



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 28, 2013

Delivered via Electronic and Statehouse Mail

Tom Luna
Superintendent of Public Instruction
STATE DEPARTMENT OF EDUCATION
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RE: Request for Analysis – Master Agreement Collective Bargaining

Dear Superintendent Luna:

This letter is in response to your request of March 26, 2013, for a written legal analysis from this office on the following questions:

Question #1 – Assuming the passage of SB 1040, which requires school districts to issue individual teacher employment contracts for the ensuing school year by no later than July 1, and assuming passage of SB 1147, which prohibits “evergreen” clauses in master labor agreements by providing that the financial aspects of those agreements can only last for one fiscal year, if a school district has bargained in good faith and been unable to reach an agreement with their teachers’ union on a new master labor agreement by July 1st, can the school district declare an impasse and issue individual employment contracts by the July 1 statutory deadline, based on the school district’s last collective bargaining offer?

Question #2 – If a district declares an impasse and issues individual employment contracts on July 1st based on the school district’s last collective bargaining offer, could such an action become the basis of a bad faith bargaining lawsuit brought by the teachers’ union?

This analysis presupposes that certain mandatory collective bargaining subjects must also be included in individual teacher contracts. This analysis also presupposes that any school district establishing a July 1st deadline for collective bargaining negotiations has a reasonable basis for establishing such a deadline and that the deadline and supporting rationale are disclosed to the local education association in good faith at the outset of negotiations.¹

This analysis primarily references federal case law interpreting the National Labor Relations Act (“NLRA”). With respect to mandatory collective bargaining, Idaho law very much follows the NLRA. *Firefighters Local No. 672 v. City of Boise City*, 136 Idaho 162, 170, 30 P.3d 940, 948 (2001). When a statute is adopted from another jurisdiction, it is presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdictions. *Liefeld v. Johnson*, 104 Idaho 357, 367-68, 659 P. 2d 111, 121-22 (1983). Therefore, while such federal case law is not generally binding on Idaho courts, it is persuasive in interpreting state collective bargaining issues. *Firefighters Local No. 672*, 136 Idaho at 170, 30 P.3d at 948; *see also State ex rel. Kidwell v. Master Distributors, Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

1. A school district that has negotiated in good faith and been unable to reach an agreement by a July 1st deadline may declare an impasse and issue individual teacher contracts based on the school district’s last collective bargaining offer.

A fundamental principle of collective bargaining is that both parties negotiate in good faith² to reach an agreement. *See, e.g., NLRB v. Katz*, 369 U.S. 736 (1962). Either party to collective bargaining negotiations may declare an impasse when there is no longer “any realistic possibility that continuation of the negotiations would have been fruitful.” *Beverly Farm Foundation, Inc. v. N.L.R.B.*, 144 F.3d 1048, 1052 (citing *ConAgra, Inc. v. N.L.R.B.*, 117 F.3d 1435, 1444 (D.C. Cir. 1997)). The NLRB has identified five factors for determining whether impasse exists:

- (1) the bargaining history;
- (2) the good faith of the parties in negotiations;

¹ The applicable case law does not prohibit establishing a deadline for negotiations. However, the selection of an arbitrary deadline by either party to a negotiation would likely constitute bad faith.

² The question presented is in the context of good faith negotiations by the school district. Therefore, this analysis assumes that both parties have negotiated in good faith. A determination of good faith is based on multiple factors and, ultimately, a totality of the circumstances with respect to specific negotiations. For additional discussion on the elements of good faith negotiations see *National Labor Relations Board v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969); *La Porte Transit Co., Inc. v. N.L.R.B.*, 888 F.2d 1182 (7th Cir. 1989); and *Gilbert v. Nampa School District No 131*, 104 Idaho 137, 657 P.2d 1 (1983).

- (3) the length of the negotiations;
- (4) the importance of the issue or issues as to which there is disagreement; and
- (5) the contemporaneous understanding of the parties as to the state of negotiations.

The factors above are all relevant in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *review denied*, 395 F.2d 622 (D.C. Cir. 1968). If the employer declares a genuine impasse, the employer then has the ability to unilaterally offer or impose employment terms concerning mandatory negotiation subjects. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996).

However, any such unilaterally imposed or offered employment terms must be “reasonably comprehended within the employer’s preimpasse proposals”, which would include the employer’s last offer to the union or labor association. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996). Notably, federal courts of appeals are divided on the question whether an employer may declare impasse as to a particular issue subject to mandatory bargaining and unilaterally implement its last offer on such issue when impasse has not occurred as to all matters under the negotiation—*i.e.*, total impasse. *Compare NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 481 (5th Cir. 1963) (partial impasse sufficient), *with, e.g., Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 997-99 (7th Cir. 2000) (total impasse required). The NLRB demands, absent special circumstances, total impasse. *Id.* at 997.

As a result, a school district that has negotiated in good faith, but has been unable to reach an agreement by a reasonably established and known July 1st deadline, would likely be in a legally defensible position if an impasse has occurred—with the presuppositions explained above—and offer individual teacher contracts based on the school district’s last collective bargaining offer. However, consideration must be given to the split of authority over the question whether the impasse may be partial—*i.e.*, limited to those matters related to the individual certificated personnel’s contract—or total. Nevertheless, given the unique bifurcation of individual teacher contracts and so-called master agreements and the practical need to issue the former by some date certain to ensure the school district’s effective operation, a substantial argument can be made that partial impasse provides an adequate basis for implementation of the board of trustees’ last offer as to the issue(s) as to which impasse has occurred.³

³ In this regard, it is essential that Boards of Trustees work with their respective attorneys in order to make the determinations referenced within this letter. This office does not and cannot represent Boards of Trustees, nor can this office’s analysis be substituted for legal advice dispensed in the course of an existent attorney client relationship between a Board of Trustees and its respective attorney.

2. A school district's declaration of an impasse and issuance of individual teacher contracts based on the school district's last collective bargaining offer could potentially be the basis for a bad faith claim lawsuit against the school district.

Any time an employer declares an impasse during collective bargaining negotiations, and, thereafter, unilaterally imposes employment conditions on mandatory negotiation subjects, lawsuits may certainly follow. However, the outcome of such lawsuits will largely be determined by a court's consideration of the points of law discussed above. Trustees thus must undertake a carefully-considered collective bargaining strategy in consultation with their legal counsel designed to discharge their duty to bargain in good faith and simultaneously to carry out their duty with respect to ensuring the school district's efficient operation.

I hope that you find this analysis helpful.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andrew J. Snook".

ANDREW J. SNOOK
Deputy Attorney General

cc: Luci Willits, SDE Chief of Staff (via email)