

Labor Law and Non-profit Organizations

Labor Relations Principles

1. Frequently labor issues and disputes arise where it is unclear as to the place of final jurisdiction. For example, a matter of overtime compensation can be addressed in statute, personnel policies and the labor contract. The rule of thumb is that the law always takes precedence over the labor contract and over an organization's written rules and policies. The labor contract takes precedence over written rules and policies. Often, however, the law is written to provide minimum requirements with the parties allowed to bargain for a higher level. Thus, again for example, the law can require time and a half compensation for all work over forty hours in a work week, but the labor agreement can require double pay for all work beyond 37.5 hours. The labor contract stands since the benefit enhances that found in statute.
2. One of the most common mistakes is to confuse membership in the union with membership in the bargaining unit. The bargaining unit is the group of employees who will be represented by the union in a collective bargaining relationship. For example, with regard to unionization of a hospital, the definition of the bargaining unit might include all full-time and regular part-time employees in the job classifications of custodian, clerical and food service. Union membership means exactly that, joining the union. Thus, if you are a custodian you are in the bargaining unit but a member of the union only if you join¹. Also, it is possible to be a union member and not be a member of the bargaining unit. An employee could, if he or she chooses, join a union and pay union dues even if the union did not represent them in a collective bargaining relationship – the right to do so would depend on the union's by-laws
3. Supreme Court decisions that span the last twenty years have cast doubt on the constitutionality of a "union shop." In a union shop, all members of the bargaining unit have to become members of the union. The courts have determined that a union shop can unconstitutionally infringe on the right of free association. The courts have approved, however, an agency shop where all employees are required to either be a member of the union and pay their union dues, or pay a representational fee to the union (usually the same as the union dues) for the representational work done by the union on their behalf. If you are a fee payer and not a union member, you cannot vote on the contract or participate in union governance. In addition to the above, the law allows a person for religious reasons to refuse to pay money to the union. If so, in most cases, the person must contribute an amount equal to union dues to a charitable organization, not of that person's choosing -- you cannot contribute money to your own church in lieu of union dues.

¹ If Union membership is mandatory then in all most all cases being a member of the bargaining unit also means that you are a member of the Union and will pay Union dues.

4. The law provides for something called an unfair labor practice. If the NLRB finds either the union or the employer guilty of an unfair labor practice, the penalties are most often pretty light -- a cease and desist order, a public apology, a small monetary fine. However, if the actions are particularly egregious, the fines have been known to grow into seven figures. Also, if an employee has been improperly discharged, the back pay can be substantial.

What is at times difficult for the employer is that employees, actively involved in an organizing effort, receive "protected status" so long as their actions are centered on "union work." Thus hostile, malicious statements directed at management as part of pro-union discussion is protected, even though under most other circumstances the employee could be discharged for insubordination.

Frequently, during an organizing effort unfair labor practice charges are common. The unusual number of unfair labor practices reflects the adversarialness that is often associated with organizing. At this time, both management and the union are more likely to act in ways contrary to the concept of good faith labor relations, thus increasing the likelihood of engaging in "prohibited activity." Additionally, unions have found that filing multiple unfair labor practice charges is an effective method to wear down a recalcitrant employer.

Bottom Line, use good sense in not doing the obvious retaliatory and threatening actions, but don't be intimidated by the threat of an unfair labor practice.

Union Certification

1. The goal for the union during an organizing campaign is to force an election, conducted by the NLRB, at which it is declared the winner.
2. To have that election it must present the NLRB with signed petitions indicating that the employees desire to have an election. Thirty percent (30%) of the bargaining unit must sign a petition.
3. In order to find that the union has obtained the required 30% showing, there must be a determination of the scope of the bargaining unit. The union and the employer can voluntarily agree on the scope, or the NLRB can conduct a unit determination hearing.
4. Once the 30% requirement is met, other unions can get on the ballot by a 10% showing. "No union" is always one of the choices on the initial ballot.
5. Once sufficient petitions have been verified, an election date is set. Any member of the bargaining unit can vote in the election.
6. It takes 50% + of the cast ballots to win the election. Thus, if there are more than two choices on the ballot and no choice receives a majority of the ballots cast, then there is a run-off election with the top two selections the only options. If the top two vote getters are two competing unions, then the

choice of “no union” is no longer an option for the members of the bargaining unit.

7. If a union is certified² a winner, then they can immediately initiate negotiations for a collective bargaining agreement. The union has one year to reach an agreement with the employer on a collective bargaining agreement. During that time it is free from any decertification efforts or from a challenge from a competing union. If no contract is reached within one year, then the union becomes vulnerable to a competitor or to a decertification action.
8. A decertification requires an election similar in all respects to the original election. Upon a 30% showing of interest in an election, the members of the bargaining unit can vote to keep the union they have, vote in a new union or vote for no union.
9. If, on the other hand, a collective bargaining agreement is negotiated, the union cannot be decertified during the life of the agreement. Technically the law provides a window of time 90 days prior to the end of the contract stretching to sixty days for a decertification petition to be filed. If a successor agreement is approved prior to that window, then the window never opens. If the collective bargaining agreement expires without a successor agreement, then the union is vulnerable at any time to a decertification action.

Bottom Line, once a skillful union is voted in, decertification is very difficult as there may never be an available opportunity to decertify. And, even if a window of opportunity opens, most employees lack the knowledge necessary to lead a decertification effort.

Relationships

The information provided in this section of the memo focuses on the dawning of a regular relationship between labor and management, assumes that the union won the election and encompasses the period of time around the first couple of labor agreements. It is divided into three sections labeled Traditional, Collaborative Options and Suggestions.

Traditional

Since most organizing campaigns are conducted in an adversarial environment where the union attacks management and management responds by hiring hard core, anti-union consultants/attorneys, the early relationship between labor and management is rocky at best. Even after the relationship settles down a bit, it

² Certification means that the union is recognized as the exclusive representative of the members of the bargaining unit.

rarely takes on the characteristics of high trust and open communication. Rather, the relationship is marked with:

1. Management acts and union, if it chooses, reacts either with a lawsuit, unfair labor practice or grievance.
2. Management treats the union as a "foreign body," not really a part of the organization. The motto becomes "fight the union, not your employees." There is always the sense that management would like to get rid of the union.
3. Each party (management and labor) constantly position themselves to protect their own interest with little attention paid to joint interests.

Collaborative Option

There are a number of well-known examples of organizations and unions that have specifically chosen to develop a cooperative, supportive relationship. Instead of viewing each other as the enemy, union and management see each other as an ally and a valuable resource. There is a specific and conscious effort to develop and maintain the following:

1. High levels of trust and open communication between the two parties..
2. Instead of self-interest bargaining, the parties mutually promote a win-win problem solving approach to issues.
3. A conscious joint decision to focus on long term benefits as opposed to short term victories.

Suggestions

Across the state of Oregon and throughout the nation, community non-profit agencies have usually chosen an adversarial model of labor relations. Like Saturn in the auto industry, a community agency is in the unique position to effectively implement a cooperative model of labor relations. There are some specific benefits to the agency if it succeeds in this quest. They include:

1. The union is in a unique position to work with management to help achieve a true labor-management partnership. As an agency grows, maintaining a sense of partnership has become more difficult. Having support from the union towards this goal can be very helpful.
2. Over the years community agencies may have developed a series of highly innovative, pioneering strategies by which to manage the workplace. These efforts may be viewed with great respect around the country. Protecting existing innovation and cultivating new efforts will be difficult under a traditional adversarial labor relations model.

3. Maintaining the focus on high performance will be difficult without a cooperative relationship and where the interest of employees is bargained separately from management concerns.

Can it be done? Yes, but it will take a specific, concerted effort. Cooperation is a recessive pattern of behavior primarily because it takes two to cooperate and only one to destroy. Experience indicates that for a cooperative model of labor relations to work, support for the process must be present at three levels of the organization: 1) the executive level must understand and give more than lip support to the process, 2) the operational level (middle management) must develop the tools for managing through a cooperative relationship, 3) The field level must handle daily routine consistent with the cooperative model.

Change

What will happen if agency employees vote for a union? The following is a list of those changes that are likely to occur as a result of AFSCME becoming a part of the picture. The projections are based on the assumption that the initial experience with the union is a somewhat positive version of traditional labor relations. Aggressively working to implement a cooperative model would change at least some of the following.

1. Always a critical issue in labor management relations is the question of control. Usually the Employee Handbook has a statement that "The Agency retains exclusive discretion in making policy decisions in the best interest of the Agency." With regard to wages, hours and working conditions, the Agency will no longer have "exclusive discretion." These matters are all subject to negotiation and, as a result, decision making is slowed down.
2. The union is a political body with its leadership subject to election and recall. As a result, its focus is on championing the interest of employees separate from the interest of the organization and the interest of the mission and purpose of the Agency.
3. Union leadership need to be able to take credit for good things that happen to Agency employees. If employees receive a pay raise, for example, the union needs to be able to say that "it worked hard on the employees behalf and got them this raise. Since the union cannot claim credit for existing employee benefit programs it may have little interest in protecting them. The fact may be that many of those who will support the union are not benefiting from these programs which will increase the difficulty of maintaining them as viable programs.
4. When members of the bargaining unit become part of agency governance, the union typically wants to have control over their appointment. What the union fears is the selection of an anti-union member of the bargaining unit who will take positions contrary to the union's interest.

5. Field level leadership that emerges within the union sometimes reflects the most negative of the employees in the bargaining unit. This is true because the more positive employees frequently were the opposition to the union and chose not to join. This can leave the supervisor dealing with a shop steward who he/she would like to get rid of and who has protected status. This also leaves the supervisor wanting to urge some employees to join the union so that they can have a voice in its operations and have an opportunity to serve in a leadership capacity with the union. While there will be appropriate places to make a positive comment about joining the union, the supervisor must be concerned about not "interfering" in union activities – an unfair labor practice.
6. Field level supervisors will have the new experience of having employees request the presence of a union representative when adverse situations are being discussed. They will need training on when union representation is warranted and how to proceed when the union representative is present.

Forewarned is forearmed. By taking a few minutes and thinking through the above scenarios, the supervisor can be better prepared to deal constructively with a wide variety of labor relations situations. Most importantly, the above six points re-illustrate the importance of cultivating a cooperative relationship. Under a cooperative relationship, these problem areas can be discussed in a collaborative fashion and both parties have a vested interest in finding workable solutions to any problems that might arise.