provision requiring police officers to carry their own liability insurance.

Upon execution of a union contract, the City must implement it in the form of an ordinance or resolution. If implementation of the contract requires adoption of a law, ordinance or charter amendment, the city must make every reasonable effort to propose and secure the enactment of this law, ordinance, resolution, or charter amendment.

RELEVANT LINKS:

LMC model [self-audit checklist](#).

Handbook, *The Statutory City*.

[Minn. Stat. § 412.691](#).

Handbook, *The Home Rule Charter City*.

[Minn. Stat. § 179A.07, subd. 2\(a\)](#).

Gallagher v. City of Minneapolis, 364 N.W.2d 467 (Minn. App. 1985).
[Minn. Stat. § 179A.07, Subd. 2\(a\)](#) and [Minn. Stat. § 179A.20, Subd. 2](#).

Labor relations is a complex area of law no matter what form of city government is in place. It is very important for a city to be aware of management rights, as well as mandatory and permissive subjects of bargaining under the Minnesota Public Employment Relations Act. A self-audit checklist can be helpful as an overview of issues the city may face in hiring, training, union organizing, contract negotiation and administration, mediation and arbitration, disciplinary issues, strikes and other common aspects of labor relations.

A. Standard Plan and Statutory Plan A

In Standard Plan and Plan A cities, the council is responsible for personnel administration. It has the authority and responsibility to hire and fire personnel, determine working conditions, set salaries, approve union contracts, and establish policies regarding promotions, vacations, training opportunities, and fringe benefits.

B. Statutory Plan B

In Statutory Plan B cities, the city manager is responsible for personnel administration, including determining salaries of staff within the budget approved by the city council. However, the city council must still approve the union contract, because contracts must be signed by both the mayor and city manager.

C. Home-Rule Charter

Charters are limited in application by certain statutory requirements. Cities may not pass or use a charter provision that prohibits the city from negotiating over grievance procedures and the terms and conditions of employment. In the event a city chooses to negotiate over matters that would be included as inherent managerial policy, a city charter cannot void those negotiations. As noted above, a home rule charter cannot conflict with the provisions of the Public Employment Labor Relations Act.

D. Civil Service Commission

In cities that have adopted a civil service system, the civil service commission usually supervises the hiring, promotion, demotion, suspension, and discharge of city employees. However, any applicable union contract provisions must also be followed unless superseded by the statutory rights of the civil service commission.

RELEVANT LINKS:

[Minn. Stat. ch. 419.](#)
[Minn. Stat. ch. 420.](#)
[Minn. Stat. § 436.06.](#)

[Minn. Stat. ch. 179A.](#)

[Minn. Stat. § 197.455, subd. 1\(b\).](#)

[Minn. Stat. § 197.455, Subd. 1.](#)

Civil service systems limit appointing authorities to the selection of an appointee from a certified list of people who have passed the civil service examination provided by the civil service commission. In addition, more limitations are placed on the removal of unsatisfactory employees. When an employee is covered by both a civil service system and a union contract, the employee may have the right to both a grievance hearing and a civil service hearing, depending on the provisions of the union contract.

II. Applicable state and federal laws

The Minnesota Public Employment Labor Relations Act (MNPELRA) is the primary law governing public-sector collective bargaining in Minnesota. As such, it is the law that will be most applicable to Minnesota cities when they are dealing with employment issues in a unionized setting. Therefore, this chapter focuses primarily on MNPELRA and how it applies to Minnesota cities.

However, employees (i.e., union employees) covered by a union contract (also called a labor contract or collective bargaining agreement) still maintain many other protections afforded to them by law. For example, a union employee who is a veteran can grieve his or her termination through a veterans' preference termination hearing. Just because he or she is covered by a union contract does not (with a few exceptions) mean he or she gives up other rights under other laws. A veteran who chooses to utilize a veterans' preference process may, however, be prevented from pursuing the same case under a union contract.

State and federal laws that may apply to unionized employees at various points during their employment with the city are listed in the applicable chapters of this Human Resources Reference Manual. For example, equal employment opportunity laws are discussed as they relate to recruitment, job ads, employment applications, and interview questions in the Hiring Chapter of this manual. Laws prohibiting discrimination, such as the Minnesota Human Rights Act and various federal laws such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, also apply to employees covered by a union contract. For example, an employee covered by a union contract who is terminated may contest the termination through the grievance procedure in the union contract and file a state and federal charge of discrimination.

RELEVANT LINKS:

[Minn. Stat. § 179A.20, subd. 2.](#)

[Minn. Stat. Ch. 363A.](#)

[Minn. Stat. Ch. 197.](#)

[Minn. Stat. Ch. 176.](#)

[Minn. Stat. Ch. 268.](#)

[Minn. Stat. Ch. 364.](#)

[Minn. Stat. ch. 181.](#)

[Minn. Stat. § 181.955, subd. 1.](#)

A. Interaction with state and federal laws

1. Minnesota law

In general, the union contract only covers those terms and conditions of employment specifically listed in the union contract, as well as certain binding past practices. The existence of a union contract does not operate to generally waive the application of either state or federal employee protection laws. Union contracts may not be in conflict with state law or rules promulgated under law.

Common Minnesota statutes applying to union employees include, but are not limited to:

- Minnesota Human Rights Act.
- Veterans Preference Act.
- Military leaves.
- Workers' compensation laws.
- Unemployment compensation laws.
- Employment of criminal offenders.

The general employment laws of the state may or may not apply to employees covered by union contract, depending upon the law. For example, union employees have the same minimum protections under the controlled substance testing law as nonunion employees, and may have additional rights as they may be collectively bargained with the union.

2. Federal law

The Constitution and federal law generally preempt (or trump) the application of union contracts, unless the federal law specifically permits a union contract to take precedence. In addition to the equal employment opportunity laws and the laws prohibiting discrimination noted above, common federal laws applicable to union members include:

- The First Amendment to the United States Constitution and other constitutional guarantees.
- Family and Medical Leave Act (FMLA).
- Fair Labor Standards Act (FLSA).
- Occupational Safety and Health Act (OSHA).
- Consolidation Omnibus Budget Reconciliation Act (COBRA).
- Health Insurance Portability and Accountability Act (HIPAA).
- Uniformed Services Employment and Reemployment Act (USERRA).
- Immigration and Nationality Act (INA).

RELEVANT LINKS:

[Minn. Stat. § 179A.03, subd. 2.](#)
[Minn. Stat. § 179A.09.](#)

3. Application

Unions normally do not have the right to become involved in the application of general employment laws unless:

- The applicable statute defines the union authority.
- The union contract provides an additional remedy for violations of the applicable law.

To illustrate this principal, consider the application of the FLSA—the federal law governing compensation for overtime for most employees. If the union contract does not address the FLSA, the union may not become involved in an employee grievance based upon the application of the law. In practice, however, many union contracts include a provision requiring the city to follow all applicable state and federal laws, and the provision may provide the authority for the union to become involved in an FLSA-based grievance.

Claims by a union that a city has violated either state or federal law (as well as the union contract) require careful scrutiny because processing the matter through the grievance procedure may not prevent the employee from also pursuing the same claim in another forum (such as state or federal courts).

Before accepting a grievance based on a state or federal law and its interpretation, the city should consult with a labor attorney and decide whether the employee has the right to use the grievance process. In other words, whether or not the union contract covers the issue at hand.

B. Definitions

One of the most important sections of the Minnesota labor law at Minnesota Statutes Section 179A (commonly called MNPELRA or PELRA) is the Definitions section. These definitions establish which types of employees are eligible to be unionized and which are not. They also establish different subgroups of unionized employees such as “essential” and “confidential.”

1. Appropriate unit

An “appropriate unit” is the unit of similar employees determined when employees attempt to organize for union representation.

2. Board

The shorthand reference for the Public Employment Relations Board. It is also commonly referred to as the PERB.

RELEVANT LINKS:

[Minn. Stat. § 179A.03 subd. 2a and Minn. Stat. § 179A.041.](#)

See [2017 Minn. Laws Ch. 94, Article 12, section 1.](#)

[Minn. Stat. § 179A.04.](#)
Minnesota Bureau of
Mediation Services
1380 Energy Lane, Suite 2
St. Paul, MN 55108
651.649.5421.
[BMS website.](#)

[Minn. Stat. § 13.37, subd. 1\(c\).](#)

This is a three member board, comprised of one officer or employee of an exclusive representative of public employees (i.e., a union representative), one representative of public employers and one individual representative of the public at large appointed by the two other members. Each member also has an alternate member. The duties, authority and power of PERB are detailed within MNPELRA. While currently inactive until July 1, 2020 because of a lack of funding, it is intended to eventually serve primarily as an appeals board on matters related to unfair labor practices – including unfair labor practice matters involving elections.

3. Bureau

“Bureau” is the shorthand reference for the Minnesota Bureau of Mediation Services. It is also commonly referred to as the BMS. This state agency is part of the executive branch of government and is led by a commissioner. The commissioner’s duties, authority, and power are detailed within MNPELRA.

4. Commissioner

“Commissioner” is the shorthand reference for the commissioner of the Bureau of Mediation Services. The commissioner is appointed by the governor.

5. Confidential employee

A “confidential employee” is an employee who as part of the employee’s job duties, either:

- Is required to access and use labor relations information; or
- Actively participates in the meeting and negotiating on behalf of the public employer.

“Labor relations information” means management positions on economic and noneconomic items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position. An individual must be required to access and use labor relations information as part of his or her job duties. This definition was changed in 2014, so prior case law in this area on who constitutes a confidential employee has limited application.

In practice, the term extends to the traditional labor relations bargaining team member who has access to and used the labor relations data.

RELEVANT LINKS:

The confidential definition no longer applies to individuals in the information technology area who may have access to labor relations data but do not use that data. Significantly, individuals working in human resources may not fall within this definition of a confidential employee if they do not use labor relations data.

The definition is important because a confidential employee may not be included in a bargaining unit with nonessential employees. A confidential employee is considered to be an essential employee as that term is defined below. This means confidential employees may not strike. Confidential and supervisory employees may form their own organizations.

In the event confidential employees are in a bargaining unit and a city is not able to agree on the wages, terms, and conditions of employment during negotiations, the unresolved issues must be submitted to interest arbitration.

6. Employee organization

An “employee organization” is defined as any union or organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment. This definition is broader than the definition for exclusive representative. An employee organization includes unions or organizations of public employees not certified by the commissioner.

[Minn. Stat. § 179A.13, subd. 2.](#)

The definition of employee organization is particularly important because an individual may be engaged in protected activity prior to the time when a union is certified (for example, during a union organizing campaign). A public employer commits an unfair labor practice by dominating or interfering with the formation, existence, or administration of any employee organization or contributing other support to it. It is also an unfair labor practice for a public employer to discriminate against an individual in regard to hire or tenure to encourage or discourage membership in an employee organization.

As these statutes demonstrate, it is very important for a public employer to identify an employee organization at its earliest stages.

7. Essential employee

[Minn. Stat. § 626.84.](#)

For city purposes, “essential employees” mean firefighters, peace officers subject to licensure under the peace officer training statutes, 911 system and police and fire department public safety dispatchers, confidential employees, supervisory employees, and assistant city attorneys.

RELEVANT LINKS:

[Minn. Stat. § 179A.18, subd. 1.](#)

[Minn. Stat. § 179A.16.](#)

[Minn. Stat. § 179A.12.](#)

[Mora Federation Of Teachers, Local 1802 v. Independent School District # 332, 352 N.W.2d 489 \(Minn. App. 1984\).](#)

[AFSCME Local 66 and Council 96 v. St. Louis County Board of Commissioners, 281 N.W.2d 166 \(1979\).](#)

[Minn. Stat. § 179A.03, subd. 9.](#)

Firefighters are defined as salaried employees of a fire department whose duties include, directly or indirectly, controlling, extinguishing, preventing, detecting, or investigating fires.

Essential employees are subject to special rules under MNPELRA. Essential employees cannot be included in bargaining units with employees not defined as essential. Essential employees may not strike.

Because essential employees may not strike, they may utilize binding interest arbitration to resolve disputes over terms and conditions of employment that have not been resolved by substantial, good-faith bargaining efforts.

8. Exclusive representative

An “exclusive representative” is defined as an employee organization certified by the commissioner of the Bureau of Mediation Services to meet and negotiate with the employer on behalf of all employees in the appropriate unit. This certification by the commissioner is outlined state law.

The court of appeals has suggested the definition of exclusive representative implies that a union may file and arbitrate grievances on behalf of its members.

When there is a dispute about who is the exclusive representative of an appropriate unit, the matter should be resolved by a district court rather than through the grievance procedure. Because the dispute concerns the identity of the exclusive representative, the matter is not a grievance as that term is used in MNPELRA or the union contract. The parties must know who the exclusive representative is before using the grievance process because the exclusive representative must participate in the grievance process.

9. Fair share fee challenge

A “fair share fee challenge” is defined as any proceeding or action instituted by a public employee, a group of public employees, or any other person to determine their rights and obligations with respect to the circumstances or the amount of a fair share fee.

A fair share fee is an amount an exclusive representative formerly was able to require employees who are not members of the exclusive representative to pay as their fair share for services rendered by the exclusive representative. As a practical matter, this definition and the application of fair share fee challenges is obsolete given a 2018 United States Supreme Court decision.

RELEVANT LINKS:

[Janus v. AFSCME, 585 U.S. ___ \(2018\).](#)
[Minn. Stat. § 179A.06, subd. 3.](#)

[Minn. Stat. § 179A.03, subd. 10.](#)

[Minn. Stat. § 179A.06.](#)
[Minn. Stat. § 179A.08.](#)

[Minn. Stat. § 179A.03, subd. 11.](#)

[Minn. Stat. § 179A.03, subd. 13.](#)

Pursuant to the United States Supreme decision in *Janus v. AFSCME*, public employees who object to belonging to a union cannot be forced to pay a fair share fee. The Supreme Court held that laws compelling these dues from unwilling members violated the First Amendment by requiring employees to, in effect, pay for speech with which they do not agree. The Supreme Court held that unions representing public employees have to fairly represent these employees regardless of whether they were dues paying members. The Supreme Court summarized its view as follows:

Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

Accordingly, the provisions in PELRA relating to required withholdings of fair share fees are invalid. Cities receiving requests from unions to withhold fair share fees should not do so unless the employee has authorized such deduction in writing.

10. Meet and confer

The phrase “meet and confer” is defined as the exchange of views and concerns between employers and their employees. This definition is primarily used in the MNPELRA sections applicable to “Rights and Obligations of Employees and Policy Consultants” to describe a city’s duty to meet and confer with professional employees on matters that are not terms and conditions of employment.

The term “meet and confer” should be contrasted with the term “meet and negotiate” as defined below.

11. Meet and negotiate

The phrase “meet and negotiate” is defined as the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget-making process, with the good-faith intent of entering into an agreement on terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession.

12. Professional employee

The term “professional employee” is defined to mean any employee engaged in work:

- Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work.

RELEVANT LINKS:

[Minn. Stat. § 179A.06.](#)
[Minn. Stat. § 179A.08.](#)

[Minn. Stat. § 179A.03, subd. 14.](#)

- Involving the consistent exercise of discretion and judgment in his/her performance.
- Of a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
- Requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental, manual, or physical processes.

Or, a professional employee is any employee, who has:

- Completed a course of advanced instruction and study in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental, manual, or physical processes.
- Is performing related work under the supervision of a professional person.

Professional employees have a special right under MNPELRA to meet and confer with the city on matters that are not terms and conditions of employment.

Professional employees are not essential employees, and may strike unless they also meet one of the definitions of essential employees.

13. Public employee

One of the most important definitions in MNPELRA is who is a public employee. The term public employee is defined to mean any person appointed or employed by a public employer except:

- Elected public officials.
- Part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit.

RELEVANT LINKS:

Adams v. Indep. Sch. Dist. No. 316, No. A07-0774, (Minn. Ct. App. July 1, 2008) (unpublished decision).

AFSCME Council 14 v. Ramsey County, 513 N.W.2d 257 (Minn. App. 1994).

- Employees whose positions are basically temporary or seasonal in character and 1) are not for more than 67 working days in any calendar year; or 2) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment.
- An employee hired for a position under the 67-working-day exception is a public employee if that same position has already been filled under this exception in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, “same position” includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position.
- Retirees.

There are also a number of other individuals who are excluded, such as election officers and emergency employees who are employed for emergency work caused by natural disaster.

Who is a public employee and who is excluded from this definition is very important because only public employees can belong to a bargaining unit represented by a union under MNPELRA. Individuals who fall within the three exceptions may not be included in a union.

The initial issue in determining whether an individual is a public employee is whether the individual is an employee or an independent contractor, because independent contractors are not included in the definition of public employee.

The determination of the status of an individual as an independent contractor or employee is made in several different areas in order to determine eligibility for unemployment compensation, workers’ compensation coverage, or tax withholding. Each of these areas may use slightly different tests to determine the status.

In reviewing this in a labor setting, the following factors were utilized:

- The right of the employer to control the manner and means of performance of the work.
- The mode of payment.
- Furnishing materials or tools.

RELEVANT LINKS:

Independent Sch. Dist. No. 721, New Prague v. School Service Employees, Local 284, Richfield, 379 N.W.2d 673 (Minn. App. 1986).

- Control of the premises where the work is performed.
- Right of discharge.

For purposes of the labor law, the issue will most likely arise in a unit determination or unit clarification setting where the union petitions the Bureau of Mediation Services to include these individuals in a bargaining unit. In the event the Bureau of Mediation Services determines the individuals are employees, rather than independent contractors, the BMS will use the same factors applied to other city employees to determine whether they should be placed in a bargaining unit.

In the event the individuals are employees, the next issue to determine is whether they fall within any of the three general exclusions. The term elected public employees is self-explanatory. In the event an individual is elected to his or her position with a city, the individual is not a public employee and may not be in a union.

The second exclusion is for part-time employees who do not work more than 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit. The 14-hour limitation is used when the full-time employees in the bargaining unit work 40 hours per week.

In the event the "full-time" employees in the bargaining unit in question work less than 40 hours, then the test is whether the part-time employee works 35 percent of the full-time work week. For example, employees who work 10 hours per week are not public employees under this definition where "full-time" employees work 35 hours per week. Because 35 percent of 35 hours is 12.5 hours, employees who work 10 hours per week are not public employees because they fall within the part-time employee exclusion. The "normal work week" is calculated by reference to the normal, predominant work week of the full-time employees of the bargaining unit.

The third exclusion is commonly called the temporary or seasonal employee exclusion. In order to be excluded from the definition of public employee under this definition, an employee may not work for more than 67 working days in any calendar year. In calculating this time, it is important to remember:

- This exclusion is measured by working days (not calendar days).
- The 67-day maximum applies for a calendar year. In the event the employee works in the same position at different times throughout the year, the days the employee actually works will be added together for purposes of reaching the 67-day limit.

RELEVANT LINKS:

In the Matter of a Petition for Clarification of An Appropriate Unit C1-98-1015 (Minn. App. Jan. 12, 1999) (unpublished decision).

Independent Sch. Dist. No. 621 v. Pub. Employment Relations Bd., 268 N.W.2d 410 (Minn. 1978).

Patzwald v. Public Employment Relations Board, 306 N.W.2d 118 (Minn. 1981).

AFSCME Council 65 v. Public Employment Relations Board, 372 N.W.2d 786 (Minn. App. 1985).

Adams v. Indep. Sch. Dist. No. 316, No. A07-0774, (Minn. Ct. App. July 1, 2008) (unpublished decision).

Savelle v. City of Duluth, 806 N.W.2d 793 (Minn. 2011).

- The time is calculated for all of the time an individual (or individuals) works in a position. Time spent working in different positions are not counted together. For example, an individual hired to work for a city as a wastewater plant operator for 66 days, and then moves to the water and sewer crew for 59 days, does not fall within the definition of public employee because the individual is working in two different positions for the city.
- In the event one individual moves out of a position and another individual moves into the same position (or a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position), the time each employee works in the position or positions is added together to determine whether the 67-day limit is reached. In the example noted above, if a second individual was hired into these positions after the first individual left the position, the days the first individual spent in the position would be counted toward the 67-day period that the second individual would have had to work in order to be considered a public employee. For example, in the event the city replaced this individual with another individual who was a wastewater plant operator, the second individual would be considered a public employee after his or her second day of work.

The language in the temporary or seasonal employee exclusion requires the positions be basically temporary or seasonal in character and meet the maximum day restrictions (i.e., 67 days or 100 days in the case of students). Employees hired to fill in for regular employees who are on a leave of absence occupy positions that are basically temporary in character. The Minnesota Legislature intended to treat individuals who are hired to temporarily replace a regular employee and individuals who are hired for a limited-duration position the same way under MNPELRA.

Whether an individual falls within the statutory definition of public employee depends upon his or her contractual employment and does not depend on what an employee “ordinarily” does in a given work situation.

Excluding retirees from the definition of employees is relevant primarily in the context of their continued eligibility for retiree insurance. The retirees’ rights under a union contract are governed by the language in the union contract at the time of their retirement. This is also significant because retirees are not required to submit disputes about retiree insurance by using the grievance procedure and arbitration clause of the union contract. The right to change retiree insurance plans by drafting such flexibility into the union contract is permissible.

RELEVANT LINKS:

UBAH Medical Academy Dist. No. 4121, Hopkins v. Education MN, No. A11-966, (Minn. Ct. App. April 16, 2012) (unpublished decision).
[Minn. Stat. § 410.191](#) (charter cities) and [Minn. Stat. § 412.02, subd. 1\(a\)](#) (statutory cities).

[Minn. Stat. § 179A.03, subd. 15.](#)
IUOE, Local No. 49 v. City of Minneapolis, 305 Minn. 364, 233 N.W.2d 748 (1975).

AFSCME Council 14 v. Washington County, 527 N.W.2d 127 (Minn. App. 1995).
General Drivers v. Aitkin County Bd., 320 N.W.2d 695 (Minn. 1982).

[Minn. Stat. § 471.59.](#)

[Minn. Stat. § 179A.60.](#)
See section VI *Joint Powers Agreements*.

Tyo v. Ilse, 380 N.W.2d 895 (Minn. App. 1986).
[Minn. Stat. § 179A.03, subd. 15.](#)

In addition, individuals who are both public employees and members of the elected board may not participate in the employees' bargaining unit. It should also be noted there is a statutory prohibition against elected officials being employed. This statute defines "employed" as "full-time permanent employment as defined by the city's employment policy."

The definition of public employee also applies regardless of whether a city and a union have language in the union contract differing from the statutory definition. For example, if a union contract states that employees are not in the union until 120 days (rather than the 67 days in the statute), the union contract provision is not enforceable.

14. Public employer

The definition of "public employer" includes city councils. The definition of public employer includes "the governing body of a political subdivision or its agency or instrumentality which has final budgetary approval authority for its employees." This definition is also broad enough to include the governing body of a city's agency or instrumentality such as a civil service commission.

Having "final budgetary approval authority" means the entity is able to determine how money is spent. In contrast, the limitation on public employer to include the entity with final budgetary authority means a police chief is not a public employer.

While the definition of public employer to include city councils is generally simple and there is usually no dispute as to who is the public employer, it is important to note a public employer may also be created under a joint powers agreement. The definition provides that when two or more units of government subject to MNPELRA undertake a project or form a new agency under law authorizing common or joint action, the employer is the governing person or board of the created agency. Joint powers entities and the issues associated with the state labor law are discussed in Section VI of this chapter.

The definition of public employer also provides that "nothing in this subdivision diminishes the authority granted pursuant to law to an appointing authority with respect to the selection, direction, discipline, or discharge of an individual employee if this action is consistent with general procedures and standards relating to selection, direction, discipline, or discharge which are the subject of an agreement entered into under sections §§ 179A.01-179A.25 [MNPELRA]."

RELEVANT LINKS:

[Minn. Stat. § 44.10.](#)

[Minn. Stat. § 179A.18.](#)

[Minn. Stat. § 179A.19.](#)

[Minn. Stat. § 179A.03, subd. 17.](#)

MNPELRA does not provide any procedural or substantive protection to probationary employees. This means the union contract will determine whether a probationary employee has rights to contest a discharge during the probationary period or has access to other benefits provided by the contract. This is important for a city because failure to specifically indicate in the union contract that an employee on probation may not contest their discharge will generally mean the employee has access to the grievance procedure, including the right to binding arbitration to contest this decision. Cities covered by municipal civil service laws have a specific law governing probationary employees.

15. Strike

The term “strike” is the concerted action in failing to report for duty, the willful absence from one’s position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purposes of inducing, influencing, or coercing a change in the conditions, compensation, or the rights, privileges, or obligations of employment.

This definition is very broad and includes more actions than the traditional situation where an employee is outside a facility picketing rather than working. What is considered a strike is very important because essential employees may not strike and other employees may only strike in limited circumstances.

16. Supervisory employee

The phrase “supervisory employee” is defined to mean a person who has the authority to undertake at least six of the following supervisory functions in the interests of the city:

- Hiring.
- Transfer.
- Suspension.
- Promotion.
- Discharge.
- Assignment.
- Reward.
- Discipline of other employees.
- Direction of the work of other employees.
- Adjustment of other employees’ grievances on behalf of the employer.

RELEVANT LINKS:

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

Teamsters Local 320 v. County of McLeod, 509 N.W.2d 554 (Minn. App. 1993).

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

Minn. Stat. § 179A.06.

Minn. Stat. § 179A.03, subd. 7.

Minn. Stat. § 179A.03, subd. 17.
See Section III-B-1, *Defining the bargaining unit*.

To be included as a supervisory employee, the individual must use independent judgment in exercising his or her authority. In other words, the individual may not exercise authority that is merely routine or clerical in nature. The statute also provides that an employee, other than an essential employee, who has authority to effectively recommend a supervisory function is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The administrative head of a municipality, municipal utility, or police or fire department, and the administrative head's assistant, are always considered supervisory employees.

There are two methods to use when determining whether an individual is a supervisor. In the event the individual meets either test, he or she is considered a supervisor for purposes of the statute. The first test is to determine whether the individual has the authority to exercise six of the 10 listed factors. If one of the factors does not apply, it does not reduce the number of factors needed to qualify the individual as a supervisor.

The Bureau of Mediation Services does not have the authority to look at any factors outside the 10 listed in the statute. The focus should be on the 10 factors and no other information is relevant in meeting this test.

In the event the employee is not otherwise an essential employee, "authority" is more broadly defined to include instances where the employee has the authority to effectively recommend the supervisory function. In contrast, essential employees must have the actual authority—it is not sufficient if they merely have the authority to effectively recommend.

The employees must also have current authority to undertake the function. Prospective authority is not sufficient. An employee may have the authority to undertake a supervisory function without actually exercising that authority.

The second method to determine whether an individual is a supervisor does not rely on the 10 factors. Rather, the individual will be deemed a supervisor if he or she is the administrative head of a city, city utility, or police or fire department. In addition, the administrative head's assistant is also always included in the definition of a supervisor. This portion of the definition gives a city some significant control over this designation.

Supervisory employees may not be in the same bargaining unit with the individuals they supervise, but may join a union of other supervisory employees.

Supervisory employees are also essential employees. Supervisory employees may not strike.

RELEVANT LINKS:

[Minn. Stat. § 179A.03, subd. 19.](#)

[Minn. Stat. § 179A.07.](#)

[Minn. Stat. § 179A.07.](#)

[Minn. Stat. § 179A.25.](#)

[Alexandria Housing and Redevelopment Auth. v. Rost](#), 756 N.W.2d 896 (Minn. App. 2008).

[Teamsters Local 320 v. City of Minneapolis](#), 225 N.W.2d 254 (Minn. 1975).

[City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters](#), 276 N.W.2d 42 (Minn. 1979).

The definition of supervisory employee also provides a city may not designate an individual as supervisor and remove him or her from a nonsupervisory appropriate unit, unless the city obtains the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner.

17. Terms and conditions of employment

The phrase “terms and conditions of employment” is defined to mean the hours of employment and the compensation, including fringe benefits. Terms and conditions of employment does not include retirement contributions or benefits, but does include employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay. Terms and conditions of employment also includes the employer’s personnel policies affecting the working conditions of the employees. The phrase terms and conditions of employment is subject to the portion of MNPELRA on the rights and obligations of cities as employers.

This definition is extremely important because the portion of MNPELRA detailing the rights and obligations of employers provides that public employers have an obligation to meet and negotiate in good faith with the exclusive representative of public employees regarding grievance procedures and terms and conditions of employment (unless the terms and conditions are so intertwined with management rights that negotiation of one would by necessity include negotiation of the other).

This definition is also important because an employee has a right to independent review of any grievance arising out of the interpretation or adherence to terms and conditions of employment. When a public employee is not covered by a union contract, his or her right to an independent review stems from any contractual protections that the employee has to not be terminated except for “cause.” At-will employees do not have such contractual protections and, therefore, are not entitled to an independent review.

Court decisions explaining which items are included in the phrase terms and conditions of employment frequently arise from disputes over an employer’s obligation to negotiate with unions on mandatory subjects of bargaining. Because the phrase “mandatory subjects of bargaining” includes terms and conditions of employment as part of its definition, general observations by the courts about mandatory subjects of bargaining are relevant to deciding whether an item is a term and condition of employment. The Legislature intended the scope of the mandatory bargaining area be broadly interpreted.

RELEVANT LINKS:

Itasca County v. Teamsters Local 320, A16-1773 (Minn. App. June 26, 2017) (unpublished).

City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42, 49 (Minn. 1979).

Teamsters Local 320 v. City of Minneapolis, 225 N.W.2d 254 (Minn. 1975).

Operating Engineers Local No. 49 v. City of Minneapolis, 233 N.W.2d 748 (Minn. 1975).

Minneapolis Fed. of Teachers v. Minneapolis Special Sch. Dist. No. 1, 258 N.W.2d 802 (Minn.1977).

LELS v. County of Hennepin, 449 N.W.2d 725 (Minn.1990).

LELS v. City of Luverne, 463 N.W.2d 546 (Minn. App. 1990).

Hill v. City of Winona, 454 N.W.2d 659 (Minn. App. 1990).

LELS v. City of Roseville, 393 N.W.2d 670 (Minn. App. 1986).

General Drivers Union Local 346 v. ISD 704, Proctor School Board, 393 N.W.2d 670 (Minn. App. 1986).

Questions about whether a matter is a term and condition of employment cannot be submitted to a court even where the request is from both the employer and the union.

Accordingly, cities should also operate under the assumption that if it is questionable whether an item is a term and condition of employment, courts will be more likely to include the item as a term and condition of employment than to exclude the item.

The Supreme Court has stated “[I]f an issue in a labor dispute affects employees’ welfare, and is not part of management function; it is a term or condition of employment.” Terms and conditions of employment may overlap with areas of inherent managerial policy.

The definition of terms and conditions of employment includes the “hours of employment.” This has been interpreted to mean how many hours an employee should work. It does not mean when an employer deems it necessary to report to work.

The phrase terms and conditions has also been interpreted to include or affect the following:

- Whether an employee may be suspended or receive a written reprimand.
- A dispute about the fairness of a competitive examination used to fill a position.
- Adopting criteria by which individuals may be identified for transfer.
- Implementing a physical appearance or grooming standards (but note it may not be a mandatory bargaining subject where it cannot be separated from creation of the policy).
- Implementing a mandatory physical examination policy.
- Requiring an individual to undergo a psychological examination.
- Establishing a clothing allowance.
- Determining whether or not an employee’s job will be terminated so the same function can be performed by an employee who is not in the bargaining unit (subcontracting).

RELEVANT LINKS:

Foley Education Association, et al. v. Independent School District No. 51, 353 N.W.2d 917 (Minn. 1984).

St. Paul Firefighter Local 21 v. City of St. Paul, 336 N.W.2d 301 (1983).

LELS v. County of Mower, 353 N.W.2d 917 (Minn. 1984).

Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005).

City of West St. Paul v. LELS, Inc., 481 N.W.2d 31 (Minn. 1992).

Cloquet Education Assoc. v. Ind. School Dist. No. 94, 344 N.W.2d 416 (Minn. 1984).

LELS v. Sherburne County, 695 N.W.2d 630 (Minn. App. 2005).

West St. Paul Federation of Teachers v. ISD No. 197, West St. Paul, 713 N.W.2d 366 (Minn. App. 2006).

University Education Ass'n v. Regents of University of Minnesota, 353 N.W.2d 534 (Minn. 1984).

University Education Ass'n v. Regents of University of Minnesota, 353 N.W.2d 534 (Minn. 1984).

- Jurisdictional questions dealing with the assignment of work to bargaining unit members.
- Lengthening hours of employment and increasing work load.
- Whether an individual is entitled to premium pay during participation in a training program, and the manner in which the participation requirement must be fulfilled (e.g., whether the participation requirement is to be fulfilled during a single assignment to the training program or by alternate assignments to line duty and training units).
- The employer payment of or contributions to premiums for group insurance coverage of retired employees.
- Those parts of implementing a ride-along program involving explorer scouts or community volunteer groups rather than newly hired officers.
- Assignment of an individual to chaperone a dance.
- Implementation of a random drug testing policy.
- Health insurance coverage, including the level of coverage.

In contrast to items that are terms and conditions of employment, the following items are not terms and conditions of employment:

- Tenure and promotion (in a school setting).
- Faculty evaluations (in a school setting).
- The quality of work an employer expects.
- Academic calendar (in a school setting).
- When it is necessary to report to work.

RELEVANT LINKS:

[Arbitration between Metropolitan Airports Commission and Metropolitan Airports Police Federation](#), 443 N.W.2d 519 (Minn. 1989).

[Lipka v. Minn. School Emp. Assoc.](#), 537 N.W.2d 624 (Minn App. 1995) affirmed as modified 550 N.W.2d 618 (Minn. 1996).

[Minneapolis Ass'n of Administrators and Consultants v. Minneapolis Special School Dist. No.1](#), 311 N.W.2d 474 (Minn. 1981).

[City of West St. Paul v. LELS, Inc.](#), 481 N.W.2d 31 (Minn. 1992).

[LELS v. County of Cook](#), No. C0-99-397 (Minn. Ct. App. Sept. 7, 1999) (unpublished decision).

[Educ. Minnesota-Osseo v. Ind. School Dist. No. 279](#), 742 N.W.2d 199 (Minn. App. 2007).

[St. Paul Police Fed. v. City of St. Paul](#), No. A09-1349 (Minn. Ct. App. May 18, 2010) (unpublished decision).

[AFSCME v. Sundquist](#), 338 N.W.2d 560 (Minn. 1983).

[Minn. Stat. § 356.24](#).

- Assignment of work that is not bargaining unit work.
- Creating a policy against sexual harassment simply stating that harassment and violence in the workplace are not allowed because they violate state and federal laws and regulations. (The parties cannot bargain around the laws).
- The decision to transfer employees (note that implementation of this transfer decision is a term and condition of employment as discussed above).
- A procedure for determining which supervisory positions are to be stripped of administrative functions.
- A decision to establish a police ride-along program and implementation of a ride-along program for trainees (as opposed to community group members or others).
- Implementation of a response time policy.
- Vendor selection for Internal Revenue Code Section §403 (b) retirement plans.
- Creating research-analyst positions in a police department's cold case unit and staffing them with nonunion personnel where the action did not affect the union member's hours of employment, compensation, fringe benefits, or personnel policy.

This definition specifically excludes retirement contributions or benefits with one exception. The exclusion of retirement contributions or benefits has been interpreted to remove pension issues from the scope of permissible bargaining. Pension contribution levels are not even permissible subjects of bargaining. Therefore, cities may not negotiate over retirement plans now largely covered by state-administered pension plans. In other words, a city cannot negotiate with a union about contributions to either the Coordinated or the Police and Fire Public Employees Retirement Association (PERA) plans.

RELEVANT LINKS:

Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005).

Cities are not prohibited from negotiating over and contributing public funds toward certain specifically identified, supplemental pension and deferred compensation plans.

For example, a city may negotiate with a union about how much sick leave, if any, will be paid at retirement, whether it will be paid into a post-employment, health care savings plan, or whether the city will make matching contributions to a deferred compensation plan (including what is commonly referred to as a Section 457 plan).

There is an exception to the exclusion of retirement contributions or benefits. The employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay is specifically included as a term and condition of employment. A city is authorized under this section to obligate itself in a union contract to pay retiree health insurance premiums indefinitely; therefore, if a city wishes to avoid this obligation, it should specifically negotiate an end date and have the contract language reviewed by an experienced labor attorney.

Cities are required to negotiate over employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay.

III. Union organizing, certification and decertification elections

Employees typically organize into unions by one of two methods. Either a state or national union contacts them about organizing to become union members, or the employees themselves approach the union about joining. When it is the employees approaching the union, it is often because one or more are unhappy about some new city policy, working condition, or change in leadership at the city. It is also often the case employees will approach the union because they have reason to believe their jobs are threatened.

In either case, the city should be aware of its rights and obligations. The Minnesota Public Employment Labor Relations Act (MNPELRA) governs the extent to which a city can participate in this process, including what a city can and cannot do to encourage or discourage union membership. This section discusses the city's rights, the union's rights, employee rights, and the unfair labor practices outlined in MNPELRA. It also describes the process the union must use under MNPELRA and the associated rules of the Bureau of Mediation Services to organize an employee group.

There are three major parts to a union-organizing effort:

RELEVANT LINKS:

Bureau of Mediation
Services
1380 Energy Lane, Suite 2
St. Paul, MN 55108
651.649.5421.
[BMS website.](#)

[Minn. R. 5510.0410.](#)

[Minn. R. § 5510.0410.](#)

- Union petition (the union must show at least 30 percent of identified members are interested in unionizing).
- Determination of appropriate positions (the BMS decides which positions are appropriate to include in the bargaining unit).
- Campaign and election (the employees occupying appropriate positions vote on whether they want to be represented by the proposed union).

The major steps and important facts about each of these three major parts are outlined in the following paragraphs.

A. Union petition

The Bureau of Mediation Services (BMS) is the state agency overseeing labor relations in Minnesota—both in the public and private sector. It plays a large role in determining whether a union is appropriately and legally certified to represent a group of employees (called a bargaining unit) in a city.

1. Contact by union

An organization wishing to represent a currently nonunion employee group must meet certain requirements under Minnesota Rules. It must have a constitution or bylaws providing for election of officers, filling of vacancies in elected offices, and a purpose that must (in whole or in part) be to deal with public employers concerning grievances and terms and conditions of employment.

While it is more typical for the union organization to be affiliated with a state or national union organization, such as the American Federation of State, County and Municipal Employees (AFSCME), the Teamsters, or Law Enforcement Labor Services (LELS), sometimes unions are formed at the city level. For example, a group of management employees might form their own organization, adopt bylaws meeting the requirements outlined in Minnesota law, and represent themselves.

2. Meeting by union with prospective members

Once the union has identified or targeted an employee group at a city or a group of employees is interested in organizing into a bargaining unit, the next step is generally for the union or employee to have a meeting with some or all of the prospective members of the group to be represented. There is no requirement at this stage in the proceedings for all employees to be notified. Some meetings may involve only those employees identified as supporters of the union.

RELEVANT LINKS:

[Minn. Stat. § 13.43.](#)

Employees in a bargaining unit sought to be represented that are closely associated with management may or may not be informed of the meeting or meetings.

Unions generally obtain the relevant employee names from the employee leaders of the organizational movement. Sometimes a union will directly contact the city for a list of all employees listed in certain job titles. Because home addresses are not public information under the Minnesota Government Data Practices Act, unions and employees supporting the unions must obtain home addresses without access to city home address lists.

[Minn. Stat. § 179A.06, subd. 2.](#)

These meetings are held after work and often in a location other than the work site to maintain secrecy from the city. A city and its representatives generally must not interfere in this process. Employees have the right to form and join labor or employee organizations, and have the right not to form and join such organizations.

[Minn. Stat. § 179A.13.](#)

For example, city representatives may not spy on organizational meetings. Spying is an unfair labor practice under the employer's prohibition against interfering, restraining, or coercing employees in the exercise of their rights under MNPELRA or as constituting interference with the formation of any employee organization.

Until a union has been certified as the exclusive representative of the employee group, the union or group has no more (or less) right than any other organization or member of the public to hold a meeting at city offices.

By this point in the process, the union has likely identified the target group of employees it will seek to represent in a petition to the Bureau of Mediation Services.

[Minn. Stat. § 13.43.](#)

The union organizing the employees has the right to request any public information about employees from the city. The city can charge the union for this information as allowed under law and Minnesota Rules. Cities should not provide the union with home addresses at this stage in the proceedings, since home addresses are private data. The city must provide the Bureau of Mediation Services with home addresses later in the process.

The BMS will then provide the union with home addresses later in the process. Cities should note, however, labor organizations do have special access to otherwise private data on employees under the Minnesota Government Data Practices Act; therefore, it is always advisable to consult with an attorney when a labor organization requests employee data.

RELEVANT LINKS:

[Minn. R. Ch. 5510.](#)

[Minn. R. 5510.0710.](#)

[Minn. R. 5510.0510, subp. 2.](#)

[Minn. R. 5510.0710, subp. 2.](#)

[Minn. R. 5510.2010, subp. 1.](#)

3. Petition and authorization cards

The first formal step for a union or employee organization seeking to represent employees is filing a petition for certification of exclusive representation. Petition requirements and limitations on filing a petition are outlined in Minnesota law.

The BMS will also require the union (or employee organization) to provide copies of its constitution or bylaws, if not already provided.

The petition must be in writing and must include:

- The name, address, and phone number of all other employee organizations or exclusive representatives known to have an interest in or claiming to represent any of the employees involved.
- A statement regarding whether there is a labor contract in effect and its expiration date.
- The type of public employer involved.
- The approximate number of employees included in the proposed or previously determined appropriate unit.
- The proposed or previously determined appropriate unit description.
- A statement indicating at least 30 percent of the employees in the proposed or previously determined unit support the intent of the petition.
- The date the petition is signed.
- The name and title of the person signing the petition.

The petition contains a great deal of valuable information to a city. When a city receives information that a petition has been filed with the Bureau of Mediation Services, it should immediately contact the BMS and request a copy of the petition. In particular, the proposed bargaining unit and the number of employees the union believes are in the proposed bargaining unit should be scrutinized to determine if the number of employees in the claimed bargaining unit is accurate.

The primary limitation on filing a petition for a nonunion group is it cannot occur within one year of a prior representation election.

The union or employee organization is also required to submit authorization cards showing at least 30 percent of the employees of a proposed unit (the group of employees who will make up the bargaining unit) wish to be represented by the union. Since the union ultimately needs 50 percent + 1 of the votes to win an election (i.e., be elected as the union authorized to represent the employee group), it will usually have well over the 30 percent needed at this stage.

RELEVANT LINKS:

[Minn. R. § 5510.0810.](#)

The primary reason why it is important for a city to review the union identified number of employees in the bargaining unit in the petition and compare it to the actual number of public employees in the bargaining unit is that failure to meet this 30 percent showing of interest will result in the petition being dismissed. The BMS may not order an election unless there is at least a 30 percent showing of interest for the unit determined appropriate.

The authorization cards must contain the following information:

- A statement clearly reflecting the employee's support for the purpose of the petition.
- The clearly printed name of the employee making the authorization.
- The signature of the employee.
- The date the employee signed the card.

[Minn. R. § 5510.0810.](#)

Authorization cards may contain the name, address, and phone number of the union organization. They may not contain statements of explanation, interpretation, or advice and cannot be dated more than six months prior to the receipt of the petition by the commissioner. They also cannot have been modified or altered in any way from the original card format.

[Minn. R. § 5510.0810.](#)

The BMS will not include invalid authorization cards in determining whether a petition meets the required 30 percent showing of interest. If there is evidence authorization cards were obtained or submitted in a fraudulent manner, the petition will be denied. Also, the BMS will prohibit the party submitting the fraudulent cards (the union or other employee organization) from holding an election for that unit for one year.

[Minn. R. § 5510.0810.](#)
[Minn. Stat. § 179A.12.](#)

City representatives are generally curious about the actual authorization cards that have been submitted with the petition. These cards are not available to the city at any point in the process. The names of individuals who have signed an authorization card are privileged and confidential and available to the BMS only. Names may only be withdrawn by the petitioner (union or employee organization).

[Minn. Stat. § 179A.12.](#)

When the BMS certifies an exclusive representative, the question of representation (i.e., which union, if any, will represent the group of employees) cannot be considered again for one year, unless the union is decertified by a court or by the BMS.

RELEVANT LINKS:

[Minn. Stat. § 179A.09.](#)

[Minn. Stat. § 179A.09, subd. 2.](#)

[Minn. Stat. § 179A.09, subd. 3.](#)

B. Unit determination

1. Defining the bargaining unit

After a petition is filed with the BMS, the next step in a union or employee organization seeking to represent a bargaining unit is to define the appropriate bargaining unit. MNPELRA provides statutory criteria to use in determining an appropriate bargaining unit. The BMS must take into account the following factors in determining whether positions belong together in a bargaining unit:

- Positions covered by the same classification and compensation plan.
- Positions in the same professions and skilled crafts, and other occupational classifications.
- Relevant administrative and supervisory levels of authority.
- Geographical location.
- History.
- Extent of organization.
- Recommendation of the parties.
- Other relevant factors.

The BMS is directed by law to place particular importance upon the history and extent of organization and the desires of the petitioning employee representatives. The law also provides some specific prohibitions against certain types of employees being placed together in the same bargaining unit. Essential and nonessential employees, as those terms are defined in MNPELRA, cannot be placed in the same bargaining unit. Supervisory and confidential employees cannot be included in the same bargaining unit as employees who are not supervisory or confidential. Supervisory and confidential employees may be included in the same bargaining unit.

For example, this means police officers (who are defined by statute as essential) cannot be in the same unit with clerical staff (who are not essential as defined by statute) assigned to the police department. Police units containing other essential employees (such as dispatchers) can be separated into two bargaining units at the request of the majority of the police officers or the other group (e.g., dispatchers).

A primary reason for not mingling essential employees with other employees is that essential employees have the right to binding arbitration in order to settle union contracts, whereas other types of employees groups must strike if they cannot reach settlement. All of the employees in the same unit need to have the ability to settle their contract in the same manner.

RELEVANT LINKS:

[Minn. Stat. § 179A.09, subd. 2.](#)
[Minn. Stat. § 179A.03, subd. 17.](#)

[American Federation of State, County and Municipal Employees No. 65, *Nashwauk v. City of Buhl*, 541 N.W.2d 12 \(Minn. Ct. App. 1995\).](#)

See [Teamsters Local 320 v. Coon Rapids](#), A12-1349 (Minn. App. April 15, 2013) (unpublished).

[City of Bloomington v. AFSCME](#), A12-1829 and A12-2016 (Minn. App. July 15, 2013) (unpublished).

As noted above, supervisory or confidential employees may not be in the same unit with employees who are not essential employees. In addition, the law states supervisory or confidential employee organizations shall not participate in any capacity in any negotiations that involve units of employees other than supervisory or confidential employees. For example, a city cannot jointly bargain at the same time and place with two units—one unit consisting of nonsupervisory employees and one unit consisting of supervisors.

However, while it is generally improper to certify a union as the exclusive representative for both supervisory and nonsupervisory employees of the same public employer, this section has been interpreted to mean an employee organization representing police officers may also represent the supervisory police officers as an exception to the general rule for firefighters and peace officers.

Confidential and supervisory employee groups do have the right to form their own organizations under the law, however. Supervisory employees at different levels of supervision (for example, a lieutenant and captain) may be in the same bargaining unit.

There is no minimum size of a bargaining unit. Historically, the BMS has recognized bargaining units as small as one person. This differs from federal law and seems to defy the logic of “collective” bargaining. However, there have not been any legal challenges to date.

It is also important to note that while the BMS unit determination will generally be described as public employees within designated job classifications, the BMS may also designate certain individuals as part of the bargaining unit. The BMS may use this approach in dealing with employees who are not appointed to regular positions by the city but work sufficient hours to meet the definition of a public employee.

The union or employee organization will have the first opportunity to define the appropriate positions to be covered by the union as part of submitting the petition of Certification for Exclusive Representation. The BMS will make the final determination as to which positions are appropriate to include and which are not.

In the event the matter goes to a formal hearing, cities often mistakenly believe the BMS is seeking the most appropriate bargaining unit. In fact, the BMS will determine first whether the union’s proposed bargaining unit is an appropriate unit utilizing the statutory criteria. The BMS will not consider whether the union’s proposed bargaining unit is the most appropriate unit.

RELEVANT LINKS:

If the union's proposed bargaining unit is "an appropriate" unit, then the union's proposed definition will be adopted. There may be more than one appropriate unit. It is only when the union's proposed bargaining unit is deemed "not appropriate" that the BMS will consider the city's proposed definition.

The BMS practice upon receipt of a petition and the required number of showing of interest cards (based on the number of employees indicated on the petition) is to prepare a proposed stipulation containing the bargaining unit description requested by the union or employee organization. The BMS practice is to send the proposed stipulation to the city along with a Maintenance of Status Quo Order and a letter notifying the city a petition has been filed with the BMS.

A common mistake by cities is to assume the bargaining unit described in the proposed stipulation sent by the BMS has been approved by the BMS. Cities making this mistaken assumption often simply sign the stipulation as a ministerial act. It is important to note that signing the proposed stipulation means the city agrees with the union or employee organization that the proposed unit is appropriate. This is particularly important because once the BMS issues a unit determination, it may not alter that determination unless there has been a change to the parties' situation.

The city may agree with the proposed bargaining unit description, but it should carefully review it before signing. It is important to note the letter from the BMS specifically indicates the proposed stipulation is "a format to facilitate discussions for settlement, and you are free to make changes you find appropriate."

Cities should review any proposed bargaining unit with their labor attorney or city attorney prior to signing. The definition of the bargaining unit is a vital part of the bargaining unit process because of its long-term implications. A union may petition for a bargaining unit that is drawn so as to include enough of its supporters to win an election. In such an instance, the union could seek to initially certify a smaller bargaining unit and then, over time, seek to "accrete" (add) additional positions into the bargaining unit without the need for another vote. (Accretion is discussed in more detail below).

On the other extreme, bargaining units including positions without a "community of interest" may lead to impossible negotiations and poor employee morale. Including conflicting positions (such as supervisory employees in a bargaining unit with the individuals they supervise) may create administrative havoc at the city or adversely affect its operations. A city without staff expertise on unit determination should seek the advice of an experienced labor relations professional.

RELEVANT LINKS:

Teamsters Local 320 v. City of Brooklyn Park, A13-0059 (Minn. App. Aug. 19, 2013) (unpublished).

[Minn. Stat. § 179A.06, subd. 2.](#)

[Minn. Stat. § 179A.03, subd. 14.](#)

Once a job class has been determined as appropriate to include in the unit, the city is likely to have to live with that decision for a long time. As noted above, once the BMS issues a unit determination, it may not alter that determination unless there has been a change to the parties' situation. This is true even in an instance in which the parties stipulated to the original determination.

In the event the city determines the petitioned-for bargaining unit is not appropriate utilizing the statutory factors, it should submit its own proposed bargaining unit description. The BMS will take the city-proposed bargaining unit and contact the union or employee organization and attempt to resolve the differences, if any, through informal discussions.

In the event the parties are able to agree to the appropriate bargaining unit, the BMS will review and likely approve the bargaining unit. If no agreement is reached, the BMS will then hold a hearing to determine the appropriate bargaining unit. This is referred to as a unit determination hearing.

2. Identifying employees to be included in bargaining unit

In reviewing the proposed bargaining unit in the union petition and the number of employees the union claims comprises the bargaining unit, the city should focus on whether a position includes any employees who meet or do not meet the definition of public employee under the state law. In Minnesota, only those employees who meet this definition can legally join and participate in a union. The BMS, in its letter to the city notifying it of the existence of the petition, will note it is seeking to establish a list of the employees falling within the scope of the appropriate bargaining unit. Accordingly, the city should seek to identify the covered employees at an early stage in the proceedings.

Like the unit determination proceeding, the BMS will seek to obtain agreement on the individuals to be included in the bargaining unit eligibility list (meaning these individuals will be included within the bargaining unit and will be eligible to vote in the bargaining unit representation election). In the event no agreement is reached, the BMS will then hold a hearing to determine the appropriate bargaining unit. This is referred to as a unit determination hearing.

It is worth noting that an employee's desire to be in the union is given little consideration in deciding whether or not the employee must be included. The statutory criteria on including positions in or out of a bargaining unit does not list this as a factor—rather it will look at the wishes of the petitioning employee representatives.

RELEVANT LINKS:

Metropolitan Council v. Amalgamated Transit Union, Local 1005, No. A09-1096 (Minn. Ct. App. March 2, 2010) (unpublished decision).

The Bureau of Mediation Services will also look at factors such as whether the compensation plans for the employee and the bargaining unit are the same or similar, whether the employee is supervised by the same supervisor as bargaining unit employees, whether the job duties are similar to those covered by the union, and other factors. An employee who wishes to state a personal preference should contact the Bureau of Mediation Services. In the event the matter goes to a hearing, the employee should appear at the hearing and seek to testify to this effect.

Common areas of dispute in determining the bargaining unit eligibility list include whether individuals in part-time, temporary, or seasonal positions have worked a sufficient number of days and hours to qualify as public employees. For example, cities operating golf courses may have temporary or seasonal employees working significant hours as long as the golf course is open. Where these employees exceed 67 calendar days (or 100 calendar days for students), they meet the definition of public employee and either the city or union may seek to include them in the bargaining unit.

As noted above, it is not necessary for the employees to be in a formal regular position in order to be included in a bargaining unit.

Cities should note the BMS unit determination proceeding does not give the city the right to transfer work that “belongs” to another bargaining unit. The fact that the BMS has recognized the placement of a position in a defined bargaining unit does not prevent another union from objecting to the work performed by that position.

3. The unit determination hearing or investigation

If the city determines it does not agree with the union on all of the job classes to be included in the described bargaining unit, then the matter is determined at a unit determination hearing or investigation based on the preference of BMS. The BMS will utilize this unit determination hearing or investigation to make the final determination on any disputed issues regarding the unit description and employees included within the appropriate bargaining unit.

The BMS will generally request the parties participate in a prehearing conference prior to a full hearing. The purpose of a prehearing conference, in addition to attempting to reach an agreement, is to determine the witnesses for both parties, lay the foundation for testimony and exhibits at the hearing, and simplify the issues that will be under consideration at the hearing. If no agreement is reached in the prehearing conference, then an actual hearing will occur.

RELEVANT LINKS:

See *Teamsters Local 320 v. Coon Rapids*, A12-1349 (Minn. App. April 15, 2013) (unpublished).

[Minn. R. § 5510.1910.](#)

Bureau of Mediation Services (BMS) Sample: [Employer Name, City, Minnesota v. Union Name, City, Minnesota BMS Case No. \(Date\).](#)

The BMS can also decide to conduct an investigation about the various job classes if it so chooses rather than hold a formal hearing. An investigation may be as simple as the BMS requesting information from the parties. There is no requirement that BMS hold a formal hearing.

If a hearing is held, it will be much more formal than the prehearing conference. It can involve witnesses, testimony, cross-examination, subpoenas, and rules of evidence. Many cities choose to have a labor relations attorney or professional consultant represent them at a unit determination hearing.

As noted above, the BMS initial role is to determine first if the union's proposed bargaining unit is an appropriate unit. The BMS will consider the city's proposed bargaining unit only in the event the union's proposed bargaining unit is not appropriate.

4. Status quo order

Upon receipt and acceptance of a petition for Certification of Exclusive Representative, BMS will issue a written Maintenance of Status Quo Order. This document is the city's first official notice of an attempt to organize a group of employees, but it is likely the city has heard of the effort before this time through informal means (such as the "grapevine").

The purpose of the Maintenance of Status Quo Order is to make sure the election occurs in a "laboratory condition" free from improper influences (such as restraint or coercion) by a city interfering in employees' rights to form and join labor organizations.

The BMS has noted it uses this "administrative tool" to recognize "the fact that the employer controls all aspects of an employee's employment and prohibits the employer from using this control to affect the outcome of the election." This is a uniform order issued in all representation situations.

The order basically tells the city it should not make any changes in the terms and conditions of employment for the group of employees under consideration for unionization. Generally, this will mean no unplanned and unannounced changes regarding:

- Pay increases or decreases.
- Changes in job classifications.
- Substantial changes in work shifts, overtime practices, or benefits.
- Other significant employment practice.

RELEVANT LINKS:

Anderson v. County of Lyon,
784 N.W.2d 77 (Minn. App.
2010).

Normal cost of living increases are likely included in the types of pay increases that violate the status quo order. If the wage increase was planned and underway before the status quo order was received, the city might be able to move forward with implementing the increase for the covered employees. In the alternative, a city may wish to discuss the action with the union (not as a formal negotiation issue) to see if there is agreement the action may take place and submit the agreement to the BMS.

The more conservative course of action would be to wait until the vote is taken and either a) wait for a new contract if the union is voted in and implement whatever wage increase is negotiated as part of the first contract; or b) implement the cost of living increase after the union is not voted in. Status quo orders are tricky—the city’s best course of action is to consult with an experienced labor attorney.

Interpreting how to apply a status quo order is difficult. The BMS will not provide any guidance to a city on whether the status quo order will be prohibited or permitted in any particular instance. Violation of a status quo order may invalidate an election in which the employees voted for no representation and require a second vote.

Individual employees subject to a status quo order do not have standing to contest a BMS determination where the employer decision specifically stated that the planned modification of health benefits “shall not apply to employees currently subject to BMS status quo order until such order expires.” This case should not be broadly viewed as prohibiting the petitioning union from making such a challenge.

Accordingly, the city should err on the side of interpreting the order conservatively (i.e., not making any change which might be considered to be covered by the order). The city should also talk to an attorney specializing in labor law on any questions relating to the interpretation of the order. League staff is also available to help on general questions of interpretation.

The city should also take steps to notify its supervisors, managers, and city council about the fact that it has received a status quo order. Any action by any individual or group of individuals that have the authority to act on behalf of the city may be perceived as a violation of a status quo order.

Violation of a status quo order could bring a charge of an unfair labor practice (discussed below in the section on Unfair Labor Practices).

RELEVANT LINKS:

[Minn. Stat. § 179A.13.](#)

[Minn. Stat. § 179A.13.](#)
[Minn. R. § 5510.2110.](#)

See Section III-C-1,
Campaign do's and don'ts.

[Minn. R. § 5510.2110.](#)
[Minn. Stat. § 179A.13, subd.](#)
1.

5. Unfair labor practices

While there is a large section of MNPELRA that deals with unfair labor practices, there are four practices which most closely relate to union-organizing and election activity. These are:

- Dominating or interfering with the formation of any employee organization or contributing other support to it.
- Discriminating in regard to hire or tenure to encourage or discourage membership in an employee organization.
- Discharging or otherwise discriminating against an employee because the employee has signed or filed an affidavit, petition or complaint.
- Violating rules established by the commission regulating the conduct of representation elections.

Some examples of practices that could be seen as an unfair labor practice during a union-organizing drive include:

- Promising employees better benefits or pay increases if they vote against the union.
- Threatening or implying that if the employees unionize, management will get much tougher.
- Threatening layoffs if the union is voted in.
- Promising to promote an employee after the union-organizing campaign if he or she discourages other employees from voting in favor of the union.
- Taking any negative employment action against an employee because of his or her involvement with the union-organizing drive.

There are many other activities and actions that could be seen as unfair labor practices. Public employees have a right to engage in concerted activities for the purpose of collective bargaining or other mutual aid protection. This broad protection applies in the organizing phase to the same extent as it does once a union is in place. The city should always consult with an attorney (ideally one specializing in labor relations) before taking any action that might be seen as an unfair labor practice.

One consequence of being found to have carried out an unfair labor practice may be an order by the BMS for a new election. Unfair labor practices may also result in injunctive relief in favor of the union and damages against the city.

RELEVANT LINKS:

[Minn. Stat. § 179A.09.](#)

[County of Scott v. Public Employment Relations Board](#), 461 N.W. 2d 503 (Minn. Ct. App. 1990).
[School Service Employees Union Local 284 v. Ind. School Dist. No. 270](#), 499 N.W. 2d 828 (Minn. Ct. App. 1993).

6. Unit accretion

Accretion is the process by which the bargaining unit gains one or more job classes and employees. Such an action may or may not require an election depending upon the number of individuals involved and the size of the existing bargaining unit.

Accretion may be a common sense approach to clarifying an existing bargaining unit. For example, when the city creates a new job class of “City Hall Custodian,” the union currently representing the city’s public works maintenance workers may try to “accrete” (or add) the new position into the existing public works bargaining unit. In this case, the jobs are similar enough that the union will likely be successful. However, there are often cases where the new job class does not “fit” with the existing unions and the city may choose to challenge the accretion of the new job class.

The BMS is responsible for determining the appropriate unit and is directed by statute to consider the same list of items as when it initially determines any new bargaining unit (see the section Defining the Bargaining Unit above). Those are:

- The principles and the coverage of uniform, comprehensive position classification.
- Compensation plans of the employees, professions and skilled crafts, and other occupational classifications.
- Relevant administrative and supervisory levels of authority.
- Geographical location.
- History.
- Extent of organization.
- The recommendation of the parties.
- Other relevant factors.

The statute also directs the commissioner of the BMS to “place particular importance upon the history and extent of organization, and the desires of the petitioning employee representatives.”

However, court decisions have determined employee choice is only one factor among many to be considered in determining the bargaining unit to which an employee will ultimately be assigned. The employee, therefore, has no right to “vote” on their preferred bargaining unit—only to express a preference.

RELEVANT LINKS:

[AFSCME Council 65 and City of Cloquet](#), BMS Case No. 84-PR-768-A (March 1, 1984).

The BMS has offered guidance on when it is appropriate to accrete new positions to an existing bargaining unit and when a vote should take place related to the accretion. The BMS will first determine questions regarding the appropriateness of the ensuing unit. If the unit is determined to be appropriate, any question of representation will then be weighed against the “universe” of employees within the unit, rather than a minor subset of the unit.

If the proposed accretion involves employees in sufficient numbers to constitute the majority of employees in the newly defined unit, the BMS will determine if a legitimate question of representation exists. This means the accretion would be appropriately decided by an election if the parties fail to agree to a verification of authorization card signatures to resolve the matter. In contrast, where the number of employees involved in a proposed accretion does not upset the majority standing of the exclusive representative in the newly defined unit, no question of representation will exist.

C. Campaign and election

1. Campaign do's and don'ts

Between the time of the unit determination and the union election, the employer may campaign in favor of remaining union free (i.e., against the election of the union). However, there are several important restrictions on how the campaign can be conducted and what the city can say. The city's campaign can consist of both written materials and meetings with employees. Any written materials or information that the city is considering providing to employees should be reviewed by a labor attorney experienced in public sector labor issues. Also, the city should keep in mind that it could be challenged as to whether an expenditure of city funds to provide such materials has a “public purpose.”

The city cannot:

- Make threats against employees for voting in favor of a union (e.g., “The city will have to lay off some jobs if a union is voted in.”).
- Make promises (e.g., “The city will give larger-than-normal increases next year if the union is voted down.”).
- Discharge or discipline an employee because of union activity (this could include a layoff unless a legitimate business purpose has been identified AND the plans were in progress before the union organizing began; the city should definitely consult with an experienced labor attorney before attempting a layoff during or immediately after a union-organizing campaign).

RELEVANT LINKS:

- Recognize that employees have significant protections to discuss terms and conditions of employment, and maybe able to communicate in what may appear to be a disrespectful or offensive demeanor regarding working conditions.
- These protections apply to both verbal, written and electronic communications.
- Question an employee regarding his or her actions or opinions.
- Spy on union activities, nor ask about union matters, such as meetings
- Discriminate either in favor or against based on union activity (e.g., give a better shift to employees who have expressed a negative viewpoint about having a union).
- Ask employees when they are hired or after hiring whether they belong to a union, carry a union card, or have ever signed a union authorization card.

The city and its management employees can, however:

- Listen to (but don't solicit) information from employees if it's voluntarily given, but discourage disclosure of names of union advocates.
- The City will want to enforce rules uniformly, without bias, and in accordance with past practice, regardless of an employee's activity in the union organizing campaign but be prepared to justify any action taken against a union supporter.
- State their opinions about unions provided such statements are not a promise or threat (e.g., "I believe the city has done a good job of compensating and rewarding its employees." Or, "The city's current pay and benefit structure compares very favorably to cities that have unions and you do not need to pay dues.").
- State any factual information (e.g., "The union you are seeking charges dues in the amount of \$_____").
- Tell employees the city prefers to deal with them personally on a one to one bases, rather than settle grievances through a union or other outside agent (e.g., "The City of X prefers to work directly with its employees because we believe the voice of each individual employee is important.").
- Tell employees about the current benefits they enjoy without making promises or threats about future benefits (e.g., "Currently, City of X benefits are among the top 5 percent compared to cities of similar size.").
- Tell employees that no matter how they vote, the decision will not be held against them with respect to future wages or promotions.
- Tell employees that if an election takes place, the election is by secret ballot.

RELEVANT LINKS:

[Minn. Stat. 179A.06 subd. 2.](#)

- Explain to employee that the mere election of a union does not guarantee any specific change. Instead, the city will negotiate with the union on all terms and conditions of employment.

Employees may come to the city asking for help because they don't want a union. The city can do very little in this situation. Management representatives (and this includes supervisors) cannot take any action or make any promises or threats that interfere with an employee's right to join a union. However, the city can point out factual information, such as information about the process of joining a union. The city could, for example, work with an experienced labor attorney to develop some written materials providing factual information about joining a union. One important thing a management representative can do is urge employees to vote in the election, as discussed below.

Under no circumstances, should management attempt to answer questions about union organizing activities—these should be referred to the Bureau of Mediation Services.

Employees sometimes mistakenly believe if they are not in favor of having a union, the best thing to do is to not vote at all. Also, they may be pressured by other employees in favor of the union to “stay home” on election day (this is less of a concern where the election is conducted by a mail ballot election). However, since it is actually the case the election will be determined by 50 percent + 1 of the employees who vote, an election in which employees who do not favor the union don't vote will be skewed in favor of approving the union. Therefore, a city that wishes to remain union free should urge all eligible employees to vote.

2. Certification of unit determination

The BMS will have issued a Certificate of Unit Determination which contains a definition of the appropriate bargaining unit; e.g., a list of all the job classes appropriate to be in the same bargaining unit along with the names of individuals who do not fall within a job classification. This is important because when the city adds or deletes job classes in the future, this list will help determine whether an employee is included in the bargaining unit and covered by the union or not.

3. Voting eligibility list

The BMS will also issue a Voting Eligibility List containing the names of the employees in the unit. This is the list of individuals who will be able to vote in the election. Cities must be sure to check the list against the city's own list to make sure they match. Cities should notify the BMS immediately if there are any discrepancies.

RELEVANT LINKS:

[Minn. R. § 5510.2010, subp. 3.](#)

[Minn. R. § 5510.2010, subp. 5.](#)

[Minn. R. § 5510.2010, subp. 9.](#)

4. Election order

The BMS will issue and mail an election order to the city and the union at least 10 calendar days prior to the date of the on-site election or the date of the mailing of ballots for a mail ballot election. This order will:

- Identify the appropriate bargaining unit.
- Establish the cutoff date for voter eligibility.
- Include a list of the eligible voters.
- Include a sample ballot.
- Establish campaign and election rules.
- Provide for the parties to appoint election observers.
- Identify the date, time, and location of an on-site election and provide for absentee ballots.
- Identify the date of mailing ballots in a mail ballot election.
- Include any other conditions which are necessary for the conduct of a fair election.
- Provide for posting by the city of the election order and attachments.

A city should review the cutoff date for voter eligibility and the list of eligible voters to make sure the individuals eligible to vote are correctly identified. A city should immediately notify the BMS if there is a needed correction to the voter eligibility list. Transfers, promotions, demotions, separations, and other changes in status (that are not prohibited by the Maintenance of Status Quo Order) may affect this eligibility list.

5. Mail ballot or in-house (on-site) election

The union and the city will have the opportunity to indicate their preference for either a mail ballot or on-site election at the same time as the parties address the bargaining unit definition and list of eligible employees. There is a potential for a combination mail and on-site election ballot but such an option is unusual. The BMS strongly prefers mail ballot elections and has the ultimate authority to determine the type of election to be conducted. There are pros and cons to each method:

- Mail ballots are more convenient and employees may feel they are more private.
- In-house elections must be held during working hours.
- In-house results are tallied immediately and the results are known more quickly.
- Employees may feel more pressure to actually cast their vote in an in-house election.

RELEVANT LINKS:

[Minn. R. § 5510.2010, subp. 13.](#)

- Parties may designate an observer in an on-site election during the casting of ballots. The observer’s role is to identify employees eligible to vote in the election.

Regardless of the type of voting, votes are always tallied by the BMS and the BMS will permit the presence of both the employer and the union representative. The BMS will prepare and sign a “tabulation of election results.” The BMS will then provide a copy to each observer present. The BMS will retain all election ballots and materials for at least 60 calendar days.

In the event the union obtains a majority of votes cast in its favor, it will be deemed the exclusive representative. If more than one exclusive representative is seeking to represent the group and none of these groups obtains a majority of the votes cast, there will be a runoff election between the top two organizations.

If the majority of voters choose no representation or there is a tie vote between representation and no representation, the BMS will declare the union is not the exclusive representative of the bargaining unit and lift the existing status quo order.

6. Bargaining unit membership classifications

Employees included in the bargaining unit will fall into one of three classifications.

- Full dues paying members.
- Fair share members who voluntarily choose to pay toward the union but are not full members.
- Non-member who do not pay any dues yet are still covered by the union contract.

Full dues paying member are permitted dues checkoff as a noted. Fair share fee members must consent in writing to have fair share fees taken from their paychecks. Non-members of course have no dues deducted.

D. Minnesota unions and union organizations

1. AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of national and international labor unions. The AFL-CIO does not directly represent union employees, but instead provides services to union organizations such as political lobbying (generally at the federal level) on behalf of union causes.

RELEVANT LINKS:

The AFL-CIO does not have offices in Minnesota, but many Minnesota unions are members of the AFL-CIO.

2. Minnesota police and peace officers association (MPPOA)

The MPPOA, like the AFL-CIO, does not directly represent union employees at the bargaining table, but focuses its efforts on statewide initiatives, such as lobbying at the state legislature for police and peace officer benefits and holding statewide training and conference events.

3. Common unions representing city employees in Minnesota

Many of the unions representing city employees in Minnesota have large national representations including a wide variety of professions and trades. However, they may only represent some portion of those professions and trades in Minnesota. Some of the more common union organizations representing employee groups in Minnesota are listed below, along with the groups of city employees they typically represent:

- American Federation of State, County and Municipal Employees (AFSCME)—often represents city office workers and sometimes maintenance, police, supervisory, and confidential employees.
- General Laborers—typically focuses on maintenance and public works employees.
- International Association of Firefighters (IAFF)—represents full-time professional firefighters and paramedics (most paid on-call and volunteer firefighters do not meet the definition of public employee under Minnesota law and therefore cannot unionize).
- International Brotherhood of Electrical Workers (IBEW)—represents electrical utility workers in cities with electrical utilities.
- International Union of Operating Engineers (IUOE)—generally represents maintenance workers such as heavy equipment operators, utility maintenance workers, and park maintenance workers.
- Law Enforcement Labor Services (LELS)—represents many police officers and police supervisors throughout the state.
- Teamsters Local 320—represents a wide variety of city employees, including police, dispatchers, office, and maintenance workers.
- Minnesota Public Employee Association—originally focused on law enforcement but has broadened its scope of representation.

RELEVANT LINKS:

See Section III-B-1- *Defining the bargaining unit.*

[Minn. R. § 5510.0410.](#)

[Minn. Stat. § 179A.13, subd. 2.](#)

[Minn. R. § 5510.0510.](#)
[Minn. R. § 5510.0310.](#)

[Minn. R. § 5510.0310, subp. 9.](#)

4. City-specific unions

Nearly any group of city employees meeting the requirements of state law and the BMS rules can form their own unique, city-specific labor union. These often exist as federations or associations. This sometimes happens with management employees (across all city departments) in larger cities; however, there are also some small cities where one department's employees (police or maintenance workers, for example) have formed their own city-specific union.

Because these unions tend to be less formally structured and smaller than the statewide unions, there is sometimes confusion about their legal status. These groups have all of the same rights and protections under state law as any other union, and city officials are legally bound to any agreements made with these unions.

However, these unions must have been certified by the BMS using a formal legal process in order to be eligible for state law protection and the right to bargain collectively. The best way to find out if a local, city-specific union has been certified is to contact the BMS for verification.

5. Decertification

In the event employees within an existing unit wish to become nonunion, they may follow what is called a decertification process. It is vitally important for a city to understand this process must be entirely bargaining unit employee initiated and conducted.

A city will be deemed to have committed an unfair labor practice in the event it initiates or is involved in such a decertification effort. The city is prohibited from interfering, restraining, or coercing employees in their right to belong to a union, and more specifically the city is prohibited from interfering with the existence of any employee organization.

A decertification petition can only be filed when it is submitted during an open window period (60 to 120 days prior to the expiration of an existing union contract); after a contract has expired; or when it is submitted jointly by the employer and the exclusive representative (which is unlikely to occur in most circumstances).

The BMS commissioner can allow a petition at other times when the commissioner determines "the interests of good labor relations policy warrant consideration of the petition." A decertification petition also cannot be filed within one year of a failed decertification election or where a contract has been certified for arbitration.

RELEVANT LINKS:

[Minn. R. § 5510.0710.](#)

See, *In the matter of a petition for decertification involving University of Minnesota, Unit 9, Crookston, Minnesota v. University of Minnesota, Minneapolis, Minnesota*, 730 N.W.2d 300 (Minn. App. 2007).

[Minn. R. § 5510.2010, subp. 15.](#)

[Minn. Stat. § 179A.07, subd. 6.](#)

Blumhardt v. Ind. School Dist. No. 361, Int'l Falls, 814 N.W.2d 72 (Minn. App. 2012).

A decertification effort uses the same general procedure as a union uses to initially represent the bargaining unit. An individual or group of employees must file a petition stating the current exclusive representative no longer represents the majority of employees in an appropriate unit and that at least 30 percent of the employees no longer wish to be represented. A similar petition and the same showing of interest in the form of authorization cards must be submitted along with the petition. The city is a proper party for purposes of participating in a decertification hearing.

A unit decertification election often presents fewer procedural obstacles than an initial certification election. The bargaining unit has already been determined by the BMS or PELRA and the names of the employees within the bargaining unit should already exist in some form. All that is required is to review the petition and have the BMS check the authorization signatures against the bargaining unit members. If 30 percent have submitted authorization cards, a decertification election is held. Decertification occurs if the majority of those voting choose no representation. A tie vote would result in the union retaining its status as exclusive representative.

E. Union leave

A city must afford reasonable time off to elected officers or appointed representatives of the exclusive representative to conduct the duties of the exclusive representative.

This section has been interpreted to provide that the leave mandated by PELRA for conducting official union duties does not extend to a public employee who is elected or appointed to serve an employee organization that is not the exclusive representative for these employees.

For example, an employee's appointment as a field representative with Education MN (a statewide employee organization) takes her out of the "exclusive representation for the employees" category of PELRA, because she would now be a rep for Education MN and working with 15 different districts rather than just for the specific local within the school district. The employer, therefore, does not have to grant employee leave under this statutory leave provision.

IV. Union contracts

Negotiating a union contract is similar to any type of negotiation process (like buying a car, for example); however, there are both formal and informal procedures unique in a labor relations environment. This section lays out what to expect and what to pay attention to when negotiating a union contract from a management standpoint.

RELEVANT LINKS:

[LMC Model Contract Language – Police Unit.](#)

[LMC Model Contract Language – City Hall Unit.](#)

When possible, however, the best practice is to have an experienced labor negotiator handle the negotiation process on behalf of the city, especially if negotiating your first union contract with a newly formed employee union. If that is not possible, the second best approach is to have any proposed contract provisions reviewed by an experienced negotiator or attorney.

A. League’s model contracts

The League of Minnesota Cities, in cooperation with Scott Lepak with the law firm of Barna, Guzy and Steffen, has developed two model union contracts. The models also contain explanations of why each provision is recommended to be written in a certain way and what types of language to avoid.

Cities negotiating labor contracts should refer not only to the model language, but also to the explanation sections to determine whether such language is desirable for the city. It is also important to remember that each city is unique and when negotiating labor contracts, a city should make sure to tailor the language in the contract to best fit a city’s particular needs.

The League’s model describes standard provisions and clauses such as:

- Union recognition clause.
- Union security clause.
- Employer authority/management rights clause.
- Grievance procedure.
- No strike (nonessential).
- Discipline.
- Holidays.
- Vacation.
- Sick leave.
- Hours of work.
- Part-time employees.
- Insurance.
- Uniforms (police).
- Wages.
- Seniority.
- Definitions.
- Savings clause.
- Probationary period.
- Complete agreement.

RELEVANT LINKS:

- Mutual consent.
- Duration.

B. Overview of contract negotiations

1. Importance of first contract

While any contract negotiations are important, the first contract negotiated with a newly formed union is the most critical. The primary reason for the importance of the first contract is that it will establish the basis for all subsequent negotiations. Once contract language is agreed to and placed into an existing contract, amending that language by one party often involves considerable give and take (quid pro quo) in order to change. Where a bargaining unit has access to interest arbitration, arbitrators are very reluctant to change existing contract language. In addition, the language in the first contract often forms the basis for what may become binding practices the city may not unilaterally amend during the contract term.

In the first contract, the city should take care to establish certain management rights that will later protect the city's ability to manage its workforce; e.g., establish work schedules, job classifications, number of staff, etc. There are certain clauses described in the League's model contract that will help guarantee these rights if included in the first contract. Even if the city cannot afford to hire an experienced labor negotiator for subsequent contracts, it should strongly consider getting this help to negotiate the first contract.

2. Bargaining team

One of the most important decisions the city can make with regard to contract negotiations is who to include in the bargaining team to represent management. In larger cities, there may be designated human resources/labor relations professionals whose job it is to lead the bargaining team. In smaller cities, especially Statutory Plan A cities, the city administrator or city council may lead the bargaining team either directly or indirectly.

The bargaining team may also include appropriate department heads or managers. For example, if the city is bargaining a police contract, the police chief may be included on the bargaining team to help the city's bargaining team understand the current practices in the department, correct misperceptions by the union, and understand the impact of union proposals.

RELEVANT LINKS:

[Minn. Stat. § 179A.14, subd. 3.](#)

It is important to note that all negotiations, mediation sessions, and hearings between public employees and cities or their representatives are public meetings except as may be provided by the BMS commissioner. Because of the potential for these meetings to include rancor or expression of harsh feelings and viewpoints, elected officials may wish to have representatives engage in the actual negotiations rather than “jump into the fray” themselves.

Regardless of who is chosen for the bargaining team, the team itself should meet before negotiations have begun to decide strategy and parameters for bargaining, discuss likely proposals, and formulate any management proposals. The team should have an understanding of what type of wage or benefit increases are viable for the contract period and what other types of provisions the team is likely to accept or reject. The team should decide on a chief spokesperson and, for the most part, allow that person to do the speaking for the team at the bargaining table.

[Minn. Stat. § 13D.03.](#)

Depending upon how the city is structured (Statutory A, B, or charter) and depending on past practice and the city’s budgeting procedures, the city may want to establish some general parameters with the final decision makers at this time. For example, the city administrator or HR director may want to meet with the city council to discuss a general limit on how much the city can afford to negotiate with the union on wages and benefits before it begins the bargaining process. A meeting to discuss union negotiation strategy may be closed, but must be electronically recorded. The recording shall be preserved for two years after the contract is signed, and shall be made available to the public after all labor contracts are signed by the governing body for the current budget period.

As noted in the introductory section of these materials tact and discretion should be utilized in these closed meetings. Those present should consider that their statements will ultimately be publicly available and subject to disclosure.

Sitting on the bargaining team can be difficult. The union will be pushing for immediate responses to proposals it has laid out and will sometimes claim the city is not bargaining in good faith if the management bargaining team does not provide an immediate reaction.

All members of the bargaining team should understand there is no legal requirement for the city to react immediately to any union proposal, and it is reasonable to ask for time to consider the proposal and to discuss it with all appropriate staff. The city and the union are required to negotiate in good faith.

RELEVANT LINKS:

[Minn. R. § 5510.2710.](#)

[Minn. Stat. § 179A.14.](#)

[Minn. Stat. § 179A.20, subd. 6.](#)

That includes the right and duty to fairly consider proposals. It is far more harmful for the team to react to a proposal at the table and later change its position than to just request time to consider the proposal.

3. Bargaining methods

a. Notice to begin negotiations

A written notification of the desire to meet and negotiate an original contract, renewal of a contract, or a reopener of a contract must be served by the party wishing to begin the negotiations. The notice must be sent to both the other party and the commissioner of the Bureau of Mediation Services. Typically, the union is the one to start negotiations, but management can make the request as well. The notice may be served on forms available from the BMS or in other written format which includes the items listed in the BMS rules.

The party wishing to renegotiate an existing contract must file the notice at least 60 days prior to the expiration of the existing contract, and failure to do so can result in a very small fine (\$10 per day) imposed by the BMS. The BMS typically does not fine in this instance.

In a typical environment, the union is more motivated to begin negotiations because they will be asking for wage and benefit increases, but in difficult economic times the city may be the one wishing to negotiate a new contract in order to implement wage and benefit concessions or changes. Therefore, the city should pay attention to these deadlines if it believes the union will not be filing the notice to negotiate.

Because the provisions of an existing union contract generally remain in effect until a new one is negotiated, it is possible the union may prefer to keep an existing contract in place under extreme economic conditions.

b. Offer and counteroffer (traditional bargaining)

The most common form of bargaining is simple. Generally, there is an initial meeting (sometimes called “coming to the table”) at which the union asks for wage and benefit increases and changes or additions to contract language. The city will consider these proposals and schedule a second meeting, if necessary, to respond to the union proposals and present the city’s own proposals. Management may also come to the first meeting with a list of proposals it would like the union to consider. Often the first meeting is spent just going down these lists and explaining the rationale behind each item.

RELEVANT LINKS:

In presenting management proposals, the city's bargaining team should carefully identify which proposals and responses are contingent upon agreement to an entire contract, contingent upon agreement, or trade in another area, or simply agreed to without any contingencies. This avoids confusion as to what has actually been offered and agreed to in negotiations. City bargaining teams need to guard against a union seeking to selectively "pick and choose" pieces of the management offer most beneficial to the union, when the intent of management is to put together a package that makes overall financial sense for the city.

At the second meeting, union and management are often more prepared to discuss the items on each other's list and may have a list of "counteroffers" to provide. For example, if the union has asked for a 3 percent across-the-board wage increase, the city may counter with a 2 percent wage increase.

This back-and-forth, "offer and counteroffer" process usually continues over several meetings until a "package" of agreed-upon provisions has been reached. It is crucial the union and management discuss these provisions carefully to avoid misunderstandings later. At least one member of the management bargaining team should take careful notes during the negotiations so if a disagreement comes up later, the intent of the bargaining team will be clear.

Once agreement is reached, the union takes the list of agreed-upon provisions to the entire bargaining unit for a vote (called a ratification vote). The union must have a majority vote in order to formally agree upon the package.

In the event the parties voluntarily agree to terms in negotiations, the parties should discuss and seek a statement from the other party that its negotiation team will recommend the tentative agreement to the union membership or city.

Generally, the city will need to take the entire tentative agreement to the city council for a vote as well—usually after the union has voted for approval. In Plan B cities (and sometimes charter cities), the city manager has the authority to establish terms and conditions for all employees. However, the city council still controls the city budget so it is good practice, even in these cities, to have the city council approve the final package.

Traditional "offer and counteroffer" bargaining is simple and relatively easy to learn. The downside is it often does not get at the heart of issues that are causing problems for management and the union. Both parties have prepared more for conflict than for conciliation and creativity is only used as a "last resort" method.

RELEVANT LINKS:

In addition, traditional bargaining simply may not always get the job done. There will be times when the city and the union cannot come to an agreement. See the section Failure to Negotiate below.

c. Interest-based bargaining

Interest-based bargaining is another method that may be used to negotiate a union contract. Interest-based bargaining comes at the negotiation process from a different perspective. Instead of trying to come up with an agreement that is the “best” from a management or union standpoint, interest-based bargaining seeks to understand the heart of the issues over which management and the union have conflicts.

Both sides discuss their unique interests and seek creative options for solutions. The options are evaluated against shared values or standards and the most viable option is chosen.

For example, in a difficult economic environment, management may believe it needs to use a wage freeze to control costs and retain as many workers as possible. The union may see its interests in retaining jobs too, but only at a certain standard of living. In interest-based bargaining, both parties would discuss their interests and seek common ground (e.g., both parties are interested in making sure the city does not go bankrupt and that jobs are preserved). Creative options would be charted (e.g., looking at other cost-saving measures, thinking about temporary pay cuts or layoffs, etc.) and the most viable option would be chosen.

Interest-based bargaining is time consuming and labor intensive, requires training and a great deal of patience, and may not be suited for an environment where tough and unpopular changes are required. It requires trust, commitment, and the ability to focus on the long-term nature of the union-management relationship vs. short-term gain.

However, proponents of interest-based bargaining claim it results in creative win-win solutions, builds long-term trust between the parties, and can “permanently” solve long-standing issues that otherwise never go away. The BMS provides free training to parties interested in this method of negotiating.

4. Topics of bargaining

MNPELRA has been in existence since 1971. This means the law has been amended and clarified over the years so there is some common understanding about which topics must be bargained under the law, which are permissible to bargain over, and which are either prohibited for bargaining or clearly fall within the purview of a management right.

RELEVANT LINKS:

[Mandatory, Permissible and Prohibited Topics for Collective Bargaining.](#)

[Minn. Stat. § 179A.07, subd. 1.](#)

[Mandatory, Permissible and Prohibited Topics for Collective Bargaining.](#)

[University Education Ass'n v. Regents of University of Minnesota, 353 N.W.2d 534 \(Minn. 1984\).](#)

It is important for the city's management representatives to understand the differences between these topics in order to avoid unintentionally giving away management rights.

In addition to the following discussion of management rights and mandatory, permissible, and prohibited topics of bargaining, the League has developed a chart providing a "quick reference" to each of these topics. The chart was developed in cooperation with Scott Lepak with the law firm of Barna, Guzy & Steffen.

a. Management rights

The legal basis for most management rights is found in state law. It states a public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to:

- The functions and programs of the employer.
- Its overall budget.
- Utilization of technology.
- The organizational structure.
- Selection of personnel and direction, and the number of personnel.

Whenever management is approached by the union to negotiate on an issue appearing to be related to one of the above topics, it should proceed carefully and consult with a labor relations attorney prior to negotiating or agreeing to limit its rights in these areas. A city may waive its management rights in these areas but should never do so.

It is not always easy to know which issues are management rights and which are not. There are arbitration and court decisions providing guidance, however.

Areas that have been found to be management rights include the following:

- Tenure and promotion (in a school setting).
- Faculty evaluations (in a school setting).
- The quality of work an employer expects.
- Academic calendar (in a school setting).
- When it is necessary to report to work.

RELEVANT LINKS:

Metro. Airports Comm'n v. Metro. Airports Police Fed'n, 443 N.W.2d 519 (Minn. 1989).

Lipka v. Minn. School Emp. Assoc., 537 N.W.2d 624 (Minn App. 1995) affirmed as modified 550 N.W.2d 618 (Minn. 1996).

Educ. MN-Aitkin v. ISD No. 1, No. A05-1061 (Minn. Ct. App. April 25, 2006) (unpublished decision).

Minneapolis Ass'n of Administrators and Consultants v. Minneapolis Special School Dist. No.1, 311 N.W.2d 474 (Minn. 1981).

City of West St. Paul v. LELS, Inc., 481 N.W.2d 31 (Minn. 1992).

LELS v. County of Cook, No. CO-99-397 (Minn. Ct. App. Sept. 7, 1999) (unpublished decision).

Educ. Minnesota-Osseo v. Ind. School Dist. No. 279, 742 N.W.2d 199 (Minn. App. 2007).

St. Paul Police Fed. v. City of St. Paul, No. A09-1349 (Minn. Ct. App. May 18, 2010) (unpublished decision).

ISD No. 656 v. IUOE, Local No. 70, No. A10-670 (Minn. Ct. App. Nov. 23, 2010) (unpublished decision).

- Assignment of work that is not appropriate unit work.
- Creating a policy against sexual harassment simply stating that harassment and violence in the workplace are not allowed because they violate state and federal laws and regulations. (The parties cannot bargain around the laws).
- The decision to transfer employees that is not a demotion or subject to disciplinary proceedings. (Note that implementation of this transfer decision is a term and condition of employment as discussed above). This is also discussed further below in Mixed Mandatory and Management Rights Subjects of Bargaining.
- A procedure for determining which supervisory positions are to be stripped of administrative functions. (Note this may be limited to supervisory positions being stripped of administrative functions).
- A decision to establish a police ride-along program and implementation of a ride-along program for trainees (as opposed to community group members or others).
- Implementation of a response time policy.
- Vendor selection for retirement plan.
- Creating research-analyst positions in a police department's cold case unit and staffing them with nonunion personnel where the action did not affect the union member's hours of employment, compensation, fringe benefits, or personnel policy.
- A school's decision to combine an administrative assistant position and secretary position when the administrative assistant retired because the school faced a low operating levy, the change in technology reduced the need for additional clerical assistance, the secretary accepted new duties, the school did not hire a nonunion employee to fill the position, and the combination did not cause another member of the union to go without employment was not "contracting out work" and therefore was an inherent managerial right.

RELEVANT LINKS:

[Mandatory, Permissible and Prohibited Topics for Collective Bargaining.](#)

[Teamsters Local 320 v. City of Minneapolis](#), 225 N.W.2d 254 (Minn. 1975).

[Operating Engineers Local No. 49 v. City of Minneapolis](#), 233 N.W.2d 748 (Minn. 1975).

[Minneapolis Fed. of Teachers v. Minneapolis Special Sch. Dist. No. 1](#), 258 N.W.2d 802 (Minn.1977).

[LELS v. County of Hennepin](#), 449 N.W.2d 725 (Minn.1990).

[LELS v. City of Luverne](#), 463 N.W.2d 546 (Minn. App. 1990).

[Hill v. City of Winona](#), 454 N.W.2d 659 (Minn. App. 1990).

[LELS v. City of Roseville](#), 393 N.W.2d 670 (Minn. App. 1986).

[General Drivers Union Local 346 v. ISD 704, Proctor School Board](#), 283 N.W.2d 524 (1979).

[Foley Education Association, et al. v. Independent School District No. 51](#), 353 N.W.2d 917 (Minn. 1984).

b. Mandatory subjects of bargaining

Under Minnesota law and through court decisions and arbitration precedents, many items are likely to be seen as mandatory subjects of bargaining; i.e., the city must negotiate with the union over them. Some of the most traditional (and obvious) mandatory subjects of bargaining include:

- Disciplinary procedures.
- Grievance procedures.
- Compensation.
- Benefits (such as health insurance, vacation, etc.).

However, there are some subjects cities may believe are management rights but arbitration precedent or court decisions have ruled otherwise. These specific areas are noted in the definition section under Terms and Conditions of Employment along with their case reference but include:

- Whether an employee may be suspended or receive a written reprimand.
- A dispute about the fairness of a competitive examination used to fill a position.
- Adopting criteria by which individuals may be identified for transfer.
- Implementing a physical appearance or grooming standards (but note it may not be a mandatory bargaining subject where it cannot be separated from creation of the policy).
- Implementing a mandatory physical examination policy.
- Requiring an individual to undergo a psychological examination.
- Establishing a clothing allowance.
- Determining whether or not an employee's job will be terminated so the same function can be performed by an employee who is not in the bargaining unit (subcontracting).
- Jurisdictional questions dealing with the assignment of work to bargaining unit members.

RELEVANT LINKS:

[Foley Education Association, et al. v. Independent School District No. 51](#), 353 N.W.2d 917 (Minn. 1984).

[St. Paul Firefighter Local 21 v. City of St. Paul](#), 336 N.W.2d 301 (1983).

[LELS v. County of Mower](#), 483 N.W.2d 696 (Minn. 1992).
[Housing and Redevelopment Authority of Chisholm v. Norman](#), 696 N.W.2d 329 (Minn. 2005).

[City of West St. Paul v. LELS, Inc.](#), 481 N.W.2d 31 (Minn. 1992).

[Cloquet Education Assoc. v. Ind. School Dist. No. 94](#), 344 N.W.2d 416 (Minn. 1984).

[LELS v. Sherburne County](#), 695 N.W.2d 630 (Minn. App. 2005).

[West St. Paul Federation of Teachers v. ISD No. 197, West St. Paul](#), 713 N.W.2d 366 (Minn. App. 2006).

[ISD No. 182 v. Educ. MN Crosby Ironton](#), No. A07-0745 (Minn. Ct. App. April 8, 2008) (unpublished decision).

[Minn. Stat. § 179A.03, subd. 19.](#)

[Minn. Stat. § 356.24.](#)

[Mandatory, Permissible and Prohibited Topics for Collective Bargaining.](#)

- Lengthening hours of employment and increasing workloads.
- Whether an individual is entitled to premium pay during participation in a training program and the manner in which the participation requirement must be fulfilled (e.g. whether the participation requirement is to be fulfilled during a single assignment to the training program or by alternate assignments to line duty and training units).
- The employer payment of or contributions to premiums for group insurance coverage of retired employees.
- Those parts of implementing a ride-along program involving explorer scouts or community volunteer groups rather than newly hired officers.
- Assignment of an individual to chaperone a dance.
- Implementation of a random drug testing policy.
- Health insurance coverage, including the level of coverage.

There are many factors to consider in any given bargaining situation (e.g., current contract language, past practice, type of unit, etc.), so a city may want to consult with a labor relations attorney before agreeing to bargain on a right that could be an inherent management right.

This is especially true because once the city agrees to bargain on a management right, it has usually given up its ability to claim the right is exclusively a management right. This is referred to as a waiver of rights. The subject then becomes a “permissible” subject of bargaining, unless it is specifically prohibited by the law (see “prohibited/section d” below).

c. Permissible

Permissible subjects of bargaining are those that are either not clearly in the realm of a managerial right or clearly in the realm of a prohibited subject of bargaining. Oftentimes, these are subjects for which there is no clear court ruling or arbitration decision to define whether the city must bargain over them.

RELEVANT LINKS:

[Minn. Stat. § 181.985.](#)

[Minn. Stat. § 179A.03.](#)

[Housing and Redevelopment Authority of Chisholm v. Norman](#), 696 N.W.2d 329 (Minn. 2005).

In addition, as stated above, a managerial right can become a permissible subject of bargaining if the city voluntarily bargains over it.

This sometimes happens accidentally when the city gives up a management right by bargaining over it, because they are not aware it is a management right under the law.

If a city does not wish to concede what it believes to be a management right under the law, there are several alternatives it can offer to the union:

- Offer to meet and confer but not bargain with the union over the issue (meet and confer just means the city and the union get together and try to figure out a solution outside of the union contract).
- Take the issue to an existing labor management committee or offer to form a labor management committee to discuss noncontract issues and share viewpoints.
- Invite outside experts to a briefing session to educate both sides on the topic.
- Ask the BMS (or another mediation organization) to provide a mediator for this purpose. (Private mediators will likely charge a fee for this service).

Including workplace communications in the collective bargaining agreement is a permissible subject of bargaining. The term communication for this purpose means any printed or electronic document, letter, brochure, flyer, advertisement, e-mail, text message, or similar means pertaining to union business or labor organizing as provided under state law.

One area that is a permissible subject of bargaining involves certain retirement and severance benefits. The statutory definition of terms and conditions of employment, which is a mandatory subject of bargaining, specifically notes it “does not include retirement contributions or benefits but does include employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay.” This means this limited area is a permissible subject of bargaining.

It is important to note this is a very limited area. The employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay is specifically included as a mandatory subject of negotiations. A city is authorized under this section to obligate itself in a union contract to pay retiree health insurance premiums indefinitely. Cities are required to negotiate over employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay.

RELEVANT LINKS:

[Minn. Stat. § 356.24.](#)

[Minn. Stat. § 179A.07 subd. 1.](#)

[Itasca Cnty. and AFSCME Council 5](#), BMS case number 06-PA-1243 (Oct. 23, 2006), (Jacobs, Arb.).

For example, a city can bargain with the union over a matching city contribution to a deferred compensation plan up to 50 percent of the allowable maximum allowed by the IRS. The city can also bargain over and make contributions to certain union pension funds outlined in the law.

d. Prohibited

There are only a few prohibited subjects of bargaining; i.e., those subjects which a city is prohibited by law from bargaining over with the union.

These subjects fall into two areas: selection of supervisory employees and retirement benefits.

The law states no public employer shall sign an agreement that limits its right to select persons to serve as supervisory employees or requires the use of seniority in their selection. This means the city cannot bargain with the union over the procedures it will use to promote employees into supervisory positions.

At least one arbitrator has ruled the provision that prohibits a city from bargaining over supervisory selection or requires the use of seniority only applies to selection of supervisors to supervise the staff in the bargaining unit.

For example, if the bargaining unit is composed only of police officers and not sergeants, then the city is prohibited from bargaining over the selection of supervisors (police sergeants). However, if the unit is composed of police sergeants, then the city is not prohibited from bargaining over the selection of police sergeants.

In the area of retirement benefits, Minnesota law generally precludes cities from making contributions to retirement plans other than the mandated state plan (i.e., the Public Employees Retirement Association or “PERA” plan). However, there are some exceptions to this, including matching contributions to deferred compensation and post-employment health care savings plans (see the section Permissible above).

e. Mixed mandatory and management rights: subjects of bargaining

A significant number of subjects require careful review before they are negotiated by a city. Courts have struggled with the concept of what is a mandatory term and condition of employment and what is a management right in certain areas. The result of this struggle is a “gray” area called a “mixed subject of bargaining.” Because of the complexity of this area, a city should always contact a labor professional before bargaining in this area.

RELEVANT LINKS:

Teamsters v. City of Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975).

St. Paul Firefighter Local 21 v. City of St. Paul, 336 N.W.2d 301 (1983).

LELS v. City of Luverne, 463 N.W.2d 546 (Minn. App. 1990).

IUOE, Local No. 49 v. City of Minneapolis, 305 Minn. 364, 233 N.W.2d 748 (1975).

West St. Paul, v. LELS, 481 N.W.2d 31 (Minn. 1992).

Oglivie v. Indep. Sch. Dist. No. 341, 329 N.W.2d 555 (Minn. 1983).

Minneapolis Fed. of Teachers v. Minneapolis Special Sch. Dist. No. 1, 258 N.W.2d 802 (Minn.1977).
Matter of LELS, Inc., 414 N.W.2d 452 (Minn. App. 1987).

Lipka v. Minn. School Emp. Assoc., 537 N.W.2d 624 (Minn. App. 1995).

As a general matter, courts will lean toward declaring an issue a mandatory subject of bargaining rather than a management right when there is uncertainty.

Mixed subjects of bargaining most often occur where a city has the management right to create a policy but implementing it may be a mandatory subject of bargaining.

In the event a city creates a policy as a management right but implementation of the policy is severable from creating the policy, then the implementation of the policy is subject to mandatory bargaining to the extent that negotiation is not likely to hamper the employer's direction of its functions and objectives. Examples of this include the following:

- Deciding to establish a training program is a management right, but implementing it is a mandatory subject of bargaining.
- Formulating a physical examination policy is a management right, but implementing it is a mandatory subject of bargaining.
- Deciding whether to give competitive examinations is a management right, but certain aspects of the implementation of this policy are a mandatory subject of bargaining.
- A decision to establish a police ride-along program is generally a managerial right. If the ride-along program is for police trainees, then it is also a matter of inherent managerial policy. If the ride-along program involves explorer scouts or community volunteer groups, then implementation may be a mandatory subject of bargaining.
- The decision to assign a vocational agriculture teacher to teach part-time in an adjacent school district pursuant to a joint powers agreement is one of inherent managerial authority and not subject to negotiation. In contrast, the adoption of criteria by which individual teachers are identified for the assignment, like the intra-district transfer of teachers, is a proper subject for negotiation.
- The issue of transferring employees has been a troublesome issue for the courts. While selection of personnel is listed as a matter of inherent managerial policy, courts have not consistently included transfers as part of a city's right to select employees. It appears a city may decide that transfers are necessary without consulting with a union.

Nevertheless, a city needs to have a procedure in place to identify the employees to be transferred. A city needs to negotiate with a union on this procedure. In this instance, when the transfer occurs a union may only contest whether the proper procedure was followed.

RELEVANT LINKS:

Educ. MN-Aitkin v. ISD No. 1, No. A05-1061 (Minn. Ct. App. April 25, 2006) (unpublished decision).

General Drivers Union Local 346 v. ISD 704, Proctor School Board, 283 N.W.2d 524 (1979).

Independent Sch. Dist. No. 88, New Ulm v. School Service Employees Union Local 284, 503 N.W.2d 104 (Minn. 1993).

City of Baxter v. AFSCME No. 65, No. A07-2234 (Minn. Ct. App. Dec. 16, 2008) (unpublished decision).

LELS v. Sherburne County, 695 N.W.2d 630 (Minn. App. 2005).

LELS v. County of Hennepin, 449 N.W.2d 725 (Minn. 1990).

This management right also exists where the union contract does not detail criteria for the transfer, does not result in demotion, and is not used as a pretext for discipline.

- In the absence of any language in a union contract specifically permitting subcontracting, whether or not an employee's job will be terminated so the same function can be performed by a nonunit employee is a subject contemplated for negotiation as a term and condition of employment. Good-faith negotiations require sufficient notice of decisions pertaining to the terms and conditions be given by the employer to the employee. A union is entitled to notice that a subcontracting decision has been made, or one is imminent, before that decision is implemented. In the event the decision to subcontract is finalized, the effects of that decision, including such topics as severance pay and pension, may well be proper subjects for negotiation. In other words, even where a union contract specifically includes language allowing subcontracting, a city is still required to negotiate over the effects of the subcontracting. This is referred to as impact bargaining. This is also an area where arbitrators and courts will look closely to determine if the city has waived its subcontracting rights.
- The decision to drug test safety-sensitive positions on a random basis is a management right, but implementation of some areas is a mandatory subject of bargaining.

The most complex area occurs where the mere act of creating the policy also implements the policy. For example, in Hennepin County the sheriff created a grooming policy that included restrictions on hair length and fingernail length. The Minnesota Supreme Court said because the decision to create the grooming policy and its implementation were so linked together that negotiation of one would by necessity include negotiation of the other, the policy decision was not subject to mandatory bargaining. This is why this issue is included as a management right.

5. Negotiating wages and benefits

a. Considerations in wage and benefit negotiations

(1) Internal equity

Internal equity should be the city's primary goal in labor negotiations both in terms of compensation and benefits. Internal equity is often the key to maintaining employee morale. For cities wishing to maintain nonunion work forces or segments of the work force, this is important because it provides an incentive for nonunion employees to remain nonunion.

RELEVANT LINKS:

[Minn. Stat. §§ 471.991-999.](#)

If unionized groups do not obtain wages greater than nonunion employees, there is less incentive to organize.

One important area cities must take into consideration in negotiations (and present to an arbitrator if necessary) is the impact of any wage position on the city's obligation to maintain pay equity, as that term is defined under the law. A city should not negotiate any increase that will take it out of pay equity compliance.

Internal equity is also a key consideration in the event an essential employee group that has access to interest arbitration uses that process to address compensation issues.

If the city is bargaining with an essential unit, an arbitrator may ultimately be the one to decide the issue using the city's and the union's positions on the contract provisions, including wages and benefits. The arbitrator will likely look closely at internal comparisons to see if the city and the union are being fair with its offer of wages and benefits. The arbitrator will look at other unionized groups whose wages have been established for the contract period.

Therefore, the city's position will be strengthened substantially if there is a "pattern" set; e.g., most union groups have already settled their contracts for the same amount being offered. Arbitrators typically do not place much weight on nonunion increases or changes.

(2) External comparables

[Minn. Stat. § 471.993, subd. 1.](#)

The amount of pay and benefits provided in comparable cities and other entities should also be considered as a key element of negotiations. This is an element that must be considered as part of the city's pay equity obligation. Cities should look to see if what it pays its employees bears a reasonable relationship with external comparables.

In addition, external comparables are traditionally considered because of their potential impact on retention and recruitment. Failure to pay competitive wages and benefits as compared to another market with the same labor needs leads to the loss of qualified employees. It is for this reason that external comparables are also given primary consideration by arbitrators when resolving disputes over essential employee pay issues. Unions and cities often spend a considerable time during negotiations discussing what are comparable jurisdictions and wages. Accordingly, a city should have performed an advance review of this issue before starting negotiations.

RELEVANT LINKS:

[LMC Salary & Benefits Survey.](#)

A city's position within the external market comparables involves at least two inquiries. The first is defining a "comparable" external market. Factors such as population, tax capacity, geographic location, and types of services provided are generally considered.

For example, a truck driver may have a comparable counterpart in the private sector whereas a police officer does not have a private sector comparable. A city will need to decide the most relevant comparable external market.

The second inquiry is determining the city's appropriate position within that external market. Typically a comparable market will consist of several other cities. Not all of the cities in this market will have the same pay. One consideration is the average pay in that external market. Unions representing employees in cities paying higher than the average will not seek to have the employee pay reduced to the average. Under this inquiry, a city will need to identify and decide where in the range of the comparable market it exists or should exist. If a city has traditionally ranked fifth of 12 cities in a recognized external market, the city may view that as its appropriate position and negotiate recognizing that position.

The League of Minnesota Cities offers a free salary and benefits online survey to member cities if they participate in the survey by providing their data. This data can be sorted by geographics, population, budget, or a "custom cut" of cities.

(3) City ability to efficiently manage and conduct their operations

A key element of negotiations involves the city's ability to efficiently manage and conduct their operations. This factor used to be simply noted as the city's interest or ability (sometimes both) to pay for increases to wages and benefits. This is a complex policy decision based on both current financial data and projections into the future.

Projection of the city's ability to efficiently manage and conduct their operations is often required where the parties are negotiating a multiyear agreement.

Cities should recognize there is a difference in the "ability to pay" and a city's "willingness to pay." The first consideration is most often used by arbitrators in interest arbitration, but is now viewed within the broader context of the city's ability to efficiently manage and conduct their operations. Valid areas to explore include: will payment of the amounts in dispute jeopardize a city's financial status or create inefficiencies in managing and conducting operations?

RELEVANT LINKS:

[Minn. Stat. § 179A.16, subd. 7.](#)

[State Budget Deficit and County Unreserved Fund Balances.](#)

Arbitrators typically will not provide great weight to a city's blanket statements about willingness to pay.

Arbitrators are required to consider a city's statutory rights and obligations to efficiently manage and conduct their operations within the legal limitations surrounding the financing of those operations. One example of evidence in support of this consideration is a large cut in local government aid. The city will need to show the amounts in dispute will harm a city's financial status or result in negative consequences to its citizens.

It is important to remember arbitrators may make wage awards and note a city may utilize layoffs or other staffing management rights if a city determines it cannot afford the result at current staffing levels, as long as the arbitrator determines it does not affect the city's ability to efficiently manage and conduct their operations. Arbitrators typically will not provide great weight to a city's willingness to pay without a very strong argument from the city. Some options include showing efforts the city has already taken to reduce costs such as layoffs or other budget cuts; explaining how the city's reserves will be used and why the city maintains certain levels; and demonstrating the current economic conditions of the city's residents.

The city should note that its financial argument will be given considerably less weight if it has undesignated fund balances in excess of that recommended by the state auditor.

In reviewing ability to pay, unions typically focus on the amount of money a city holds in reserves. This is particularly true if the reserve is not designated for a specific use. If this is a substantial amount, a union will simply point it out and note the city can pay for any increase out of reserves. Cities usually counter with their responsibility to maintain a reasonable level of reserves. The state auditor's position paper on this which details a city's appropriate reserves is typically given considerable weight in this argument.

(4) Inflation and cost of living

A fourth consideration is what effect the economy has on an employee. Most negotiations start with the union premise that an employee should be increasing their compensation at a level necessary to maintain (if not advance) their standard of living. This involves consideration of inflation. A statistic often used in this area is the change in the Consumer Price Index. This issue is most often associated with pay increases and is less applicable to negotiating benefits.

RELEVANT LINKS:

[29 U.S.C. § 207 \(b\).](#)

[29 C.F.R. §207 \(b\).](#)

6. Overtime pay

Overtime pay and the ability to work overtime is often addressed in union contracts both in terms of assignment and the amount of pay. As noted in the model contracts, maintaining management discretion to assign overtime should be a city's primary goal. The ability to require employees to work overtime is a primary city interest. In contrast, unions may seek to have overtime distributed based on seniority or "on an equal basis." While such an approach sounds reasonable, it can be difficult for the city's supervisors to manage. For example, if a maintenance crew is out working on a water main break at the end of a work day, it may not be very efficient to have to stop that crew's work and find the most senior crew members to finish the job just so they can earn overtime.

In regard to pay for overtime, the federal Fair Labor Standards Act (FLSA) governs overtime earning and usage for most city employees. Union contracts may not establish overtime payments less than the FLSA, but they may negotiate benefits beyond that required by law. For example, an employee cannot negotiate away their right to receive time and one-half overtime after 40 hours in a work week if they are legally entitled to receive it. In contrast, the FLSA does not prohibit a union contract from paying double time rather than time and one-half.

Common overtime provisions the union will seek to add include double time on Sundays and holidays. In addition, cities and unions often detail the operation of compensatory time-off programs providing time off rather than overtime payments in the union contract, including many aspects of how it will be earned and used.

Some issues associated with overtime can only be negotiated with union groups. For example, only union employees are allowed to negotiate certain approaches to scheduling allowing greater flexibility with overtime. These are called 1040 and 2080 Plans. These plans are not commonly used by cities—partially because they require union consent and partially because they present difficult bookkeeping and payroll problems. These 1040 and 2080 plans do present an option for city operated dispatch centers as dispatchers do not qualify for the traditional public safety overtime rules.

7. Other benefits

a. Court time

Police contracts often contain provisions specifying police officers earn a minimum amount of paid time for their court appearances which occur off duty.

RELEVANT LINKS:

U.S. Dep't of Labor: [FLSA Hours Worked Advisor](#).

The League's model union contract for police contains preferred language on this issue (see links at beginning of this chapter).

b. Call back time

Union employees sometimes have a contract provision specifying a minimum amount of paid time they will receive if they are "called back" to work after completing their shift. This is usually referred to as "call back time." Issues related to negotiating call back time usually focus on the amount of the pay, and whether it is paid when the employee is required to report to a previously assigned shift early or to stay at the conclusion of an assigned shift (also called early reports or extension of shifts). Call back time often also implicates overtime in that a full-time employee who is called back to work in addition to their regularly scheduled shifts may also meet the definition of working overtime hours. In instances where an employee can address the issue simply by taking a telephone call rather than physically reporting for duty as a designated location, the amount of that limited call back time (if any) is also a common negotiation issue. Call back time differs from "on-call" pay in that call back time applies when the employee is actually "called" to duty.

c. On-call/standby pay

On-call pay (also called standby pay) is extra compensation employees are given in return for being "available" to respond to emergencies. "Restrictive" on-call or standby pay may require the payment of a minimum wage under the federal FLSA and also may trigger the on-call hours be counted as work time for purposes of overtime pay. The FLSA has detailed requirements about what is "restrictive" on-call pay, and the key determination is the extent to which an employee can engage in personal activities during the period they are on call.

In contrast, less restrictive on-call or standby pay can be flexibly established in negotiations such as by a set dollar amount (e.g., \$100 for one weekend) or a minimum number of paid hours (e.g., two hours at time and one-half pay). If the city does grant the on-call/standby pay, the amount granted must be added to the base pay of the employee in any week in which it is earned before overtime hours are calculated.

8. Work schedules

The most important portion of a union contract aside from the management rights clause is retaining a city's right to assign work. Management rights to schedule work and assign employees is one of the most commonly waived management rights during negotiations.

RELEVANT LINKS:

The League's model union contracts provide preferred language to define work schedules for union employees. The city should be careful to include language reserving its right to determine work schedules and hours and not to guarantee a certain number of hours to bargaining unit employees.

9. Safety

While the city will want to promote and provide a safe work environment for all its employees, it should reserve its right to determine what safety measures it will take and not include any specific provisions on safety in the union contract. One approach is to agree to a safety committee within the provisions of the union contract so employees have a method to bring safety issues to the attention of management. However, the city should maintain its right to make final determinations on safety practices.

10. Seniority

Seniority is one of the most important elements of a union contract from the union's perspective. The ability to grant preferred work status, pay, and benefits is a primary goal of the union in negotiations.

Unions will seek to have seniority apply in situations related to layoff, as well as the opportunity for advancement or work assignments (on the last issue this is true only to the extent the city has bargained away its management right to assign work). Time with the employer will also typically form the basis for unions to seek enhanced pay for senior employees (such as longevity payments) and additional paid leave accruals based on years of service.

Seniority issues in union contract negotiations often start with a discussion about how seniority will be calculated. Seniority may be calculated based on length of service with the city, length of service in the department, length of service in the bargaining unit, or some other measure. Unions may seek to have different seniority definitions apply in different settings.

For example, a union may seek to have seniority for purposes of wages and benefits accrual to be based on length of service with the city, but to have seniority for purposes of layoff to be determined by length of service within the particular bargaining unit. The League's model union contracts contain provisions on this issue.

a. Layoffs

Union contract negotiations will almost certainly address the impact of seniority in a city's ability to lay off employees (also called a reduction in force).

RELEVANT LINKS:

While unions typically seek to have seniority control in all instances of a reduction in force or layoff, cities often seek to place some limitations on when seniority will be the controlling factor.

For example, where the bargaining unit includes more than one classification, application of bargaining unit seniority as the sole layoff criteria may require an employee in one classification with more bargaining unit seniority to displace (or bump) another employee in another classification, despite the fact that the employee bumping into the position may never have served in that classification or may not be qualified to perform the work in that classification.

Because of the unique requirements of certain jobs, cities may wish to seek to have seniority be one, rather than the sole, determining factor. Having layoffs occur by job classification is a common approach to limit the impact of a seniority-based layoff system. Cities will also often negotiate clauses requiring the more senior employee to have worked in the prior classification in order to be eligible to “bump” a less senior employee and to have the immediate ability to perform all of the work in that classification.

Application of seniority in layoff situations may create the right to bump other existing employees. This often requires a chain reaction in which the employee to be bumped seeks to bump a less senior employee. It is important in labor negotiations to discuss this potential chain reaction and the application of bumping rights in a layoff situation. Some policies or union contracts may specifically permit employees with more seniority to “bump” employees in equal or lower job classes and assume their jobs to avoid being laid off. It is more common, however, to find layoff language specifying layoffs will be done according to seniority within a job class. This by itself would not give employees “bumping rights.”

Another area commonly noted in layoff sections is the existence of a recall list of laid-off employees. Typical negotiation issues deal with the ability to have these employees reinstated when there is a job vacancy, and how long an employee may remain on a recall list before their employment is terminated.

While most union contracts contain language allowing the city to lay off staff as necessary, there may be some instances where the city is required to negotiate with the union on the impact of those layoffs. For example, where an individual is laid off based on seasonal needs and there is a reasonable expectation of recall, the employee’s accrued leave banks may reasonably stay in place without the need to engage in negotiations.

RELEVANT LINKS:

[Minn. Stat. § 179A.07, subd. 1.](#)

[Independent Sch. Dist. No. 88 v. School Serv. Employees Union, Local 284](#), 503 N.W.2d 104 (Minn. 1993).

[Minn. Stat. § 471.59.](#)

In contrast, where an individual or group of individuals is laid off because the work has been discontinued and there is little likelihood the employee will be returned to work with the city, the city and the union may negotiate over the “effects” of the layoff.

In this instance, the parties may recognize that recall is not a viable option and may treat the lay off as a termination of employment for severance payment purposes.

b. Selection preference

Unions also commonly seek to include a provision in a union contract seeking to have seniority govern the ability of an employee to obtain job advancement such as a promotion. Cities need to carefully review (and should generally avoid including clauses requiring) a promotion to be filled by seniority rather than by qualification using an open process.

c. Subcontracting

Ideally, a city will be able to negotiate a clause into its management rights section specifically preserving its right to subcontract work performed by bargaining unit members during the term of the union contract.

Simply put, subcontracting is the act of replacing employees with nonemployees (contractors) to perform the same work.

The need for this language is based on the complexity of subcontracting where the city’s express authority to contract out work is not detailed. Where there is no express language permitting contracting out, the decision to contract out is an inherent managerial right, unless there is contrary or limiting language in the union contract. However, the effects of contracting out bargaining unit work are typically subject to negotiation and arbitration.

For example, a city may want to subcontract services it currently performs if there are potential cost savings by doing so (e.g., some cities are looking into contracting police services with the county instead of providing their own police protection). If the city does not negotiate to impasse the effects of a contracting-out decision, it will probably be limited in its ability to subcontract during the term of the contract. An arbitrator may rule in favor of allowing subcontracting during a contract period if:

- The action is performed in good faith.
- It represents a reasonable business decision.
- It does not result in the subversion of the labor agreement.

RELEVANT LINKS:

[Minn. Stat. § 179A.15.](#)

[Minn. Stat. § 179A.04 subd. 3.](#)

See Section IV-D, *Initiating interest arbitration.*

See Section IV-F, *Strikes.*

See Section IV-G, *Implementation of City's Final Offer.*

[Minn. Stat § 179A.04.](#)

Bureau of Mediation Services
1380 Energy Lane, Suite 2
St. Paul, MN 55108
651. 649.5421.
[BMS website.](#)

- It does not have the effect of seriously weakening the bargaining unit or important parts of it.

Only very small-scale subcontracting of bargaining unit jobs is likely to meet all four of these provisions.

If the city wants to subcontract, it needs to notify the union it is considering this option (prior to formally making the decision to contract out) and allow the union to negotiate over the effects of that decision (e.g., severance pay and retirement benefits).

If the city and union do not agree on these “effects,” a formal impasse should be obtained and declared before moving ahead with the subcontract. Risks of failure of party agreement may include a strike over the issue. The bottom line is the city should consult with a labor attorney before making any decisions on the subcontracting issue.

C. Mediation: the next step if parties do not reach agreement in negotiations

Sometimes the city and the union will not be able to reach agreement on a new contract through direct negotiations. The next step in the negotiation process where the parties are unable to reach agreement is mediation.

Mediation is a statutorily provided tool by which parties that have reached a stalemate in negotiations can obtain the services of a state mediator to assist in working through the stalemate.

The mediator works for the Bureau of Mediation Services. Employers and unions are statutorily required to participate when summoned to mediation by the Bureau of Mediation Services.

Another purpose of mediation is to determine when the parties have come to an impasse (the point in time where the parties are unable to reach an agreement). If the parties reach impasse and the group is defined as nonessential, the employees may go on strike. Conversely, the city may implement its last best offer or the parties may simply continue the status quo but no longer meet. In contrast, essential employee groups may not strike. Rather, unresolved disputes following mediation will be referred to interest arbitration.

The BMS describes mediation as meeting to help the parties find a basis for resolving the dispute on terms acceptable to both parties. This is a continuation of the negotiation process; it is not binding like arbitration. The mediator examines and analyzes positions and interests to ensure both parties have a clear understanding of the issues.

RELEVANT LINKS:

[Minn. Stat. § 179A.20, subd. 6.](#)

[BMS Petition for Mediation Services.](#)

[Minn. R. § 5510.2810.](#)

[Minn. Stat. § 179A.15.](#)

[Minn. R. § 5510.2810, subp. 5.](#)

The mediator will attempt to identify priorities and focus the parties' efforts on problems that must be solved for an agreement.

The mediator works to foster an atmosphere conducive to idea sharing and problem solving. Ultimate decision making in mediation is left to the parties. The mediator will not impose a settlement on the parties.

In the event this results in the negotiations continuing beyond the duration of the contract, the union contract terms basically stay in effect. In this case, the existing union contract for nonessential employees stays in effect until "the right to strike matures," which is 10 days after the union has filed a notice of intent to strike with the city and with the commissioner of BMS. In contrast, for essential employee groups, the contract continues until a new contract is agreed to or established by arbitration.

1. Initiating mediation

Either the city or the union can petition the BMS for mediation. The BMS also may mediate even if a petition has not been filed. Typically, the BMS will assign one of their staff mediators to schedule an appointment with the union and the city to meet and discuss their differences. The petition must be submitted to the commissioner in writing and the petition must state briefly the nature of the disagreement of the parties in the space provided.

Generally the stated nature of the dispute is "wages and terms and conditions of employment."

Upon receipt of the petition for mediation, the BMS will assign a mediator to the case. Subject to availability, the parties may request a mediator they have worked with in the past. The mediator will generally contact the representatives listed on the petition and set up a date for the mediation. This may occur in one (sometimes long) meeting or over several meetings, depending on how many issues there are to resolve and the complexity of those issues.

2. Parties' obligations and meeting etiquette

The primary obligation of the city is to come to the mediation meeting or meetings with good-faith intent to attempt to resolve the issues. The parties are statutorily required to respond to the summons of the BMS commissioner to attend the mediation. The parties are also statutorily required to continue in conference until excused by the mediator.

The parties must be represented by persons having the authority to negotiate in good faith, and must be prepared to identify unresolved issues and their positions regarding such issues.

RELEVANT LINKS:

However, there may be times when the city's best interests are to hold firm on one or more positions for fiscal reasons or because of the need to maintain a crucial management right. In this case, the city's obligation is to listen carefully to any proposals put forth by the mediator to see if there is any possibility of compromise.

Good-faith intent does not mean the city must agree to all (or any) of the mediator's proposals for settling the disputed issues. The mediator cannot substantively decide to resolve a dispute. The mediator's control is primarily related to process. The parties are not permitted to leave mediation unless excused by the mediator.

3. Location and setting: be ready for the long haul

It is often the case the mediation meeting(s) will be held at the city's facilities. Where the mediator determines there is a need to meet off site to be more productive, such as to avoid outside distractions, mediation may also occur at the BMS offices in St. Paul or some other site.

Depending on the number and complexity of the issues involved, the city may need to be prepared for a long meeting. Mediation, particularly the initial meeting, often occurs with the parties together for the initial presentation of issues before moving into separate rooms.

Accordingly, the city should make arrangements for a meeting room large enough for both parties to meet along with a second room for one of the parties to use when the groups separate.

In an effort to keep the mediation on an equal footing, the mediator will seek to change the location of mediation in the council chambers if the result is the city representatives sit above the union. A round meeting table or grouping of tables set up in a rectangle is preferred by the mediator.

Because of the potential for a long meeting, the city representatives should consider any health-related issues (for example, diabetics may need access to food) prior to the meeting. If the parties will need to take short breaks, including a formal break for lunch, this need should be communicated to the mediator prior to the mediation. Otherwise, the mediator will commonly release one side for lunch while the other side is working on a proposal or counter proposal. Accordingly, the city may wish to stock up on coffee, water, or snacks for the breakout portions of the mediation. Another tip to consider is avoiding sugar-based products as snacks or meal substitutes. While the boost of energy may be initially helpful, the later "sugar crash" in a long meeting may be counterproductive.

The use of recording devices, stenographic records, or other recording methods is prohibited in mediation meetings.

[Minn. R. § 5510.2810, subp. 5.](#)

RELEVANT LINKS:

Minn. Stat. § 179A.14, subd. 3.
Minn. R. § 5510.2810, subp. 5a.

While a mediation is generally a meeting open to the public, the mediator (acting as a representative of the BMS commissioner) may close a mediation meeting to the public when the mediator determines that closing the meeting will facilitate resolution of the dispute. Mediators commonly will close a meeting in the event more individuals than the parties are in attendance.

The mediator may close a mediation prior to its start or at any time during the meeting.

In addition, when the commissioner determines it is in the interest of resolution of a dispute, the commissioner may authorize a closed meeting of the public employer's governing body for the purpose of review and discussion of the status of negotiations and the employer's positions. No closed meeting may be authorized when the commissioner or a representative of the commissioner is not physically present at the meeting, unless the BMS has received a timely and valid notice of intent to strike.

4. Mediator is boss (to some extent)

The mediator supplied by the BMS should be considered the "boss" to some extent.

He or she will direct the way the meeting will be held, but is usually open to input from the participants. The mediator's job is to try to find methods to settle the issues between the two parties, and each mediator has their own methods or preferred approach for accomplishing this.

As a general rule, the city should comply with the mediator's requests, unless there is some compelling reason not to comply.

The mediator is "neutral" and will generally not take sides on any issue. In order to ensure neutrality, a mediator may not be called to testify regarding what occurred at a mediation session; for example, regarding a union negotiator's attitude during negotiations. A mediator's notes are not available for later use by the parties.

A mediator will generally attempt to persuade both sides to compromise and/or "give in" on an issue when appropriate. The mediator may disclose information about either party's chances of "winning" in arbitration for essential employee groups. It is not appropriate, however, for a mediator, to threaten either side in any way if they do not choose to compromise on an issue. As noted above, the mediator cannot "decide" any issue. The mediator's role is as a facilitator rather than a decision maker. The mediator's primary authority is that the parties must remain in a mediation session or sessions until excused by the mediator.

Sonenstahl v. LELS, Inc., 372 N.W.2d 1 (Minn. App. 1985).

RELEVANT LINKS:

Independent Sch. Dist. No. 88, New Ulm v. School Service Employees Union Local 284, 503 N.W.2d 104 (Minn. 1993).

Minn. Stat. § 179A.16, subd. 2.

One area where a mediator does wield considerable authority relates to declaring an impasse. Under labor law, a city cannot unilaterally implement its final offer to nonessential employee groups until the parties have reached impasse. Employees can strike without the mediator making a determination about impasse provided they meet the preconditions (such as participating in mediation for a certain period of time and providing the required notice) to a strike. This means a city cannot simply implement a final offer in the event its employees go on strike.

For essential employees, the mediator will have the authority to certify which issues may be submitted to interest arbitration. This will consist of those issues where the mediator has determined that both parties have made substantial, good-faith bargaining efforts and an impasse has occurred. A city or a union may not submit issues to interest arbitration unless they have been certified by the BMS (through the mediator).

When a city is involved in mediation, the mediator is the party controlling the process, and the city may not unilaterally discontinue mediation or declare an impasse while mediation is continuing.

5. Identifying areas of disagreement

Unless the relationship between the parties is one of particular animosity, the initial portion of the mediation will generally occur with both parties in the same room. During this portion of the mediation, the mediator will start by having the parties that are present sign an attendance sheet and then explain the mediation process.

The mediator will ask the parties to identify the issues in dispute. A good practice is for the city to make a copy of the union contract available to the arbitrator so the city and the mediator may reference it during the course of the mediation. It is also very helpful if the city provides a written statement of the issues in dispute from the city's perspective. This is particularly important in mediation involving essential employee groups.

As noted above, one of the duties of the mediator is to list those issues that may be certified to arbitration. Cities should have their city attorney or labor relations professional review the issues to be certified to make sure none of the issues falls outside of the scope of wages and terms and conditions of employment. Listing an issue that is a management right may result in that management right being considered waived for purposes of a later arbitration.

A mediator will generally limit the issues to be discussed in mediation to those noted or listed in the initial mediation session. This is done in an effort to identify and then resolve the listed issues rather than permit the dispute to be broadened.

RELEVANT LINKS:

It is also recommended this portion of the meeting be limited to a presentation of “open” issues rather than as a forum for engaging in argument. The mediator may ask for a brief statement of the city’s rationale on each issue or may simply want to have the issue identified.

6. Separation of the parties

As noted above, most mediators will start the process with the parties in the same room. The general preference of most mediators is to separate the parties following this introductory portion of the mediation into separate rooms. The mediator will typically start in the room with the party that filed for mediation (typically the union). The mediator will discuss the open issues and explore areas of potential compromise or mutual interest. The mediator will then go to the room where the other party is located and engage in the same type of discussion. This is often called shuttle diplomacy. This will allow the mediator to identify whether there are some areas where agreement may be reached or at least where the dispute may be narrowed.

Having these discussions occur in separate rooms can allow a more open discussion without the need for posturing.

7. Exchanging proposals

After the initial discussion, any of the parties (including the mediator) can put forward proposals to settle the issues under discussion. Again, this can be done with all of the parties in the same room or through the mediator traveling back and forth between the rooms to discuss proposals.

The exchange of proposals can occur in many different formats. Typically, the mediator will find out which party’s “turn” it is to present a proposal immediately prior to mediation and have that party respond to the other party in the initial mediation proposal exchange. This response can be in writing or oral, depending on the mediator’s wishes. The mediator will also determine whether the response should be presented by the party (which is often the case) or delivered by the mediator (usually limited to cases where the parties are in an antagonistic relationship). This level of mediation is similar to negotiations, except the mediator is available to assist in putting together the proposal or to “bounce ideas” off of in putting together the proposals. These exchanges can occur over the course of the entire mediation.

Where the exchange of proposals is not productive or fruitful, the mediator may try alternate methods to identify potential areas of agreement.

RELEVANT LINKS:

One method is to have the chief spokesperson for the city and the chief spokesperson for the union meet together outside the rooms where the negotiating teams are present. This is a preferred method where members of the negotiating team other than the chief spokesperson are contentious or otherwise providing a block to effective discussion. This is also a very common technique where the chief spokesperson for each side is a labor relations professional.

Another method is for the mediator to listen to both sides as they exchange proposals and then put together what the mediator views as a potential resolution to all of the disputed items. This is commonly called a mediator's proposal. The advantage to such a proposal is it allows the neutral person with access to both rooms to identify those areas of importance to both parties and attempt to fashion an acceptable resolution. The disadvantage is rejection of the mediator's proposal limits the ability of the mediator to use the same technique later in the process.

A third method is for the mediator to present a "what if" scenario. In this instance, the mediator will identify what a party would possibly be willing to accept as a compromise and, with that party's permission, verbally present that potential compromise to the other party to see if it is acceptable to the other party.

In putting together proposals involving multiple issues, mediation will also deal with potential "packaging" of issues. In this scenario, one party will put together a proposal that must be accepted or rejected as one proposal. This differs from the exchange of separate and unconnected proposals on each issue.

Ultimately, through these various exchanges and discussions, the parties will either reach agreement or the mediator will agree the parties have reached an impasse.

Generally, impasse is the point in time where the parties are unable to reach an agreement. It is a factual determination including consideration of whether the parties have negotiated in good faith, the length of time negotiations have taken place, the history of negotiations, the nature and importance of the issues left in dispute, and the positions taken by the parties.

If the parties reach impasse and the group is defined as nonessential, the employees may go on strike by following the prerequisites of a strike (discussed below) if they are not already on strike. Conversely, the city may implement its last best offer (discussed below). A third option is for the parties to simply continue the status quo but no longer meet. Unions may find themselves in this position if the membership does not accept the results of negotiations yet does not authorize a strike.

RELEVANT LINKS:

Continuing the status quo with an expired contract typically means simply continuing to operate under the terms and conditions of the expired contract.

In contrast, essential employee groups may not strike. Rather, unresolved disputes following mediation will be referred to interest arbitration (discussed below).

8. Decision makers should be present

Both the city and the union should have the persons who can make decisions about proposals either in the room during mediation or readily available. However, the city does not need to have the entire city council available; the lead negotiator for the city can make agreements but still specify they are subject to city council approval. However, the city's lead negotiator should not agree on compromises he or she knows will not be approved by the council.

D. Initiating interest arbitration

Cities should be very cautious in proceeding to interest arbitration without obtaining the advice of their city attorney or labor relations professional at the earliest stages of the proceedings. The potential waiver of management rights at the certification stage and the complexity of presenting economic and wage issues presents a potential trap for the inexperienced city representative even when that representative is experienced in labor negotiations.

1. Essential employees

An exclusive representative or city may petition for binding interest arbitration involving an essential employee bargaining unit by filing a written request with the other party and the commissioner. This written request must specify the items the party wishes to submit to binding arbitration. Within 15 days of the request, the commissioner will determine whether further mediation would be appropriate. The commissioner will only certify matters to arbitration in cases where the commissioner believes that both parties have made substantial, good-faith bargaining efforts and an impasse has occurred.

The initial observation many cities have about mandatory interest arbitration is it gives a third person (an arbitrator) who is not responsible to the general electorate the authority to exercise authority over wage and benefit levels. This decision could affect the amount of taxes a city requires of its citizens and should remain solely for a city's elected officials to determine.

[Minn. Stat. § 179A.16, subd. 2.](#)

[City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 \(Minn. 1979\).](#)

RELEVANT LINKS:

[Minn. Stat. § 179A.16, subd. 1.](#)

The Minnesota Supreme Court has upheld the statutory requirement that these disputes be submitted to interest arbitration.

2. Nonessential employees

The parties may mutually agree to use interest arbitration to resolve disputed wage issues and terms and conditions for nonessential employees. Both the issues to be decided in the arbitration and the type of interest arbitration are subject to mutual agreement for nonessential employee groups.

Either party may make a written request for interest arbitration to the BMS commissioner. The request for arbitration must specify the items to be submitted to arbitration and the type of arbitration. The three types of interest arbitration permissible under this section are the following: 1) conventional; 2) final offer, total package; or 3) final offer, item by item.

Conventional arbitration means the arbitrator considers each issue separately and is not required to award the final position of one of the parties. Under this option the arbitrator may make an award that differs from the final positions. For example, where a city's final position offers a 1 percent wage increase and the union's final position requests 5 percent, an arbitrator in conventional interest arbitration may award 3 percent or any other amount.

In contrast, final-offer, total-package arbitration means the arbitrator must consider all of the issues submitted by a party together and compare it with all of the issues submitted by the other party, and then award the final position of one party on all issues. In other words, the arbitrator must select the total package of one party. In this instance, the arbitrator may not deviate from the final positions offered by the parties, and may not award a city's final position on one issue and a union's final position on another issue.

Final-offer, item-by-item arbitration means the arbitrator must consider each issue separately, but must award one of the party's final positions on each issue. This differs from final-offer, total-package arbitration, because an arbitrator may award a city's position on one issue and a union's final position on a second issue. It differs from conventional arbitration, because the arbitrator may not deviate from the final position of either party when making an award.

If the parties reach an agreement to arbitrate, the agreement must be in writing and a copy must be sent to the commissioner. If the other party fails to respond or to reach agreement on the items for arbitration or the form of arbitration within 15 days after receiving the request, the commissioner will treat this as a rejection of the request.

RELEVANT LINKS:

[Minn. Stat. § 179A.16, subd. 3.](#)

[Minn. Stat. § 179A.16, subd. 9.](#)

[Minn. Stat. § 179A.16, subd. 4.](#)

3. Preparing final positions

The parties must submit their final positions on the items in dispute within 15 days from the time the BMS commissioner has certified a matter as ready for binding arbitration. Ideally, the city should be working with an experienced labor negotiator during mediation or at least consult with one prior to stating its final position. It is extremely important a city does not submit a final position on an issue that is a matter of inherent managerial policy (i.e., is not a term or condition of employment). The BMS will ask these final positions be submitted in the form of contract language.

If a party is not proposing any language on a term and condition of employment, common practice is to simply indicate “the city is not proposing to add any language on this issue.”

If a party is not proposing any change to existing language, the party may simply reproduce the existing text of the relevant contractual section or may simply indicate “the city is not proposing to amend the existing language on this issue.” From a practice perspective, it will aid the arbitrator and the BMS to understand the differences in the parties’ positions to indicate new proposed language and deletions proposed to existing language. The parties may stipulate items to be excluded from arbitration.

In the event the parties dispute whether an item should be submitted to binding arbitration, the BMS will determine the issues to be decided through mediation and the positions submitted by the parties during the mediation. One example of this dispute would occur when a union attempts to submit a final position on a matter of inherent managerial policy. Note that such a dispute may only arise for essential employee arbitrations, because nonessential employee issues may be arbitrated only by consent of the parties on each issue.

The arbitration statute contains a very limited application. It provides that nonessential employee groups and cities cannot agree to submit the issue of a city’s contribution toward retiree group insurance premiums to interest arbitration. In contrast, essential employees may submit the issue of a city’s contribution toward retiree group insurance premiums to interest arbitration.

4. Arbitrator selection

The parties will select an interest arbitrator who is on the BMS arbitration roster. There are two methods by which the parties may select an arbitrator.

RELEVANT LINKS:

[BMS Arbitration Awards.](#)
[LMC Arbitration summaries.](#)

The first is the parties may select an interest arbitrator that is on this list by mutual agreement. In this instance, the BMS will notify the arbitrator in writing.

Some unions and employers have “standing” lists of arbitrators they use rather than submitting the matter to the BMS seeking a list of arbitrators. As long as these arbitrators are also on the BMS arbitration roster, such a standing list and agreement of the parties is proper.

Usually the parties do not agree on an arbitrator to hear the dispute. In this instance, and the second way in which an arbitrator will be selected, the city or union will ask the BMS for a list of arbitrators. The BMS will mail a list of seven arbitrators to the parties within five working days of the request. The parties must select one name from the list by the process of elimination. (The parties can also select a three-arbitrator panel from the list, but due to cost considerations, these are quite rare). Each side alternatively strikes a name until one is left.

Parties who are unable to agree on whether the city or the union should strike the first name must resolve the dispute by a coin flip. In situations involving new parties working with each other or in instances where there is not mutual trust, such a coin flip is done in person. In situations in which there is a long-term relationship and mutual trust, coin flips may be done by phone. Another alternative is to have a union steward or other employee on site participate in the coin flip either as an observer with the business agent on the telephone or as a direct participant.

Most seasoned professionals require the losing party to strike the first name. When strikes are alternated, this results in the winning party having the selection between the final two names on the list.

The BMS website includes a library of arbitration awards going back to 2006. Cities should research the arbitrators on the list provided by the BMS to determine their preferred striking order based on an arbitrator’s tendencies in prior-related matters and their philosophical approach to making an award.

Once the arbitrator is selected, one or both of the parties will contact the arbitrator by letter to notify the arbitrator of their selection and ask the arbitrator for available dates to hear the case. The parties will then mutually select a date and time for the arbitration hearing. In instances where there are multiple or complex issues, the parties may need to seek more than one day for the hearing. The hearing must be held in the county where the city’s principal administrative offices are located unless the parties agree to another location. The parties will usually agree the hearing will be held at city hall.

RELEVANT LINKS:

[Minn. Stat. § 179A.16, subd. 5.](#)

[LELS v. City of Roseville, 393 N.W.2d 670 \(Minn. App. 1986\).](#)

[Minn. Stat. § 179A.16, subd. 6.](#)

The parties in arbitration must equally split the cost of the interest arbitrator. The arbitration roster at BMS also shows the fees that arbitrators charge.

This includes the obligation to pay cancellation fees if the arbitration is cancelled because of agreement of the parties, or if the parties must move the date of the arbitration within a certain identified period prior to the hearing.

5. Arbitrator jurisdiction

The arbitrator has authority over the disputed items certified by the BMS commissioner with one exception. The arbitrator does not have jurisdiction or authority to consider or decide any issue that is not a term and condition of employment unless the city included the matter in its final position. It does not matter whether the issue was certified by the BMS.

Any part of an arbitration decision that determines a matter is not a term and condition of employment and was not included in the city's final position is void and of no effect. In the event an arbitration decision violates, conflicts with, or causes a penalty to be incurred under state law or rules, charters, ordinances, or resolutions (provided that such rules, charters, ordinances, or resolutions are consistent with PELRA), it will not have any force or effect. The decision must be returned to the arbitrator. In this instance, the arbitrator must make the decision consistent with the laws, rules, charters, ordinances, or resolutions.

As noted above, it is important for a city to be cautious in this area because a matter is properly before an arbitrator if it is included in the employer's final position, even if the issue is not otherwise a term and condition of employment. For example, as noted in the discussion above in the section Topics of Bargaining—Management Rights, the organizational structure is a management right. In the event the union proposed to require a city to utilize a structure in which there was a division manager, this would not be a proper subject of negotiations unless such a management right was waived by a city. The union could not pursue this as an issue in arbitration unless the city did not object to including the issue. Even a city statement such as "any change to be based on relevant criteria" is sufficient to allow the arbitrator to issue an award on that issue.

6. Arbitrator powers prior to the hearing

Arbitrators have the authority to issue subpoenas to require witnesses to attend and testify and/or produce evidence. In other words, an arbitrator may order witnesses to attend a hearing in order to testify.

RELEVANT LINKS:

This is generally not a significant issue in interest arbitration where the parties generally have their own witnesses testify. It more typically applies where a union wants an on-duty employee to testify. In that instance, they may ask the city to make the employee available or may simply have that employee subpoenaed to attend.

An arbitrator may order witnesses to bring documents or other material with them that may be introduced into evidence. This may be done by a subpoena duces tecum (which is a command for an individual to appear and bring documents with them). In such an instance, the city representative will usually contact the union and determine whether the person actually needs to appear or whether the documents can simply be produced.

In the event the individual subpoenaed refuses to obey, the arbitrator may apply to the court for an order commanding the person to appear. Failure to obey this order may be punished by the court as contempt.

While unions frequently obtain subpoenas requiring the production of data for use in interest arbitration, it is also common for unions to utilize the provisions of the Data Practices Act to access relevant data. In addition, unions have special access to a city's present and proposed budgets, revenues, and other financing information.

7. The Interest arbitration hearing

The procedure and presentation in an interest arbitration hearing will be controlled by the arbitrator much to the same extent as a judge presides over a court case. The arbitrator has the power to administer oaths (i.e., swear in a witness). The arbitrator may question witnesses. A number of arbitrators are quite active in questioning witnesses. The arbitrator will rule on evidentiary objections and otherwise preserve order during the hearing.

Typically, the parties will submit a great deal of documentary evidence in interest arbitration. Witnesses tend to be limited to providing the history of existing language or to testifying about a factual situation illustrating the need for the language change that the party is seeking.

8. Standards typically used in the interest arbitration hearing

Arbitrators are required to consider the statutory rights and obligations of public employers to efficiently manage and conduct their operations within the legal limitations surrounding the financing of these operations.

[Minn. Stat. § 179A.16, subd. 6.](#)

[Minn. Stat. § 179A.16, subd. 7.](#)

RELEVANT LINKS:

[Minn. Stat. § 471.992, subd. 2.](#)

[Minn. Stat. § 471.993.](#)

Arbitrators are free to utilize any standards they wish in making an interest arbitration award. One of the key issues in preparing for interest arbitration (and in selecting an arbitrator as noted above) is to review prior interest arbitration awards issued by the arbitrator. That will allow the city to tailor its presentation to meet the arbitrator's preference or approach to issues.

9. Wage arguments: factors and burdens of proof

The legislature established pay equity standards which interest arbitrators must use when resolving wage and salary issues. In all interest arbitration involving a class that is either male or female dominated as that term is used in the pay equity statutes, the arbitrator shall consider the equitable compensation relationship standards established under Minn. Stat. § 471.992 and Minn. Stat. § 471.993 together with other standards appropriate to interest arbitration. The arbitrator shall consider both the results of a job evaluation study and any employee objections to the study.

In addition to equitable compensation relationships, the standard referred to above requires the arbitrator to consider the extent to which:

- Compensation for positions in classified civil service, unclassified civil service, and management bears reasonable relationship to one another.
- Compensation for positions bears reasonable relationship to similar positions outside of that particular political subdivision's employment.
- Compensation for positions within the employer's work force bears reasonable relationship among related job classes and among various levels within the same occupational group. Compensation for positions bears reasonable relationship to one another; compensation for positions which require comparable skill, effort, responsibility, working conditions, and other relevant work-related criteria is comparable; or compensation for positions which require differing skill, effort, responsibility, working conditions, and other relevant work-related criteria is proportional to the skill, effort, responsibility, working conditions, and other relevant work-related criteria required.

Within these considerations, arbitrators will typically review wage arguments by first reviewing the impact such an award will have on the city's pay equity. Therefore, a city should review both its wage proposal and the union's wage proposal for any impact on the city's pay equity compliance. Any party seeking to deviate from these principals carries a heavy burden to provide the need for the deviation.

In addition to pay equity compliance, arbitrators traditionally review any combination of four factors in determining wage rates:

RELEVANT LINKS:

[Minn. Stat. § 179A.16, subd 7.](#)

1) the city's statutory rights and obligations to efficiently manage and conduct their operations within the legal limitations surrounding the financing of those operations (formerly called the ability to pay the award as distinguished from the city's willingness to pay the award); 2) adjustments in the cost of living and other economic data; 3) internal wage comparisons; and 4) external wage comparisons.

The city's argument on their statutory rights and obligations to efficiently manage and conduct their operations within the legal limitations surrounding the financing of those operations (formerly called the ability to pay) typically focuses on the city's financial health. Unions typically focus on the amount of the city's undesignated fund balance in support of their argument. Accordingly, the city should review any argument in this area with its finance director or other professional to determine whether it should make such an argument.

The factor considering adjustments in the cost of living typically focuses on the change in the Consumer Price Index. Some arbitrators require this review occur over a period of years because of the volatility in this index from year to year. Comparing the general increases provided to the employee group as compared to the Consumer Price Index over a number of years is a common approach.

The internal equity factor shows the increases provided to the other represented employees at the city, if any.

Arbitrators will generally give a thorough consideration to internal equity if a city has a strong pattern of the same general increase. The impact of internal equity is magnified where the city can show there has been an internal pattern over prior years. In contrast, internal equity is not afforded as much weight where the other organized groups at the city have differing increases or there has not been a historical pattern of uniformity.

Internal equity is often focused on comparisons among represented groups at a city. Arbitrators are often reluctant to rely on general wage increases or freezes for nonunion employees as significant internal comparables for organized groups unless there is an adverse result under the pay equity laws. Unions typically argue, and arbitrators tend to agree, that nonunion employees have their wages established rather than negotiated and these nonunion employees lack the sort of bargaining power needed to establish a comparable to an organized group. Cities typically argue the arbitrator should place the greatest emphasis on this factor.

RELEVANT LINKS:

Minnesota School Employees Association and ISD No. 11, Coon Rapids, BMS Case No. 84-PN-52-A (Bognanno, 1984).

The external comparable factor is generally the factor given the greatest weight by the union in interest arbitration. In comparing wages to external comparables, the city will need to identify what are valid external comparables and be prepared to defend the validity of this chosen market in the interest arbitration. The city will also want to review whether it has a historical place within the external market and examine the impact of the city and union's proposed wage award on this position.

10. Language changes: factors and burdens of proof

In interest arbitration, new concepts are generally not favored. Negotiated changes to labor contracts are generally viewed as superior to arbitrated changes. Accordingly, arbitrators are reluctant to 1) strike down matters of tradition which have helped to frame the relationship between the parties; and 2) write innovative language designed to alter that relationship.

Based on this rationale, the party proposing the change has the burden to demonstrate there is a definite problem with the existing language and that its proposed change will effectively and efficiently resolve the problem.

This burden is to show the proposal is necessary and reasonable. In the alternative, the party can meet its burden by showing it provided a reasonable "trade" (also called a quid pro quo) for the change. Where both parties are seeking to change the same language, less deference is typically given to the existing language.

Arbitrators have also traditionally viewed their role in both language and wage awards as seeking to discover whether the proposed change would have resulted through negotiations were it not for the fact that the parties ended up in arbitration.

11. Preparation

Preparation for an interest arbitration hearing generally involves collecting the data the city will use to argue its case. Because of the wide variety of issues that may exist in interest arbitration, the materials that will need to be collected will differ significantly from case to case. The following is a sample checklist cities may want to consider:

- A copy of the city's current pay equity report.
- Reports showing the impact of the city and union wage positions on the city's pay equity compliance.
- Copies of the current union contract.
- Copies of other current city union contracts.
- Nonunion pay plans.
- Nonunion personnel policies.

RELEVANT LINKS:

- Budget information (if the city is making an ability to pay argument).
- Consumer Price Index data.
- Copies of union contracts from external comparable cities and jurisdictions.
- Prior interest arbitration or grievance arbitration awards which are relevant to the certified issues.
- Demographic data related to the external comparable market.
- Any materials relevant to the specific issues certified.

In determining whether witnesses will need to be called, the city will need to identify if factual occurrences will be relevant to the arbitration. For example, a finance director may be a valuable witness if the city's finances are at issue. A police chief may be valuable to explain the background on a uniform issue.

Cities will generally collect this information in a three-ring binder that will form the basis for the city's argument at the hearing and provide the reference for a post-hearing written argument.

12. The arbitration award

The interest arbitration award is final and binding on the parties. The decision must resolve the issues in dispute between the parties as submitted by the commissioner.

The arbitrator will issue a conventional arbitration award unless the parties agree in writing to a different type of award. The arbitrator may make an award differing from the final positions. Such an award is often between the city's position and the union's position.

In the event the parties agree in writing, the arbitrator will be restricted to selecting between the final offers of the parties on each impasse item, or the final offer of one or the other party in its entirety.

The arbitrator must issue an award within 30 days after the arbitration proceedings have concluded. An arbitrator may not request the parties waive this deadline unless the BMS commissioner grants an extension. An arbitrator not complying with the deadline will be removed from the arbitration roster for six months. The arbitrator will send a copy of the arbitration award to the BMS and the party representatives. The arbitrator will also report to the BMS if the parties voluntarily settle any issue before the arbitrator makes an award on the issue.

The parties may settle some or all issues prior to or after the interest arbitration decision that are different from or inconsistent with the arbitration award.

[Minn. Stat. § 179A.16, subd. 7.](#)

RELEVANT LINKS:

[Minn. Stat. § 572B.24.](#)

[Minn. Stat. § 572B.20 \(b\).](#)

[Minn. R. § 5530.0800.](#)

In the event a city and a union enter into such an agreement, it must be placed into the written union contract or memorandum of contract. In the event the parties resolve all issues prior to the arbitration hearing, they will be subject to any cancellation fee that may apply (the fees will typically be listed in the materials from the arbitrator).

A party may apply to the arbitrator to modify or correct an arbitration award in a limited number of circumstances within 90 days after notice of the award. A party may ask the arbitrator to modify or correct the award where:

- There is an evident mathematical miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award.
- The arbitrator has awarded on a matter not submitted to him/her and the award may be corrected without affecting the merits of the decision upon the issues submitted.
- The award is imperfect in a matter of form, not affecting the merits of the case.

Any application to modify or correct the award must be made within 20 days after receiving notice of the award.

Arbitration awards are filed with the commissioner of the Bureau of Mediation Services and classified as public documents.

The BMS collection of arbitration awards is a valuable reference library the city may use to research how arbitrators rule on issues. However, it is important to note if a discipline arbitration results in reversal of the discipline and no discipline is upheld, then the award and the underlying facts are not public. Using the library to determine an arbitrator's record with regard to disciplinary decisions is then more difficult since these types of cases do not appear in the database. The arbitration award in the city's possession, particularly if it is the final disposition of a disciplinary action, is also a public document (excluding data that would identify confidential sources who are employees of the city). If the city receives a request to release any other supporting documents relating to a grievance, such documents should be examined individually to determine if they contain public, private, or confidential data.

E. Calculating back pay for grievance awards

If a grievance is decided in favor of an employee, it may involve calculation of "back pay."

RELEVANT LINKS:

In other words, an arbitrator may decide that an employee is entitled to receive all of the wages and benefits he/she would have received had the employee been at work during the time it took to hear the grievance and render a decision.

In some cases, this may be a relatively straightforward calculation. Some issues, however, that the city may want to be prepared to address are:

- Wage increases that occurred during the time the employee was absent.
- Benefits cost increases that occurred during the time the employee was absent.
- Payment of holidays that occurred during the time the employee was absent.
- Reinstatement of insurance, cafeteria, and pension benefits that were terminated during the time the employee was absent and payment of the city's contribution to those plans.
- Whether the city wants to ask if the employee wants to change his tax deductions for the back payment if the check is going to be a large one.
- Whether the city wants to notify the employee of his ability to buy back service credit for the pension plan.
- Vacation, paid time off, or sick leave accruals that may need to be adjusted for the period of time the employee was absent and whether the time counts for future accrual rates.
- Requiring the employee to provide receipts of interim earnings to subtract from the city's back-pay amount if he or she worked for another employer during that time period.
- Notification of the unemployment office of the back payment to avoid double payment of unemployment benefits and wages.
- Whether to count that period of time for other benefits such as Family & Medical Leave Act, parental leave, or other state and federally mandated benefits that depend upon the number of hours the employee worked during a specified period of time.

The general rule for calculating back payment of wages and benefits is to make the employee "whole" (i.e., treat the employee as if he or she was present the entire time). Sometimes, however, an arbitrator will specify that an employee be reinstated without back pay or with limited back payment of wages and benefits. The city should consult an attorney for assistance with any issues that are not specified in the arbitration award to avoid any claims that the city has retaliated against the employee for filing the grievance. Questions involving appropriate back-pay amounts are a proper subject to submit to the arbitrator as a request for a clarification of the award.

RELEVANT LINKS:

[Minn. Stat. § 179A.18.](#)

[Minn. Stat. § 179A.03, subd. 16.](#)

See Section IV-G,
*Implementation of the city's
final offer.*

[Minn. Stat. § 179A.18.](#)

*General Drivers, Helpers,
and Truck Terminal
Employees Local 120 v. City
of Saint Paul*, 270 N.W.2d
877 (Minn. 1978).

F. Strikes

Strikes are the traditional, primary tool by which a nonessential employee group can pressure a city to achieve a desired bargaining result through withholding services. Because of their impact to services to the public, strikes in the public sector are limited and governed by statute to a greater extent than in the private sector.

This union right is the counterpart to the city's primary tool following unsuccessful negotiations/mediation—the right to implement its last best offer.

The term strike is defined as concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purposes of inducing, influencing, or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment. This definition is very broad and includes more actions than the traditional situation where an employee is outside a facility picketing rather than working.

As long as the action is mutually agreed upon (concerted) for the purposes of inducing, influencing, or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment, such actions as sickouts (calling in sick when the real purpose is to withhold services from the city) and work slowdowns are considered strikes.

The statute defining strikes does not address a city's ability to "lock out" employees. A lockout in the private sector is viewed as a corollary to a union's right to strike.

Basically, it is a city's prohibition against permitting employees in the bargaining unit from working during a time when a strike is authorized. Because this term is not specifically defined in MNPELRA and it involves considerable adverse consequences to a city, such as a potential determination that the locked out employees are eligible for unemployment compensation, a city should consult with its attorney prior to considering such an action.

1. Who can strike?

Essential employees, as that term is defined under the law, may not strike. Only employees who are deemed nonessential under the law and who have provided the appropriate notice (discussed below) may strike. Public employees and employee groups not directly involved in the negotiations but who are sympathetic to the bargaining unit are not permitted to strike.

RELEVANT LINKS:

[Minn. Stat. § 179A.18, subd. 1.](#)

[Minn. Stat. § 179A.18, subd. 3.](#)

[Minn. Stat. § 179A.19.](#)

2. Timing of strikes and notice

If a union contract is in place, employees may strike only when the union contract has expired and the union and the city have participated in mediation for at least 45 days.

If there is no union contract, most likely because it is a new bargaining unit or a different bargaining unit exclusive representative, employees may not strike until 45 days after the certification of the new or different representative and the parties have participated in mediation for at least 45 days.

Employees may also strike if the city has refused to comply with a valid arbitration decision.

Employees must provide a 10-day written notice prior to striking. This notice must be served on the city and the BMS commissioner. If more than 30 days has expired after service of a notification of intent to strike, a new 10-day written notification must be served before a strike may start.

3. Prohibited strikes

The general rule is all strikes are prohibited except where they are specifically permitted. The following are specifically prohibited strikes:

- Any strike by an essential employee or employee group.
- Any strike that occurs prior to the end of a union contract.
- Any strike that occurs prior to the parties being in mediation for 45 days.
- Any strike occurring without the required notification discussed above.

In other words, any strike by essential employees, any strike occurring prior to expiration of a union contract, or one that occurs before the parties have participated in mediation for 45 days is an illegal strike. This general prohibition against strikes is significant because of the broad definition of what constitutes a strike. This means any concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for purposes of inducing, influencing or coercing a change in the conditions of compensation or the rights, privileges, or obligations of employment is illegal. Even unfair labor practices by a city (except those involving a city's refusal to comply with a valid arbitration decision) may not result in a strike by employees.

RELEVANT LINKS:

General Drivers, Helpers, and Truck Terminal Employees Local 120 v. City of Saint Paul, 270 N.W.2d 877 (Minn. 1978).

Employees may not participate in “sympathy” strikes. A sympathy strike is a strike by an individual or group outside of the bargaining unit on strike.

4. Pros and cons of strikes

Strikes offer both potential benefits and costs to cities and the affected employee group. Strikes should be viewed as a blunt instrument by which a bargaining unit tests their practical power in two primary areas.

The first area is a test of whether the city will be forced to give in to the union demands because of the consequences of failing to have the bargaining unit workers perform their duties. Where a city cannot function without the services being provided, the city will have no choice but to go back to the union and seek to resolve the contract dispute on the union’s terms. This is the reason why essential employee groups such as police and firefighters may not strike. Withholding public safety services to the public would create such an uneven balance of power that cities would not be able to effectively negotiate with these bargaining units.

The second test of power occurring in a public sector strike is the union will seek to enlist the support of the citizens and other individuals who may in turn put pressure on the city’s political leaders—particularly the elected leaders.

From a city’s perspective, in the event a bargaining unit goes on strike and the city is able to continue to function, the city will gain a significant upper hand in subsequent negotiations. In addition, employees may seek to decertify a union that engaged the employees in the failed strike. In contrast, where a strike demonstrates the city cannot function without the services of the employee group, the city will be required to act on the union’s terms in order to resolve the strike and, absent some change in circumstances, into the future.

A major concern with any strike is it is an emotionally charged event in which the feelings of city officials, employees, and citizens are changed and hard feelings may remain for years.

5. Strike plan

A city facing the potential of a strike must develop a plan to deal with the impact of such a strike. A strike plan details how the city will operate during a strike. Strike planning generally includes establishing a central strike committee and establishing written strike plans.

RELEVANT LINKS:

Because of the complexities associated with operations during a strike, including compensation and hiring strike replacements, a city may wish to consult with an individual or entity providing strike planning services. These strike plans should also be prepared well in advance of the date when a union sends out its 10-day strike notice.

In this instance, when a union gives the actual strike notice the city will have 10 days to implement the strike plan already in place.

6. The central strike committee

This committee is typically viewed as the central command of strike-related activities. The members of this committee should include the chief administrative head of the city (this assumes this person is not in the bargaining unit that would be on strike), the city's labor negotiator, the city's labor attorney and/or city attorney, and key department heads. In some cities where the mayor or a councilmember liaison is actively involved in the city's operational affairs, this individual should also sit on the central strike committee.

The primary role of this committee is to coordinate the strike plans of the various city departments, provide strategic planning on how operations will continue or cease during a strike (including identifying how required staffing needs will be met and how those individuals will be compensated), serve as a resource to others at the city (including the city council and other department heads), and provide a central command post for communications.

On communication issues, all communication to the press, unions, and outside individuals typically are directed through the central strike committee and all inquiries are generally referred to the committee members. The committee will also typically prepare a communication to employees in the bargaining unit that may go on strike and a separate communication to the other city employees.

7. Written strike plan

Since a strike is the withholding of services by a group of employees, the strike plan is a written plan identifying what services will be affected by such a strike and how the city will address the loss of those services. The central strike plan is typically a coordinated document incorporating strike plans submitted by all of the city's affected departments.

The central strike plan and department strike plans should identify and prioritize each service performed by a department affected by the strike. This should include identifying which services must be performed during a strike and which services may be delayed or discontinued.

RELEVANT LINKS:

[Minn. Stat. § 179A.13, subd. 2\(12\).](#)

[Minn. Stat. § 179A.06, subd. 1.](#)

Where there is a potential loss of service that must be replaced, the plan should determine how the work will be continued. This will need to include consideration of whether there is a need for a replacement worker and whether this worker must be licensed in a particular area or whether the person will need special training.

A city cannot hire permanent replacement workers for strikers. The strike plan should also detail how many individuals will remain available in the event of a strike and whether individuals in the bargaining unit wishing to cross the picket line will be permitted to work. Other common areas addressed in a strike plan include the cancellation of planned leave, compensation for remaining employees, logistics of employees crossing picket lines, how work will be assigned, dealing with media inquiries, and such items as dealing with the delivery of goods from drivers who refuse to cross picket lines. Cities should also be aware the law does not require any public employee to perform labor or services against the employee's will.

There are not any authoritative cases providing precedent on how such language would be interpreted by courts in an instance in which a city sought to assign a nonstriking employee to work previously performed by a person on strike.

A key issue in a strike plan should be dealing with security concerns. This should include what areas may be viewed as permissible picketing areas. Immediately prior to a strike, the city should obtain all building keys and other city equipment from the members of the bargaining unit.

In the event the employees are permitted to cross the picket lines to return to work, they can be reauthorized the keys and equipment. The city will need to consider computer password issues and determine whether these passwords can be temporarily revoked and reissued. The plan should also outline the need to report security issues (such as a striking worker in a location they are not supposed to be in) to the appropriate individuals.

8. Communicating with employees

As noted above, the city will likely communicate with the members of a bargaining unit who are going on strike. Because of the highly volatile nature of the situation, it is likely such a communication will be closely viewed by the employees and the union to determine whether it violates the city's obligation to bargain in good faith or rises to the level of an unfair labor practice because it interferes, retrains, or coerces employees in exercising their right to strike.

RELEVANT LINKS:

[Minn. Stat. § 179A.19, subd. 5.](#)

[Minn. Stat. § 179A.19, subd. 3.](#)

Accordingly, any communication should be in writing to lessen the potential dispute about what was actually said. It should also be reviewed by legal counsel prior to being sent out to determine whether it would constitute an unfair labor practice. During strikes, an employer typically communicates to its employees the following notices:

- That employees engaged in a strike are not entitled to any daily pay, wages, reimbursement of expenses, or per diem for the days on strike.
- That employees who are absent from any portion of a work assignment without permission or who abstain wholly or in part from the full performance of duties without permission from the employer on a day when a strike is not authorized by Minn. Stat. §179A.19, is prima facie to have engaged in a strike on that day.

The city will likely wish to send out a written communication to the employees who are not in the bargaining unit. This letter will typically advise these employees of the potential of the strike and the city's expectations of them during the strike, including the expectation that they will come to work.

The written communication may note that work slowdowns, sickouts, and other forms of concerted worker protest other than the traditional picketing and stoppage of work are all considered strikes and are prohibited for employees who are not in the striking bargaining unit. Issues such as cancellation of vacations, security matters, and other practical informational items may be addressed in this communication.

Consistent with the notice to striking employees, the communication to other employees may include a statement that “an employee who is absent from any portion of a work assignment without permission or who abstains wholly or in part from the full performance of duties without permission from the employer on a day when a strike occurs not authorized Minn. Stat. §179A.19 is prima facie presumed to have engaged in a strike on that day.”

G. Implementation of the city's final offer

In the event the parties have exhaustively negotiated in good faith, but despite the best efforts of the city the parties have reached impasse, the city retains an extremely powerful option. This option is to implement the city's final offer.

This option applies only when the parties have reached impasse. The ability to declare an impasse is a powerful tool a mediator holds in the mediation process. As a practical matter, mediators rarely declare the parties at impasse.

RELEVANT LINKS:

Central Lakes Education Assoc. v. Ind. School Dist. No. 743, Sauk Centre, 411 N.W.2d 875 (Minn. App. 1987).

Minn. Stat. § 179A.20, subd. 6.

Minn. Stat. § 179A.20, subd. 1.

Rather the mediator will generally utilize the passage of time to determine whether positions change. Determining whether the parties are at impasse is a fact-intensive review and should never be made unless the city's attorney or labor counsel has determined the parties are at impasse.

In the event the parties reach impasse, implementation of a city's final offer recognizes the city has provided the union with the best offer it is willing to provide and further negotiations would not change that offer. At this point, the city may choose to do nothing (particularly in the case of a first contract) and allow the status quo to continue.

In the alternative (particularly where there is an existing contract in place containing a term and condition of employment the city no longer wishes to apply), the city may implement its final offer.

Cities often mistake the ability to strike with the existence of an impasse. As noted in the discussion on strikes, the timing of strikes is not tied to impasse. The city does not necessarily have the right to implement its last offer when the union members have a right to strike.

As a general matter, employees may strike after the union contract has expired, the parties have mediated for 45 days, and the union has provided the required notice. A city, in contrast, must wait until impasse has occurred prior to implementing its final offer.

In addition, the city must determine the contract is not in effect prior to implementing its last offer ("in effect" means the contract has expired by its terms and the right to strike has matured).

Because of the severe impact of such an action on the negotiation process, a city implementing its final offer should expect the union to immediately challenge that action in court. Accordingly, such an action should not be contemplated without a prior, thorough legal review.

H. Administering the contract

At the conclusion of negotiations, the exclusive representative and city must execute a written contract or memorandum of contract containing the terms of the negotiated agreement or interest arbitration decision and any terms established by law. The contract must include a grievance procedure meeting certain minimum requirements. A city and the exclusive representative may not agree to a contract provision contrary to law. A city must implement a contract in the form of an ordinance or resolution. In other words, a city will be required to pass an ordinance, or more commonly a resolution, approving the union contract and authorizing the necessary city representatives to sign the agreement.

RELEVANT LINKS:

MN Teamsters Local 320 v. County of St. Louis, 726 N.W.2d 843 (Minn. App. 2007).

Connolly v. Dep't of Public Safety, unpublished LEXIS 167 (Minn. App. 2010).

Minn. Stat. § 179A.06, subd. 6.

Anoka – Hennepin Educ. Ass'n v. Anoka – Hennepin Indep. Sch. Dist. No. 11, 305 N.W.2d 326 (Minn. 1981).

Minn. Stat. § 179A.06, subd. 6.

Where the parties do not agree on a successor contract and the prior contract expires by its terms, the parties will operate under a concept called “contract in effect” that continues the terms of a contract beyond the expiration date in certain instances.

This written document, along with the applicable law, will then govern the relationship between the city, the exclusive representative, and the bargaining unit members, as well as outline the wages and terms and conditions of employment for the bargaining unit members. As a practical matter, the union contract will place administrative duties and responsibilities on a city.

To the extent the language in the union contract is clear, outside documents may not be used to create an ambiguity in interpreting the contract. In addition, the union contract will provide the exclusive remedy available to covered employees (except where the matter is also a violation of law) and prevent employees from asserting separate binding promise cases in district court.

I. Dues deduction

1. Deductions for dues by bargaining unit employees

As a business, one of the most important issues to a union is the collection of dues from its members. The state labor statute provides employees have the right to request and be allowed dues check off for the exclusive representative.

This means the city must administratively provide for dues deductions for those members who request such a deduction from their pay checks.

This contract administration task is generally assigned to the city’s payroll department. Practical issues include identifying who such deductions should be forwarded to at the union offices.

However, when an exclusive representative exists, an employee does not have the statutory right to request a dues check off from any other organization. While such a statutory right does not exist, the exclusive representative and the employer may contractually agree to permit a check off for another organization. For example, in an unusual case in which a minority association exists along with a different exclusive representative (having an exclusive representative and a minority association is a rarity) the parties could, but would not be required to, recognize a dues check off for this minority association.

RELEVANT LINKS:

[Anoka – Hennepin Educ. Ass'n v. Anoka – Hennepin Indep. Sch. Dist. No. 11](#), 305 N.W.2d 326 (Minn. 1981).

[Minn. Stat. § 179A.06, subd. 3.](#)

[Janus v. AFSCME](#), 585 U.S. ____ (2018)

2. Deductions by nonunion members for organizations

The statute permitting deductions for organizations also applies to employees who are not members of a union. Employees are statutorily entitled to request, and must be allowed, dues check off for the organization of their choice.

3. Fair share fees

This same statute addresses fair share fee requirements. It provides an exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative.

As a practical matter, the concept and the application of fair share fees under this law is obsolete given a 2018 United States Supreme Court decision. Pursuant to the United States Supreme decision in *Janus v. AFSCME*, public employees who object to belonging to a union cannot be forced to pay a fair share fee. The Supreme Court held that laws compelling these dues from unwilling members violated the First Amendment by requiring employees to, in effect, pay for speech with which they do not agree. The Supreme Court held that unions representing public employees have to fairly represent these employees regardless of whether they were dues paying members. The Supreme Court summarized its view as follows:

Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

The statute indicates that employees who challenge fair share fee assessments must do so to the BMS commissioner. If a challenge is filed, the deductions for a fair share fee must be held in escrow by the employer pending a decision by the commissioner. This process has limited, and likely no, practical application following the *Janus* decision. Fair share fees cannot be deducted from an employee's pay check. Employees who do not wish to join a union that represents the bargaining unit that they are included in may avoid paying union dues or fair share fees by declining to join the union. Any employee who wishes to pay fair share fees through a payroll deduction must provide written permission to the city permitting these dues to be deducted.

RELEVANT LINKS:

[Ramsey County v. AFSCME, Council 91](#), 309 N.W.2d 785 (Minn. 1981).
LMC sample: [Common Rules of Contract Construction](#).

4. Administration of this provision

Because administration of dues deductions operates to the benefit of a union and the union is responsible for providing the city with notice of the amounts of the required deductions, it is a good administrative practice to negotiate a provision into the union contract requiring the union to indemnify and hold a city harmless from all disputes arising from the dues deductions.

J. Supervisor's role

Supervisors and department heads play a key role in labor relations at several stages of the process, including during the initial organizing effort, negotiations, and contract administration.

1. Organizing efforts

As a representative of the city, the statements and actions of supervisors are attributed to the city during a union organizing campaign. As discussed in the section on organizing unions, supervisors must be educated on what they can and cannot do or say during an organizing campaign.

2. Negotiations

As the city's first line representative, supervisors often have the best practical knowledge of how terms and conditions of employment will operate in their department. Accordingly, a city's labor negotiation team should either include or consult with a department head in negotiating the terms and conditions for a bargaining unit that includes the employees that they supervise. Department heads should be viewed as a resource in negotiations to provide feedback aside from negotiations on union proposals such as hours of work, scheduling, and existing practices in the department.

3. Contract administration

Supervisors also play a key role in contract administration. Given that the union contract establishes certain parameters around the supervisor's management rights, the supervisor should have access to and be familiar with the contract terms.

Areas in which supervisory discretion is typically affected in a contract may include scheduling, hours of work, utilization of seniority, vacation bidding, and grievance resolution. Cities should also educate their supervisors on what are considered management rights within their discretion.

RELEVANT LINKS:

An extraordinarily powerful, and often overlooked, role of a supervisor in contract administration exists outside of the express terms of the union contract. Labor law recognizes a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances may become binding on the city and union. Such a practice may be binding despite the fact it is not written into the union contract (and may not be written at all). Supervisors may, by their consistent actions in a given recurring situation, be creating a past practice that will bind the city to respond in the same manner in future instances.

Efficient contract administration requires identification of binding past practices. Certain qualities distinguish a binding past practice from a course of conduct having no particular evidentiary significance:

- Clarity and consistency.
- Longevity and repetition.
- Acceptability.
- A consideration of the underlying circumstances.
- Mutuality.

In the event a past practice exists the city wishes to eliminate, the process will depend on the nature of the past practice. Eliminating a past practice generally either requires a change in circumstance making the past practice no longer applicable or requires the matter be ended in contract negotiations for the next contract. In the usual practice situation, the city must raise the issue, allow the union an opportunity to seek to bargain it into the contract, and if the union is not successful, it ceases to be a practice. Where the past practice is actually an interpretation of contract language, the past practice may not be ended unless the city can change that existing language.

K. Discipline

The city's ability to discipline employees will be a key provision in a union contract. The state labor law, MNPELRA, specifically notes the general procedure and standards relating to discipline are subject to union contract provisions. A city's discipline policies are a mandatory subject of bargaining.

Cities may not negotiate a provision into a union contract stating certain forms of written discipline are not subject to the grievance procedure for nonprobationary employees. Cities may (and should if possible) negotiate a provision into a union contract stating probationary employees may not contest disciplinary action or termination through the grievance procedure.

[Minn. Stat. § 179A.03, subd. 15.](#)

[Minn. Stat. § 179A.20, subd. 4.](#)

RELEVANT LINKS:

[LMC Model Contract Language – Police Unit.](#)

[LMC Model Contract Language – City Hall Unit.](#)

[City of Minneapolis. v. Police Officers Federation of Minneapolis](#), 566 N.W.2d 83 (Minn. App. 1997).

[Hagen v. State Civil Serv. Bd.](#), 282 Minn. 296, 299, 164 N.W.2d 629, 631-32 (1969).

[Deli v. University of Minnesota](#), 511 N.W.2d 46 (Minn. App. 1994).

The League’s model contracts provide sample language for cities to include in defining the parameters of discipline in a union contract. The primary focus in discipline policies relates to when discipline may be imposed and what process should surround investigations that may lead to discipline, communicating the discipline decision, and appealing the discipline decision.

1. Just cause

a. Definition of just cause

A typical provision in a union contract will define when an employee may be disciplined. This can be negotiated as an extensive listing of every potential offense an employee may commit and also list every potential instance where an employee is required to act. As a practical matter, the creative capacities of drafters of such policies and the creative capacities of employees to take action or inaction that irritates a city will never perfectly match. Accordingly, most discipline policies use a broader definition of when an employee may be disciplined.

The most common discipline language provides an employee can only be disciplined for “cause” or “just cause.” These terms have been established and developed over decades of public and private sector labor cases and arbitration awards. In this instance, a third person, called an arbitrator, is free to adopt any reasonable definition or craft any reasonable remedy. The arbitrator’s role in this process will be discussed below in the section on grievances.

The Minnesota Supreme Court has defined the meaning of cause in the context of a public employee’s removal from office to require some relation to the administration of the office and the performance of his duties:

“‘Cause,’ or ‘sufficient cause,’ means ‘legal cause,’ and not any cause which the council may think sufficient. The cause must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the [public employee] or his performance of duties, showing that he is not a fit or proper person to hold the office.

An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it.

RELEVANT LINKS:

The court explained further this definition appears to require “that the cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial.”

By its terms, this definition contemplates an employer treats employees uniformly when applying job standards. Under this definition, the termination of an employee for any cause not affecting job performance or otherwise relating to job duties might be considered arbitrary and unreasonable.

b. Establishing just cause

Arbitrators who review “just cause” for discipline cases often (but not always) review a discipline decision by looking at certain basic elements. The elements of discipline were most notably laid out in a case written by arbitrator Carroll R. Daugherty called the Enterprise Wire Co. Decision. Arbitrator Daugherty called it the “common law” definition of just cause.

He indicated a ‘no’ answer to any one or more of the following questions “normally signifies that just and proper cause did not exist.” These questions are as follows:

- Did the employer give the employee a prior warning or provide prior instruction or information that such action would result in possible or probable disciplinary conduct? (Is this a rule, regulation, or standard that the employee should know?)
- Was the regulation reasonably related to the orderly, efficient, and safe operation of the employer’s business and the performance the employer might properly expect of the employee?
- Did the employer, before administering discipline to an employee, investigate to determine whether the employee did in fact violate or disobey a rule or order of management?
- Was the employer’s investigation conducted fairly and objectively?
- Did the final decision maker (i.e., city manager or council) obtain substantial evidence or proof the employee was guilty as charged?
- Has the employer applied its rules, orders, and penalties evenly and without discrimination to all employees?
- Was the degree of discipline reasonably related to the seriousness of the employee’s proven offense and the record of the employee in his service with the employer?

RELEVANT LINKS:

[Cleveland Board of Education v. Loudermill](#), 470 U.S. 532, 546 (1985).

[Smutka v. City of Hutchinson](#), 451 F.3d 522 (8th Cir. 2006).
[Kaibel v. Mun. Building Commn.](#), 829 F. Supp. 2d 779 (D. Minn. 2011).

[Smutka v. City of Hutchinson](#), 451 F.3d 522 (8th Cir. 2006).

L. Due process

The United States Constitution prohibits public employers from taking any action that deprives an individual of a protected property interest without first providing due process of law. A public employee with a property interest in employment is entitled to written notice of the charges against him and an opportunity to present his side of the story before final action is taken depriving that employee of his interest (i.e., before termination of employment). This is often referred to a Loudermill hearing after a U.S. Supreme Court case recognizing the property interests some public employees have in continued employment.

Not every public employee is entitled to procedural due process, however. Only those employees with a property interest in continued employment have constitutional protection. At-will employees or those considered probationary do not have a property interest and thus have no entitlement to due process prior to discipline. However, employees who cannot be removed except for cause, as is the case in most labor agreements, are entitled to due process.

It must also be noted that due process, at a minimum, requires the following: 1) a notice of the charges against the employee in sufficient detail to enable the employee to respond; 2) an explanation of pre-termination and appeal procedures and time table;

3) an indication of the consequences at stake for the employee; 4) a reasonable time for the employee to prepare a response; and 5) a forum for the employee to present his or her response. As an example, an employee's procedural due process rights were not violated by the city's failure to give proper notice that prior work history would be discussed in a termination decision meeting because the employee's work history was a "minor part" in the termination decision and the employee had received adequate notice that "the ultimate reason for the discharge was the insubordination." There was also no violation where the city did not specifically tell the employee two witnesses stated the employee's tirade lasted only a minute, because the employee was present and "knew enough about the incident to prepare a response. He did not need to be told how long the tirade lasted to prepare a defense to the charge of misconduct."

In some limited situations, employees will have entitlement to procedural due process after a discipline decision has been reached. In these cases, an employee's liberty interest in his good name is implicated by the public statements made about the employee by the employer in connection with a discipline decision.

RELEVANT LINKS:

See Section IV-P, *Peace Officer Bill of Rights*.

[NLRB v. Weingarten, Inc.](#),
420 U.S. 251 (1975).

An employee must show that untrue statements were made public by the employer, and these statements were so stigmatizing as to seriously damage his/her standing in the community or foreclose the freedom to take advantage of other employment opportunities. Unsatisfactory performance or general misconduct is insufficient. However, where an employee has been sufficiently stigmatized, the employee's due process rights are vindicated by a "name-clearing hearing at a meaningful time" during which the employee has the opportunity to respond to the employer's accusations. Legal advice is strongly encouraged whenever a public statement is made by the city which may injure an employee's reputation so that an opportunity can be provided for a name-clearing hearing.

M. Union representation

Because the union is certified to represent the bargaining unit, they have representation rights beyond just negotiating contracts. Adjusting grievances is a significant part of this representation. This duty includes representation of employees prior to the actual discipline decision.

The employee has the right to union representation in an investigative interview when he or she reasonably believes the interview may lead to discipline. Unless the union contract states otherwise, the employee must request such representation, and the city is under no obligation to inform the employee of his or her right. Cities should note that peace officers may have specific statutory rights during an investigative interview if a formal statement is being taken.

The rule on when union representatives may accompany an employee prior to a discipline decision is fairly straightforward--the right to union representation attaches only in certain instances. The right exists as follows:

- The employee must request representation. Unless it provides otherwise in a union contract, the city is not under any affirmative obligation to inform the employee of their right to union representation.
- An employee who asserts this need for union representation in a situation where there is not a "reasonable belief" and then does not participate is running the risk her or his belief will be deemed unreasonable and subject to discipline for insubordination. Simply giving instructions or meting out a previously determined discipline is not deemed an investigatory interview.

RELEVANT LINKS:

Garrity v. State of New Jersey, 385 U.S. 493 (1967).

- Exercise of the right may not interfere with legitimate employer prerogatives. The city has no obligation to justify a refusal to allow union representation, and, despite refusal, the city is free to carry on the inquiry without interviewing the employee, and thus leaving the employee the choice between having an interview unaccompanied by a representative or having no interview and foregoing any benefits that might be derived from the interview.
- The city has no duty to bargain with the union representative at the investigatory interview. The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of the matter. The city may insist it is only interested, at this time, in hearing the employee's account of the matter under investigation. While union representatives will often test an inexperienced city representative in this area, a city representative should continue to return to having the employee provide their account of the matter under investigation. A city representative may wish to include detail of the union representative's interference or disruption in the final investigative report as a means of explaining why the city relied on (or discounted) the employee's statement.

N. Garrity warning

The Garrity warning comes from a United States Supreme Court case involving police officers who were under investigation for allegedly fixing traffic tickets. The officers were given a choice of either providing a statement to their employers (which may subject them to criminal prosecution) or to forfeit their jobs.

The Supreme Court held any employee statements made to the public employer under these circumstances were coerced and the Constitution prohibited their use in a subsequent criminal proceeding. The Garrity warning was thus established: An employee statement obtained under threat of removal from office cannot be used in subsequent criminal proceedings. Therefore, before compelling a statement, a public employer should provide the employee notice and take steps ensuring the exclusion of the statement in subsequent criminal proceedings.

The overuse of Garrity warnings in discipline investigations is common and can result in unanticipated negative consequences for the city and the public at large. Before giving a Garrity, and assuming the risks of tainting future criminal proceedings should any self-incriminating statements or the fruits of any self-incriminating statements be leaked in any way outside of the employment investigation, stop and ask the following question:

RELEVANT LINKS:

[Minn. Stat. § 13.04, subd. 2.](#)

Does the investigation require a compelled (or coerced) statement? The answer is rarely yes.

A safer course of action is to start by requesting the employee provide a voluntary statement. If the employee gives a voluntary statement, no Garrity warning is required, and the statement itself may be used in a future criminal matter against the employee. A city can simply ask if the employee is willing to provide a response to allegations.

Most employees will want to provide an explanation to the alleged misconduct. If the employee refuses, the city is free to make a determination on the investigation based on the other information gathered or to consider compelling a statement and providing a Garrity warning at that time.

O. Tennesen warning

Pursuant to the Minnesota Government Data Practices Act, a city may only collect and use data from an individual, including an employee, after meeting the statutory notice requirements regarding the collection and use of this data. This notice, often called a Tennesen warning, is named after the legislator who was instrumental in placing this provision into the Data Practices Act.

The law provides private data may be used by and disseminated to any person or entity if the individual subject or subjects of the data have given their informed consent. Informed consent shall not be deemed to have been given by an individual subject of the data by the signing of any statement authorizing any person or entity to disclose information about the individual to an insurer or its authorized representative, unless the statement is:

- In plain language.
- Dated.
- Specific in designating the particular persons or agencies the data subject is authorizing to disclose information about the data subject.
- Specific as to the nature of the information the subject is authorizing to be disclosed.
- Specific as to the persons or entities to whom the subject is authorizing information to be disclosed.
- Specific as to the purpose or purposes for which the information may be used by any of the parties named in the above bullet point both at the time of the disclosure and at any time in the future.
- Specific as to its expiration date, which should be within a reasonable period of time, not to exceed one year.

RELEVANT LINKS:

[Minn. Stat. § 626.89.](#)
LMC information memo,
Police Department
Management and Liability
Issues, Section II-C-1, Peace
Officer Discipline
Procedures Act.

Minnesota courts have held a public employer is not required to give an employee a Tennessean warning before obtaining information from the employee about incidents occurring within the course and scope of his/her employment. For example, a Tennessean warning is not necessary for a public employer to obtain information during an investigation of complaints against an employee where the complaints involve conduct within the course and scope of employment, and the investigation does not involve requests for private or confidential data. Requesting information on facts of an incident under investigation is not the same as requesting private or confidential data on an employee.

However, a city is well advised to provide a Tennessean-like warning when a formal statement is being taken as part of a disciplinary investigation even if the intent is to simply ask the employee about workplace events arising in the scope of employment. This practice protects the employer should private or confidential information be volunteered by the employee or if the questioning leads to discussion of private or confidential matters about the employee.

Cities should consult their data practices officer and city attorney to develop a form that may be used in an employment setting to meet this statutory requirement.

P. Peace officer bill of rights

Licensed peace officers and part-time peace officers employed by a city have special statutory rights. Commonly called the Peace Officer Discipline Procedures Act or the Peace Officer Bill of Rights, this statute provides special rights related to obtaining a formal statement from an officer for access to information that will be used in a later administrative proceeding (which is defined to include an arbitration) as well as requiring the city to provide a copy of discipline to the officer. The law also governs and restricts the use of an officer's financial records and photographs and provides substantial penalties for noncompliance.

1. Formal statement

A city preparing to obtain a formal statement from an officer should first consult with its city attorney.

A formal statement of an officer may not be taken unless a written complaint signed by the complainant stating the complainant's knowledge is filed with the employing or investigating agency, and the officer has been given a summary of the allegations. Complaints stating the signer's knowledge also may be filed by members of the law enforcement agency.

RELEVANT LINKS:

Before an administrative hearing is begun, the officer must be given a copy of the signed complaint.

The formal statement must be taken at a facility of the employing or investigating agency or at a place agreed to by the investigating individual and the investigated officer. Sessions at which a formal statement is taken must be of reasonable duration and must give the officer reasonable periods for rest and personal necessities. When practicable, sessions must be held during the officer's regularly scheduled work shift. If the session is not held during the officer's regularly scheduled work shift, the officer must be paid by the employing agency at the officer's current compensation rate for time spent attending the session.

The officer whose formal statement is taken has the right to have a union representative or an attorney retained by the officer, or both, present during the session. The officer may request the presence of the attorney or the union representative, or both, at any time before or during the session. When a request under this subdivision is made, no formal statement may be taken until a reasonable opportunity is provided for the officer to obtain the presence of the attorney or the union representative.

Before an officer's formal statement is taken, the officer shall be advised in writing or on the record that admissions made in the course of the formal statement may be used as evidence of misconduct or as a basis for discipline.

A complete record of sessions at which a formal statement is taken must be made by electronic recording or otherwise. Upon written request of the officer whose statement is taken, a complete copy or transcript must be made available to the officer without charge or undue delay. The session may be tape recorded by the investigating officer and by the officer under investigation.

2. Information to be used in an administrative hearing

Upon request, the investigating agency or the officer shall provide the other party with a list of witnesses the agency or officer expects to testify at the administrative hearing and the substance of the testimony.

A party is entitled to copies of any witness statements in the possession of the other party and an officer is entitled to a copy of the investigating agency's investigative report, provided that any references in a witness statement or investigative report that would reveal the identity of confidential informants need not be disclosed except upon order of the person presiding over the administrative hearing for good cause shown.

RELEVANT LINKS:

[Minn. Stat. § 179A.20, subd. 4.](#)

[Minn. R. § 5510.5130](#)

[Teamsters Local 320 v. County of St. Louis, 726 N.W.2d 843 \(Minn. App. 2007\).](#)

3. Notice of discipline

No disciplinary letter or reprimand may be included in an officer's personnel record unless the officer has been given a copy of the letter or reprimand. The officer has a right to sue the city for any violations of the statute, including for any retaliation taken against the officer for exercising his rights. Damages and attorney fees can be awarded to the officer.

In addition to following the steps of the Peace Officer Bill of Rights, when disciplining or discharging a police officer, the city should be careful to follow special internal policies developed to address misconduct complaints against police officers.

In Minnesota, these internal policies are required by the state licensing board, known as the Peace Officer Standard and Training (POST) Board.

The POST Board requires every chief law enforcement officer (CLEO) establish written procedures for the investigation and resolution of allegations of misconduct against licensed police officers employed by their agency.

Q. Grievances

The union contract must have a grievance procedure including a provision for compulsory binding arbitration. This grievance procedure must also be available for all written disciplinary actions. In the event the parties cannot agree on a grievance procedure that includes binding arbitration, the parties will be subject to the grievance procedure developed by the BMS. It is important to note, when negotiating a first contract, the BMS default grievance procedure will apply until the parties agree to a different procedure. Cities should note the BMS default grievance procedure provides for default acceptance of the union position in a grievance if the city does not adhere to the specified timelines.

Grievance procedures, depending upon how they are drafted, most often deal with two primary areas: 1) disputes or disagreements about whether a city violated the union contract that involve contract interpretation; or 2) whether a city violated the union contract when it disciplined an employee that involves both the application of fact and the discipline standard.

The first type of grievance is commonly referred to as a union contract language or "language" type of grievance. Again, depending upon the language in the union contract, this type of grievance can involve the interpretation of actual contract terms and may be broad enough to include grievances over "past practice" claims.

RELEVANT LINKS:

This type of grievance is not appropriate to change unambiguous terms of a union contract or to add language to the agreement that the parties omitted.

The second type of grievance is commonly referred to as a discipline grievance. This type of grievance will be over whether the city violated the disciplinary language of the union contract or any procedural rights associated with the discipline. After the probationary period, any disciplinary action is subject to the grievance procedure and compulsory binding arbitration. Some union employees are also covered by a civil service system with its own grievance procedure. In these situations, the employee may utilize either procedure but not both.

The following sections highlight some of the areas a city should consider in negotiating the language of a grievance procedure and in administering grievances.

1. Typical contract provisions

It is important for cities to include their own grievance procedures in a union contract. Failure to negotiate such a provision will result in the city and the union being required to follow the BMS “default” grievance procedure.

Because the BMS grievance procedure requires the city to respond to a grievance on a timely basis or have the grievance resolved on the basis of the union complaint, this process is rarely recommended. The League’s model contracts include the typical contract provisions associated with grievance procedures.

In negotiating a grievance procedure, the initial section typically identifies what is considered a grievance. Typical contract provisions limit a grievance to a “dispute or disagreement” regarding a specific contract provision. Language allowing the grievance procedure to be used for any employment dispute is too broad in that it allows grievances based on the personnel policies, employment laws, and other areas not addressed in the body of the contract.

The next section typically identifies how many different levels the grievance should be presented and considered. These different levels are commonly called steps. The number of steps is primarily determined by the size of the city. Since the supervisor is the initial management person with the best knowledge of the facts, the supervisor is the logical first step in the grievance process.

RELEVANT LINKS:

LELS v. Johnson, No. A08-0874 (Minn. Ct. App. June 9, 2009) (unpublished decision).

[Minn. Stat. § 179A.13, Subd. 2](#); See also *Edina Educ. Ass'n v. Bd of Educ. ISD No. 273*, 562 N.W.2d 306 (Minn. App. 1997).

This helps a city define its position. Arbitration is the required last step. The final decision making authority, such as the city manager or city council, is usually the last step prior to arbitration. Other steps in the process should be added or substituted based on the size and organizational structure of a city.

Cities of medium size will typically have three steps: the department head will be the step one city representative, the city administrator will be the step two city representative, and the city council will be the step three city representative. In cities using the city manager form of government, the city manager will substitute for the city administrator and there will not be a step three to the city council. Following these steps, the final step will be arbitration.

It is an unfair labor practice to fail to comply with the grievance procedure. City officials, including elected officers, are not given official immunity for failing to follow a mandated grievance procedure.

It is also an unfair labor practice to retaliate against an employee for filing a grievance.

2. Timelines

It is important timelines be established at the first step from the triggering event through the balance of the grievance process. From the city's perspective, having a defined time for addressing a grievance allows the city to rely on the finality of decisions that have occurred in the past. In dealing with disputes, it is also important to require any disputes be raised and identified when all of the parties to an incident still are able to have a recent recollection of the occurrence and documentation of the event can most easily occur. Without a timeline, for example, a union could allege the city violated a contract provision related to holidays beginning five years ago and seek to have that same violation apply to each subsequent holiday that occurred.

Under Minnesota's data practices statute, certain personnel data are classified as public, including discharge and disciplinary actions. The final disposition of any disciplinary action together with the specific reasons for the action and the data documenting the basis for the action are public, excluding data that would identify confidential sources who are also city employees.

RELEVANT LINKS:

In the union setting, final disposition occurs at the conclusion of the arbitration proceeding or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement. Until final disposition is reached, the discipline and all data supporting the discipline remain private.

3. Computing time

In creating a timeline, a city and union will need to negotiate language into the contract defining how time will be computed. This typically involves a discussion about whether calendar or working days should be used and what should be the effect of a deadline occurring on a weekend or holiday. In the event calendar days are used, the parties may discuss what occurs when the final day falls on a Saturday, Sunday, or holiday. In that instance, a typical contract provision allows the next regular work day to be the deadline for filing the grievance. In instances such as law enforcement, where there is no typical Monday through Friday workweek, use of calendar days may be preferable.

4. Triggering events

It is important for a city to negotiate language into the contract clearly defining what is the triggering event that “starts the clock” for the timeline in the grievance procedure. The optimal language is to have the time start upon the first occurrence of the event constituting such alleged violation.

In contrast, the union will typically seek to include language that the event should not be considered until the employee knew or should have reasonably known of the occurrence of the event constituting the alleged violation. The optimal language is a more objective standard in which the trigger event can generally be clearly defined. The typical union proposed language is a more subjective standard in which the employee has some ability to control the timeline operations through faulty or selective memory.

It is also important for cities to recognize some events may be viewed by arbitrators as “continuing violations.” This applies where the city is repeatedly or continuously violating the contract. An example of a continuing violation is where a city has applied an overtime calculation throughout a number of payroll cycles. In a continuing violation, a grievance will not be viewed as untimely.

5. Failure to follow timelines

One key provision in any negotiated union contract should be that a city's failure to respond at any step within the time provided should be treated as a denial, and the union should be permitted to appeal to the next step. A negotiated grievance procedure should never indicate a city's failure to answer on a timely basis will result in the grievance being resolved on the basis of the union's last statement of the grievance.

This latter result is included in the BMS "default" grievance procedure. This provision is the primary reason why a city should not agree to utilize the BMS proposed grievance procedure.

Another key provision in any negotiated union contract should be that a union's failure to meet the timelines noted in the agreement will result in a "waiver" of the grievance. This is a typical consequence of an untimely grievance. In the event such a provision is not included, it provides the potential for the union to be permitted to present excuses up to and including at the arbitration stage as a basis for failure to follow the contract language. Strong waiver language where there is no dispute a union missed the timelines would likely result in a bifurcated arbitration hearing in which the arbitrator has to rule on whether they have jurisdiction over the matter given the waiver.

6. Extensions of timelines

It is also typical for the parties to include language allowing the parties to mutually agree to extend or waive the timelines in certain instances. This is common where the parties have difficulty scheduling a grievance meeting or the city needs additional time to research a grievance.

In such an instance, best practice is to require such an extension be in writing.

In the event such language is not included in the union contract or the parties operate under an informal system where timelines are commonly violated, the city may be prevented from later seeking to hold the union to a timely grievance under a theory the city has waived its right to strictly enforce the timelines. Particularly with a larger organization, adherence to timelines is a key factor in effective grievance management.

RELEVANT LINKS:

[Janus v. AFSCME, 585 U.S. ___ \(2018\)](#)

[Minn. Stat. §179A.13, Subd. 2.](#)

R. Bargaining unit employees who are not union members

The United States Supreme Court decision that prohibits automatic deduction of fair share fees without an employee's specific consent has created a class of employees who are included in a bargaining unit but do not pay dues. This status, which unions derisively refer to as "free riders", means that the employees are covered by the provisions of a collective bargaining agreement despite not being dues (or fair share) paying members.

Unions have a duty of fair representation toward these non-paying members of the bargaining unit. The duty of fair representation commonly means that a non-due paying member of the bargaining unit has a right to be represented by the union fairly, in good faith and without discrimination.

The right of employees to remain in a bargaining unit without paying dues has created considerable uncertainty for unions. As Justice Kagan, in her dissent in Janus noted:

Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers) – so they too quit the union.

The Janus decision leaves open the question of whether a union may charge non-dues paying members to access the grievance procedure in the union contract or be denied union representation altogether. While unions sort through their options after Janus and employees ponder whether to continue to pay dues, cities should remain cautious in jumping into this fray. Cities who have bargaining unit employees who are not dues paying members should not advise these employees of their rights or the limitation of the union's obligations or its internal affairs. Such action may be viewed as an unlawful labor practice related to interference with bargaining unit employees and the administration of the union.

V. Disputes: Proper subject for grievance procedure or arbitration

As noted above, careful drafting of a grievance procedure will assist the city and union in determining what is a proper subject of a grievance procedure.

RELEVANT LINKS:

This is important because one of the issues that may arise in a grievance is whether or not the disputed conduct falls within the parameters of the grievance procedure.

For example, a city may take the position a matter is not subject to the grievance procedure because it does not involve a term in the union contract, and the definition of a grievance is that it involves a disagreement or dispute about a specific term in the union contract.

In this instance, a city might argue since the matter does not involve a term in the union contract, it is not a proper subject of the grievance procedure. Under this line of reasoning, a city could respond simply by noting the matter is not a proper subject of the grievance procedure.

In the event the grievance process treats the failure of the city to respond within the designated timelines as a denial of the grievance, the union may simply move to the next step and the process is repeated until the parties reach the arbitration step. In the alternative, if the grievance procedure states the city's failure to respond within the timelines results in the grievance being settled on the basis of the union's requested remedy or the BMS grievance process applies, the city will need to affirmatively respond by stating the matter is not an appropriate topic of the grievance procedure and deny the grievance on that basis.

Disputes of this nature involve the question of whether a subject is grievable. Such a dispute also involves a review of whether the matter is subject to arbitration because arbitration is the last step in the grievance process.

In the alternative, the parties may specifically provide that certain disputes may be a subject for the portion of the grievance procedure before arbitration, but the parties agree the matter is not a proper subject for arbitration. For example, the parties may include a provision in the contract stating a city's decision to terminate a probationary employee may not be arbitrated.

In this instance, the union may file a grievance on behalf of the employee but may not, under the terms of the union contract, pursue it to arbitration. Where the union attempts to submit such a case to arbitration, the issue is whether the decision is a proper subject for arbitration (also noted as whether the dispute is arbitrable).

Cities involved in such disputes should review the dispute carefully prior to refusing to participate in a grievance or arbitration of a matter. Refusing to comply with a grievance procedure in a union contract is an unfair labor practice. In the alternative, fully participating in the grievance and arbitration may result in a waiver of this procedural bar.

[Minn. Stat. § 179A.13, subd. 2\(6\).](#)

RELEVANT LINKS:

[Minn. Stat. § 572B.06, \(b\)](#)

[County of Cass v. LELS](#), 353 N.W.2d 627 (Minn. App. 1984).

[Seagate Tech., LLC v. W. Digital Corp.](#), 854 N.W.2d 750 (Minn. 2014)

[City of Brooklyn Center v. LELS](#), 635 N.W.2d 236 (Minn. App. 2001)

[Mora Federation Of Teachers, Local 1802 v. Independent School District # 332](#), 352 N.W.2d 489 (Minn. App. 1984).

LMC Model [Contract Language – Police Unit](#).

LMC Model [Contract Language – City Hall Unit](#).

[City of Baxter v. AFSCME No. 65](#), No. A07-2234 (Minn. Ct. App. Dec. 16, 2008) (unpublished decision).

Cities should always consult with their city attorney or labor consultant on such a matter. This is particularly true where the Uniform Arbitration Act now applies to public sector labor disputes in Minnesota. This change in applicable law generally presents disputes over matters of arbitrability before an arbitrator.

A. Arbitrator’s authority

An arbitrator’s authority over a dispute is most commonly defined by the provisions of the union contract. Absent restrictions in the union contract, arbitrators may rule on issues of fact and law.

An arbitrator’s award will be set aside by the courts only when the arbitrator has clearly exceeded the powers granted to them in the union contract or by law. Courts will not overturn an award merely where the court may disagree with the arbitration decision on the merits. There is a very narrow exception to this broad authority where the award violates a well defined and dominant public policy.

An arbitrator is not required to make findings of fact to support an award. As noted above regarding disputes over whether a matter is a proper subject for arbitration (or the grievance procedure), arbitrators also generally determine whether the parties have complied with the proper procedure to arbitration. Absent contractual limitations, arbitrators have determined such issues as whether a union had standing to bring a grievance, whether a class action grievance may be filed, and whether the arbitration list must come from the BMS or some other source.

As noted in the League’s model contracts, limitations on an arbitrator’s authority include statements that the arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of the union agreement. Other limitations common in a union agreement provide the arbitrator shall consider and decide only the specific issue(s) submitted in writing by the city and union and shall have no authority to make a decision on any other issue not so submitted.

Other common limitations on an arbitrator’s authority negotiated into union contracts are statements that the arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. Arbitrators may not unilaterally issue a “cease and desist” order.

B. Grievance meetings

Within the grievance process, management representatives play a key role at each step in the process.

At the step one process where the grievance is initially presented, the city representative is responsible for first determining whether the dispute is a proper subject of the grievance procedure. If the dispute is a proper subject of the grievance procedure, the city representative must then determine if the matter is timely. Failure by the city representative to raise these issues at the step one response may be viewed as a potential waiver of the city's rights in this area. At the meeting with the grievant (and/or union representative depending upon what the grievance process requires) relating to the first step grievance, the city's representative should try to learn as much about the facts of the grievance as possible as well as the union's theory is on the violation.

Following the step one grievance meeting, the city's step one grievance representative should meet with the city administrator to discuss the grievance and the grievance meeting. The parties may wish to include the city's attorney in this discussion. At this meeting, the city representatives should decide on whether additional investigation is needed to reply to the grievance or whether the city has sufficient facts to respond to the grievance.

C. Writing a decision following the grievance meeting

The first factor that should be considered in drafting any city written response in a grievance setting is a recognition that such a response will likely be presented to a decision maker such as an arbitrator.

Accordingly, it is important for a city to remain respectful in the response and careful in its statement of the facts and applicable provisions.

As noted above, at the first and each subsequent step of the grievance process, the city's representative should listen carefully to the union presentation. In the city's written response to a grievance, the city may wish to detail the union's statement of the facts and its theory and then refute the matter with a statement of facts established by the city.

By taking this approach, the city may use the grievance responses to expose instances in which a union changes theories and alleged facts and makes inconsistent presentations. These inconsistencies should be helpful to point out in any arbitration.

RELEVANT LINKS:

In contrast, taking such an approach also exposes any flaws the city may have in its defense as new facts come to light. For this latter reason, some cities keep their written response short and avoid statements of fact and argument.

D. Settling a grievance

Resolution of a grievance typically involves a settlement agreement. A settlement agreement is a written document detailing the grievance and the terms upon which the grievance was settled. It is important to note a grievance “belongs” to the union and not simply the employee.

Accordingly, any settlement agreement must be signed by the union. As a matter of good practice, the settlement agreement should also be signed by the grievant. Grievance settlement documents should be treated the same as any other resolution of a disputed claim by a city in that they should be reviewed by the city’s attorney.

Typical settlement agreements include a statement the agreement does not constitute any acknowledgment or admission of wrongdoing. Another typical statement in a settlement agreement notes the terms cannot be used to establish a pattern or practice that will be followed in the future.

[Minn. Stat. § 13.43, subd. 10.](#)

Settlement agreements are prohibited from limiting disclosure or discussion of personnel data.

[Minn. Stat. § 13.43, subd. 2.](#)

In addition, any settlement agreement arising out of an employment relationship is a public document. In the event the agreement involves the payment of more than \$10,000 in public money, the settlement agreement must include the specific reasons for the agreement.

In discipline disputes where the grievant is also pursuing litigation or the matter involves a claim that the city violated a law (such as an anti-discrimination law), the settlement may or may not include resolution of the litigation. Unions are generally hesitant to be parties to such an agreement.

Nevertheless, such settlements are common. In such an instance, the settlement agreement is generally accompanied by a release of claims from the grievant (rather than the union).

E. Settling a grievance prior to arbitration

There may be times when it is in the city’s best interest to settle a grievance prior to going to arbitration. Settling a grievance generally means that both the city and the union compromise on their positions in order to achieve a result that is acceptable to both parties.

RELEVANT LINKS:

One major advantage to settling a grievance is that the city does not have to spend the time and money to defend its position in front of an arbitrator. The costs associated with defending a grievance can include:

- Staff time to prepare for the grievance hearing or to work with an attorney or consultant to prepare for the grievance hearing.
- Copying and supply costs to prepare the written grievance materials.
- The fee for the attorney or consultant representing the city in the grievance hearing (if one is hired).
- Staff time to represent the city at the grievance hearing (if no attorney is hired).
- Witness fees if expert witnesses are hired to testify on behalf of the city.
- Staff time to testify as witnesses at the grievance hearing.
- Half of the arbitrator's fee (the union pays the other half).

Another major advantage is that the city can agree to a settlement that is acceptable as opposed to leaving the decision in the hands of an arbitrator (i.e., a "known" decision vs. an "unknown" decision).

The decision on whether to settle a grievance prior to arbitration or proceed with an arbitration hearing is an important one in many cases. Some questions the city may want to ask and consider before making this decision are:

- What are the long-term costs if the city loses the arbitration? (e.g., Does the decision have salary and benefit implications that will impact the city in the future?)
- What is the message sent to employees and/or will there be substantial employee morale issues if the city settles the grievance? (e.g., Will employees perceive the city to be treating the employee compassionately or are they likely to see the city as "caving in"?)
- What is the importance of setting a precedent with this case? (Settlements can be drafted to either create or avoid creating a precedent. This is often an important element in settlement discussions).
- Is this an issue that involves a benefit or term and condition of employment that may be better deferred to labor negotiations? (If so, can the issue be characterized as a "temporary" issue that needs only an interim solution?)
- Is there an important management right at stake?
- Is there an important message that needs to be sent to residents?
- Will the city be violating any law by settling the grievance?

RELEVANT LINKS:

- Are there any potential liability issues? (e.g., If the city settles a disciplinary grievance by giving the employee another chance and the employee does harm to another employee or resident, will the city be held liable?)

F. Memorandums of understanding

Because union contracts covering cities may be in effect for up to three years (or longer while the parties are negotiating a new agreement after the contract term expires), issues may arise requiring the city and union to discuss and agree on certain matters while the contract remains in effect. Such mutual agreements are permissible.

Rather than redraft an existing union contract, a city and union will typically draft a memorandum of understanding covering the issue. This memorandum of understanding can then be attached to the union contract if it affects a provision in the agreement. In the alternative, it can serve as a separate agreement.

A memorandum of understanding should be signed and dated by the city and union and should be treated as a binding agreement.

In addition to midterm agreements as noted above, negotiations may result in the resolution of an issue that does not have a broad application or is not anticipated to be needed in the future. This type of “one time resolution” often is documented in a memorandum of understanding rather than placed in the union contract (which is generally drafted for continued ongoing operations).

G. Labor management committees

Labor management committees are formally established groups including representatives of a bargaining unit (often including the union business agent) and of the city.

Creation of these committees may occur in the negotiation process or may be mutually agreed upon by the parties at any point. These committees typically are created to discuss issues of mutual concern rather than operate under the more formal “meet and negotiate” obligations of collective bargaining. Particularly where the city and labor representatives have a solid and respectful relationship, these committees may be valuable tools to problem solve.

The size and composition of a labor management committee may be established in negotiations or by mutual agreement of the parties. The same process may be used to establish the topics that may be discussed in the committee.

[Minn. Stat. § 471.6161.](#)

RELEVANT LINKS:

Often times, the committee is limited to a specific topic, such as health insurance plans. Cities have successfully used labor management committees as a tool to obtain consent to change insurance programs that alter the aggregate value of benefits—an area requiring union consent as a matter of law. Other times, a city may have a broad labor management committee that meets periodically to discuss any areas of mutual concern.

Because these committees are created by agreement of the parties, they have the capacity to be very flexible. Health insurance labor management committees, for example, may include more than one bargaining unit with the city representatives. This allows a broad-based approach to a common issue.

The primary problem with labor management committees occurs where the topics that may be discussed include management rights. Unions and members may seek input on matters that management is not willing to discuss. Labor management committees meeting too frequently may result in the loss of productive time or stagnation.

[Minn. Stat. § 179A.13.](#)

Another potential problem with labor management committees is they are often extended to nonunion employees. A city may not create, dominate, or control its own unions. Accordingly, where a labor management committee is created or controlled by a city, and such committees deal with terms and conditions of employment, the committee may be viewed as a city established, dominated, or controlled union. In this instance, such committees may constitute an unfair labor practice.

[Minn. Stat. § 179A.08.](#)

Labor management committees may also exist to meet a city's obligation to meet with its professional employees regardless of whether the employees are in a bargaining unit or remain nonunion. A city must allow these professional employees to meet and confer on policies and matters other than terms and conditions of employment.

In other words, professional employees have the right to exchange views and concerns with a city to discuss policies and other matters relating to their employment that are not terms and conditions of employment. This right to expression by professional employees is ongoing and may occur in an informal setting. A labor management committee is an ideal setting for a city to meet this obligation.

In addition to these informal exchanges of views, a city must have a formal discussion with a representative of its professional employees at least once every four months. This representative should be selected by the city's professional employees. Note that this quarterly right does not extend to nonunion professional employees or to individual members of the professional employee bargaining unit.

*Minnesota State Board for
Community Colleges v.
Knight*, 104 S.Ct. 1058, 465
U.S. 271 (1984).

RELEVANT LINKS:

[Minn. Stat. § 179A.60.](#)

[Minn. Stat. § 179A.60, Subd. 3.](#)

[Minn. Stat. § 179A.60, Subd 10.](#)

[Minn. Stat. § 179A.60, Subd. 11.](#)

[Minn. Stat. § 179A.60, Subd. 5.](#)

[Minn. Stat. § 179A.60, Subd. 12.](#)

The parties should only discuss the city’s services to the public. The parties should not discuss terms and conditions of employment in this meeting. There is no legal obligation to reach agreement on topics discussed.

VI. Joint Powers Agreements

Cities that wish to utilize joint powers entities are covered by a specific labor relations statute in those instances in which the new entity will have employees.

There is a presumption for one appropriate unit for all employees of the newly created joint powers entity. This all employee unit is also sometimes known as a “wall to wall” bargaining unit. This presumption is likely subject to the typical exclusions for supervisory and confidential employees. It is also subject to the provisions discussed above that prohibit essential and nonessential employees from being in the same bargaining unit.

Employees of a city who are hired by, assigned to or transferred to a joint powers entity will have their seniority be based on continuous service with the city plus service with the new joint powers entity. This seniority will govern layoffs and recall from layoffs. Layoff recall rights continue to apply until the joint power entity and union agree to a new collective bargaining agreement.

The law permits the entities forming the joint powers agreement and the union to ask the BMS to resolve questions of appropriate unit determinations as well as provide for early certification of the bargaining unit.

While a new union contract is being negotiated, the employees will be covered by the provisions of their former contracts unless the joint powers entity and the union agree to have the contract covering the largest portion of the joint power entity’s new employees apply to all members of the bargaining unit. Employees certified into the new joint powers bargaining unit may not seek to decertify for one year after certification.