COLLECTIVE BARGAINING AND INTEREST ARBITRATION

Presented by

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How do you “set” the trend to achieve your goals?

I. Understand the Problem – Why did the “Good Times” create such a problem now?

A. Trends during the 1990s (and early 2000s)
   1. Hearty Economic Growth
   2. Individual taxpayers enjoyed unprecedented job security.
   3. Taxpayers watched their own investments, including 401Ks, balloon with unprecedented (and largely unsupported) growth.
   4. Taxpayers did not mind or even pay attention to union settlements.
   5. Municipal pension funds exceeded, by leaps and bounds, the earnings assumptions.
   6. Increased revenues in the form of increased tax revenue made “covering” the cost of higher wage settlements easier.
   7. Outstanding pension performance permitted pension improvements and other post-employment benefits at a time when the boomers were (and are) interested in addressing this now important aspect of their compensation package.

B. Reality Strikes
   1. The market has a blind date with reality.
   2. Stock prices begin to more accurately reflect earnings and taxpayer 401Ks take a beating.
   3. Municipal pension funds absorb similar hits.
4. Taxpayers do not enjoy tremendous job security, unusually hefty raises or free healthcare and otherwise begin paying attention to the tax bite.

5. Municipal revenue streams reflect the economic slowdown.

6. Taxpayers begin to pay attention to what you are doing.

II. Understand the System

A. Act 195 – Non-Interest Arbitration Groups

1. As to employees who do not have access to interest arbitration, the employer has, decisively, the upper hand. Unions have shown little ability to control or dictate the outcome of primary or general elections.

2. Government entities are better able to withstand strikes than the employees and the unions that represent them. (Especially when you have taken a reasonable and logical approach to bargaining). As a result, there are few strikes, and even fewer long strikes. If you are smart and do not give the PLRB an opportunity to label a strike as being an unfair labor practice strike, you will “win” every strike. Remember, as a matter of law, during a strike, you must stop paying for benefits.

3. Patience is a virtue. Costs of extended bargaining are small when compared to costly mistakes. The Union has the most to gain from settlement. Its members do not receive a pay increase until there is a completed, executed collective bargaining agreement. (But avoid drawing false lines in the sand.)

4. Costly mistakes generally have three sources of origin: (1) lack of patience; (2) inability to draw appropriate bargaining lines and then hold those lines; and (3) failure to understand what is truly costly and troubling.
### III. Preparing for Bargaining

#### A. Team Selection

1. Selecting Spokesperson/Chief Negotiator

2. Continuity (i.e., knowledge of history). When reviewing the Union’s proposal for shift differential, it is important to know it was rolled into base salary two contracts ago.

3. Elected Officials

#### B. Preparing Issues in Dispute

1. Review prior negotiations (notes/proposals).

2. Review grievance arbitration files.

3. Discuss with directors and supervisors (scheduling issues, etc.)

4. Avoid waiver by failing to list issues in dispute.

#### C. Be aware of the external trends

1. What do neighboring municipalities pay their comparable workforce (i.e., residual employees, human services, clerical, non-union – yes non-union).

2. What are the wage and benefit trends in these communities and what factors explain them.

3. What do truly comparable communities pay their comparable workforce and what are their trends.

   a. Sometimes your neighbor isn’t a comparable community

   b. Compare factors like:

      i. Population – size & age

      ii. Tax base

      iii. Millage rates (and other revenue streams)
D. Consider and develop information that establishes why you should or should not be expected to follow those trends

1. Unique considerations of your workforce
   a. Cost of employees as percentage of budget
   b. Bargaining history and comparability of total package – don’t get sucked into a single issue comparison (see IV below)

2. Be aware of unique considerations applicable to your community
   a. Tax base issues
      i. Have businesses been moving in or out of the community?
      ii. Has the “fixed income” population grown or shrunk in last 10-20 years?
      iii. What is the community’s plan for development or growth?
   b. Exempt/unemployment, CPI, other economic factors.

3. What is happening with other employers in your area?

E. Understand that preparation began yesterday – everything matters – it is simply a question of degree.

1. What did you “give” your executive staff?
   a. Why does it matter?
   b. How do you deal with it?
      i. It can probably be explained rationally if you take the time to review it.
      ii. It may reflect expanded responsibilities.
      iii. It will hurt you if you take the position that its “none of your business because he/she is different”.

iv. Like it or not the “trend” often starts here.

2. What did you “give” other non-union employees?
   a. Did you set/follow the trend?
   b. Why or why not?
   c. Most often, this is where the wheels of your plan come off the track.
   d. What about these arguments: “The union employees should pay towards health care first or more because they make more. It’s not fair that our non-union employees have to pay first. They make so little.” Also perhaps, “This may just force them to join a union.”

   Answer: you’re right
   you’re right
   you’re right
   Now do it if you ever expect everyone to follow suit.
   Consider a % of premium increase but do it!

3. Understand the history of the bargaining.
   a. Previous “trades” may not be and frequently are not obvious to the employer bargaining team.
   b. History and continuity are absolutely key here.
   c. If you don’t have a good history or file system – stop whining about it and start now!
   d. If you don’t have a good history go back to III.D.(1)(c) and you will likely find a “defense.”

IV. Cost Out Proposals

A. Understand the true economic cost of your collective bargaining agreement.

1. Wages – hourly rate, longevity, bonuses, shift differential, uniform maintenance and/or cleaning allowances,
education bonuses, annual sick leave buy back or other “reward” programs, minimum hour guarantees.

a. Understand the actual cost.

b. Understand the legal implications and costs that flow from those i.e., FLSA.

2. Benefits – health insurance; dental; vision; STD; LTD; deferred comp; comp time; sick, personal, vacation and other leave time; the cost of leave without pay provisions; post retirement health care; pensions, pensions, pensions.

B. Develop sound defensible positions for bargaining.

1. Establish realistic goals. Do your homework by understanding what the appropriate comparables are. Draw your line in the sand and hold that line. This is much easier if you draw a reasonable line. No bluffing. Be prepared to act upon, and to support, your assertions.

a. Wages and other W-2 items

i. Do not propose an initial increase. The union sets the ceiling, you need not set, at least at the beginning, a “floor.”

ii. Be prepared to educate and demonstrate your cost considerations.

iii. Do not consider W-2 items in a vacuum (see section b. below).

iv. Do not pay the union’s bargaining team to bargain with you.

v. Retroactivity is an important item – keep it as an arrow in your quiver.

b. Benefits

i. Cost of current benefit structure.

ii. History of increased costs.

iii. Develop actual cost and cost increase figures on an
hourly, annual, and percentage basis.

iv. Confirm unnecessary or unanticipated cost items: cost impact of comp time; duplication of sick leave bank & STD; GASB impact; actual use of uniform allowance and increase request.

v. Go after the “unborn” – for example, new hires will not have dependent healthcare coverage, post-retirement healthcare or will pay a substantial portion for the costs of the same.

vi. Note, trying to save money on healthcare premiums is not the only source of controlling expenses. The amount of paid time off employees receive is undervalued in terms of its contribution to overall personnel costs.

2. Cost out Union proposals

   a. This will support your insistence that they prioritize demands.

   b. It will permit meaningful comparisons to relevant patterns of settlement.

   c. It helps set up the argument of a finite amount of money, no matter how it is spent.

   d. It sets up a favorable comparison regarding which side is being reasonable.

   e. It may help the union committee deal with an unrealistic membership or clique.

   f. It will assist the municipality in deciding if arbitration is the better course and will help prepare for arbitration.

3. Do not fall victim to the nonsensical arguments that 1) the union “saved” you money so they should get it back in wages; 2) we need a bigger raise b/c you want us to pay for health care.

4. Do not fall victim to the frequently heard assertion from unions representing employees, that in addition to representing bargaining unit members, they represent the
needs of the constituency to be served.

5. Management rights

a. Do not be shy about seeking cost-efficiency by recapturing mgt. rights.

b. If scheduling limitations create unnecessary cost (i.e., snow removal or “weekend work”) identify it, quantify it and go after it.

c. If you need the union’s permission to manage your workforce, you have a problem.

6. Avoid language which gets in the way of efficient management.

a. Language which provides excessive amounts of paid time off.

b. Language which allows vacations to be used one day (or less) at a time.

c. Language which, to quickly, causes notices of discipline to be removed from personnel files.

d. Language which creates rigid scheduling parameters and does not permit flexibility to avoid overtime.

e. Language which dictates manning levels.

f. Language which prevents or prohibits the efficient use of part-time employees.

g. Language which prevents first level supervisors, and other supervisors/managers from performing bargaining unit work, especially if it does not impact the job security of bargaining unit employees.

h. Language which keeps the employer purchasing benefits indefinitely from employees who are not reporting to work.

C. Understand that the Trends you set and develop can be useful in binding interest arbitration.
1. First you must set the trend as outlined above.
   a. Then you must demonstrate those trends to your employees.
   b. If no settlement is achieved, then you must demonstrate those trends to the arbitrator.

THE LEGAL BACKGROUND OF PUBLIC SECTOR COLLECTIVE BARGAINING

I. What constitutes a Matter Subject to Collective Bargaining:
   a. Act 195:
      i. Matters Subject to Bargaining – Title 43 P.S. § 1101.701 provides that:

      Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

      ii. Management Rights - Under Act 195, employers have certain management rights that are not subject to bargaining. Title 43 P.S. § 1101.702 provides that:

      Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and
discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

b. Act 111:

i. Matters Subject to Bargaining - Under Act 111, policemen and firemen have a right to bargain over certain issues. Title 43 P.S. § 217.1 (2002) provides that:

Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

ii. Management Rights - There is no managerial prerogative explicitly granted to employers under Act 111. “While Act 111 does not expressly provide for the reservation of managerial rights, a management decision or action is deemed bargainable under Act 111 only where it bears a rational relationship to employees’ duties.” City of Philadelphia v. PLRB, 588 A.2d 67 (Pa. Commw. 1991).

c. Impact Bargaining: Although employers do not have to bargain over managerial issues, they may have to bargain over the impact of the policy on the employees.

i. Act 111 - Even though employers may not be required to bargain over a specific decision, they may be required to bargain over the “impact” of that decision. In Lackawanna County Detective’s Association v. PLRB, 762 A.2d 792 (Pa. Commw. 2000), the union charged that the County committed an unfair labor practice when it refused
to engage in impact bargaining over the implementation of a light duty policy. The Association argued that, though admittedly a matter of managerial prerogative, case law required the County to bargain regarding the impact of this act of managerial prerogative. The four requirements for a prima facie cause of action when a public employee alleges a refusal to bargain over the impact of a matter of managerial prerogative are: (1) the employer must lawfully exercise its managerial prerogative, (2) there must be a demonstrable impact on wages, hours or working conditions, matters that are severable from the managerial decision, (3) the union must demand to negotiate these matters following management’s implementation of its prerogative and (4) the public employer must refuse the union’s demand. The court held that the Union did not meet all four of these requirements.

ii. Act 195 – In Philadelphia Federation of Teachers v. Philadelphia School District, 26 PPER 26147 (1995), the hearing examiner held that the District’s decision to eliminate certain department positions was deemed a permissive managerial right. However, while a public employer need not bargain over an economically motivated decision to furlough personnel, it must negotiate over the impact or effect of its decision on employee wages, hours and working conditions. Philadelphia Federation at 12 (citing to Upper Gwynedd-Towamencin Municipal Authority, 18 PPER 18039 (Proposed Decision and Order, 1987)). (See also Montgomery County Community College v. PLRB, 16 PPER 16156 (Pa. Court of Common Pleas 1985) affirming PLRB decision that although community college was not obligated to bargain with faculty union concerning its decision to cancel fall semester, college violated PERA by failing to bargain with union concerning impact or effects of its decision.)

II. Determining the Difference between a Mandatory Subject of Bargaining and a Managerial Prerogative
Act 195 – State College Balancing Test

i. Test: The court is to apply a balancing test under Act 195 in determining whether a specific issue is subject to bargaining or not. In PLRB v. State College Area School District, 337 A.2d 262, 268 (1975), the Pennsylvania Supreme Court held that “where an item of dispute is a matter of fundamental concern to the employees’ interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon request by the public employees’ representative pursuant to Section 702.”

ii. Examples of cases applying the State College balancing test:

1. Code of Conduct: AFSCME v. PLRB, 479 A.2d 683 (Pa. Commw. 1984): The employer, the Commonwealth of Pennsylvania, unilaterally enacted a Code of Conduct. The union claimed that because the provisions of the Code have a significant impact upon the employees’ terms and conditions of employment, the Commonwealth was required to bargain over the issue. The Commonwealth argued that the promulgation of the Code was a matter of inherent managerial policy. In applying the balancing test, the court held that “Though some provisions of the Code do have impact on employee wages, hours, terms and conditions of employment, that impact is clearly outweighed by the greater impact such a policy has on the ability of the government to preserve
integrity among public employees and to provide a mechanism for enforcing a policy dedicated to the improvement of public service.” AFSCME at page 688.

2. Time Clocks: Institution of time clocks at a state correctional facility was within employer’s managerial prerogatives. See PSSU Local 668, SEIU, AFL-CIO, CLC v. Commonwealth of Pennsylvania, Department of Corrections, 29 PPER 29022 (1997). In this case, the complainant alleged that the hours of work had been lengthened by the use of time clocks. The complainant further alleged that the parties had agreed in their own CBA that overtime at a premium pay is owing for time spent in addition to the regular workday. Accordingly, the PLRB held that “…to the extent that the employer’s direction to use the time clock may add to the regular workday, the complainant is protected through the parties’ grievance procedure in which any additional time required by this managerial direction may add to the work day.” PSSU Local 668 at page 3.

3. Dress Code Generally: In PSSU, Local 668, of SEIU, AFL-CIO v. PLRB, 763 A.2d 560 (Pa. Commw. 2000) the relevant inquiry before the board was whether the dress code policy was a mandatory subject of bargaining or a matter of inherent managerial prerogative. The Board held that the dress code was not a mandatory subject of bargaining. On appeal, the Commonwealth court held that “Based upon the employer’s substantial interest in providing professional services to the public, the Board properly concluded that a dress code, which outlines specific minimum standards of appropriate attire, is appropriately within employer’s managerial prerogative and is not subject to collective bargaining. While PSSU contends that CAO (County Assistance Office) employees have a substantial interest in choosing their own attire and dressing comfortably, PSSU was required to present evidence in support of these assertions on the
4. Dress Code for Teachers: In Portage Area Education Association v. Portage Area School District, 29 PPER 29032 (1998) the hearing examiner held that the school district had a managerial right to require male teachers to wear a coat and tie. The hearing examiner, in applying the State College balancing test, held that the district’s interest in fostering student respect for teachers outweighed any negative impact on the teachers resulting from this requirement.

5. Employers may have to bargain over the “impact” of the dress code policy. In PSSU, Local 668, SEIU, AFL-CIO v. Commonwealth of Pennsylvania, Department of Public Welfare, 33 PPER 33055 (2002), PSSU contended that the means by which employees are required to obtain a medical exemption to the dress code is a separate negotiable impact of the managerial prerogative. The Board, in applying the factors set forth in the Lackawanna Detectives case, held that PSSU failed to state a cause of action under the second element. The Board held that “The decision to allow exemptions from the policy for medical reasons is not severable from the requirement that such medical reasons be substantiated with documentation.”

6. Work Rules: In Abington Transportation Association, et al. v. Commonwealth of Pennsylvania, et al, 570 A.2d 108 (Pa. Commw. 1990) the controversy concerned the School District’s duty to bargain with the Association concerning thirty-nine unilaterally promulgated written work rules and penalties which affected the school bus drivers. The PLRB, in its final order, affirmed the hearing examiner’s decision that some of the work rules were mandatory subjects of bargaining and others were matters of inherent managerial prerogative. “The PLRB’s final order explained in detail how it
balanced each rule weighing the District’s interest in the rule against the Association’s interest in job security.” Abington at 111. “The application of the balancing test in change of work rule cases requires a rule by rule analysis.” Fairview Education Association, PSEA/NEA v. Fairview School District, 21 PPER 21079 (1990).

“In unilateral implementation of work rule issues, the Board has also adopted the position, derived from federal precedent, that rules which are, on their face, vague or overbroad will be presumed to have a greater impact on the employees than might otherwise be the case”. Fairview Education Association, PSEA/NEA v. Fairview School District, 21 PPER 079 (1990) (citing to Abington, 19 PPER at 182). In Amalgamated Transit Union, Local #168 v. Lackawanna County Transit System, 18 PPER 18091 (1987), the PLRB found that the public employer violated its bargaining obligation by unilaterally issuing a revised employee handbook containing changes in discipline and disciplinary procedures for certain rule violations.

b. Act 111 – Rational Basis Test

i. The Test: The test under Act 111 to determine whether an issue is subject to bargaining is the “rational basis” test. This test was applied in City of Clairton v. Commonwealth of Pennsylvania, PLRB, 528 A.2d 1048 (1987). In this case, the union had filed an unfair labor practice charge with the PLRB on the basis that the City had refused to bargain with the union concerning the reassignment of dispatching work. The court noted “The balancing of considerations under PERA as set forth in the State College case is not pertinent here, inasmuch as this matter concerns police and fire personnel, and is consequently within the scope of Act 111.” City of Clairton at 1049. The court held, citing to International Assn. of Firefighters v. City of Scranton, 59 Pa. Commonwealth Ct. 235, 429 A.2d 779 (1981), that “Under Act 111, of course, a topic
of management action is deemed bargainable where it bears a rational relationship to employees’ duties.” Id. at 1049-1050.

The Commonwealth Court further clarified the City of Clairton holding in Township of Upper Saucon v. PLRB, 2 PPER 2025 (Pa Commw. 1993). In Upper Saucon, the township had unilaterally changed police officers’ rotating shift schedule to a fixed shift schedule. In determining whether this issue was subject to bargaining, the Court confirmed that the “rational basis” test is to be applied. Unlike the State College test, there is no weighing of the bargainable and non-bargainable interests. The Court noted that “…rejection of the PERA balancing test in the context of Act 111 cases does not mean that management objectives are wholly ignored. “A managerial policy concern must substantially outweigh any impact an issue will have on the employees for that issue to be deemed a managerial prerogative.” Upper Saucon at pages 7-8.

ii. Examples of cases applying the Act 111 test

1. Light Duty: The decision to have or not to have a light duty policy is exclusively that of the employer. Nevertheless, where the decision has a severable impact upon the terms and conditions of employment, the Board requires impact bargaining. See Bern Township Police Association v. Bern Township, 29 PPER 29247 (1998). The implementation of a light duty policy is a managerial prerogative and need not be bargained, although the employer may have an obligation to bargain over the impact of the decision. In Hanover Township Police Benevolent Association v. Hanover Township, 26 PPER 26124 (1995), the hearing examiner held that there were several terms and conditions of the officer’s employment that had been unilaterally altered by the imposition of light duty and therefore impact bargaining was required. For example, the officer’s schedule changed significantly due to the assignment of light duty.
2. Physical Examinations of Police Officers: In City of Sharon v. Rose of Sharon Lodge No. 3, 315 A.2d 355 (Pa. Commw. 1973) the City of Sharon enacted an ordinance which required all present employees of the police department to take and pass a physical examination as a “condition of employment”. The union relied upon Act 111’s right to bargain over terms and conditions of employment and that therefore all conditions of employment are within the purview of Act 111. The Commonwealth Court held that “The fact that Ordinance 4-71 refers to the physical examination as a ‘condition for continued employment’ is not controlling and does not make it a condition within the meaning of Act 111.” City of Sharon at 357. The Court further held that “The physical fitness of policemen is no less essential for the efficient functioning of a police force, is also a ‘condition of employment’, and, as with the above requirements, is not meant to be outside the scope of a municipality’s managerial rights.” Id. at 358.

In Fraternal Order of Police v. Commonwealth of Pennsylvania, 30 PPER 30216 (1999), the PLRB held that fitness testing is a matter of managerial prerogative and not a mandatory subject of collective bargaining. Therefore in this case, the state acted within its managerial prerogative in unilaterally instituting a fitness testing program for law enforcement personnel. Be cautioned though, as the PLRB noted thought that had the union properly raised the issue, the employer would have had to impact bargain. Therefore, the moral of the story is even though it is considered a managerial prerogative, the employer is still required to bargain over it. (See also Pennsylvania State Troopers Association v. PLRB, 33 PPER 33154 (2002) holding that unfair practice charge was properly dismissed where parties’ bargaining agreement specifically permitted employer to formulate and present complete physical fitness program to union.)
3. Outside Employment for Police Officers: Fraternal Order of Police Lodge #9 v. City of Reading, 27 PPER 27259 (1996): The Pennsylvania Labor Relations Board held that the city acted within its managerial prerogative in unilaterally requiring police officers, who were previously required to obtain approval for secondary employment related to law enforcement, henceforth to obtain approval for secondary employment of any kind. The Board further held that the City’s interest in maintaining honesty and integrity of police officers, and enhancing public perception thereof, outweighed officer’s alleged privacy interests with respect to off-duty employment.

4. It is within the municipality’s managerial prerogative to modify a court appearance policy. In South Park Township Police Association v. South Park Township, 32 PPER 32078 (2001), the PLRB held that “The Township lawfully exercised its managerial prerogative when it directed its police officers to report to the police station for their regularly scheduled daylight shift, prior to attending any court proceedings scheduled during that shift.” Likewise, if the proceeding ends before the officer’s shift ends, the Township may direct its officers to return to the station. The Board noted that “There is no more fundamental managerial right than the employer’s right to direct personnel by assigning work to its employes during their scheduled hours of employment.”

5. Dress Codes: The Township's interest in how its officers appear when they represent the township in court substantially outweighs the officers' interest in the dress code. Accordingly, the Township was exercising its inherent managerial prerogative when it issued an order requiring the officers to wear their uniforms for court appearances. South Park Township Police Association v. South Park Township, 31 PPER 31154 (2000).
6. Installation of Video Camera: In East Pennsboro Township, 28 PPER 28015 (Proposed Decision and Order, 1996) it was held that the installation of a video camera in the public area of the police station was a matter of managerial prerogative as the employer had a paramount interest in deciding how its property is used and union has other rooms available in which to conduct its business beyond view of camera.

7. Time Clocks: In FOP Lodge #36 v. Exeter Township, 26 PPER 26078 (1995) the PLRB, citing to the City of Clairton case, held that a subject such as the implementation of a time clock must be bargained with the employee’s collective bargaining representative when it is rationally related to the employee’s duties. The court further held that “An employer may implement a time clock without bargaining with the employees’ collective bargaining representative when the implementation has minimal or no impact upon the employees’ interest in terms and conditions of employment.” FOP Lodge #36 at page 4. If the implementation of a time clock produced a lengthening of the employees’ workday, that would assist the employee in demonstrating the requirement of impact upon the employees’ terms and conditions of employment. In this case the Board held that the record contained no evidence to indicate any impact on the employee’s terms and conditions of employment.

8. Pensions: A municipality’s decision to appoint a new pension fund manager is a non-bargainable exercise of its managerial prerogative. “The choice of a pension plan manager is clearly within the managerial policy exception to collective bargaining. While pensions contain many aspects which are subject to bargaining, the choice of a pension plan administrator is not one of them; it is an administrative matter.” See Frackville Borough Police Department v. PLRB, 28 PPER 28232 (Pa. Commw. 1997).
9. Test Requirements: In Pennsylvania State Troopers Association v. PLRB, 33 PPER 33179 (Pa. Commw. 2002), the Commonwealth Court held that the PLRB properly dismissed unfair practice charge challenging Commonwealth's alteration of weight given to test scores when making decisions regarding selection of police officers to be promoted to sergeant. The Commonwealth was permitted to unilaterally change weight of certain components in promotions tests because that change pertained to matter of managerial policy, not subject to bargaining under Act 111. In addition, Act 111 did not list test scoring among items subject to bargaining.

10. Scheduling: In Indiana Borough v. PLRB, 28 PPER 28187 (Pa. Commw. 1997), the Commonwealth Court held that the PLRB properly concluded that borough’s unilateral change to system of rotating police shifts from steady shifts was unlawful where borough’s interests in effecting change, although legitimate, did not substantially outweigh employees’ interests with regard to loss of earnings, substantial change in lifestyle and potential loss of outside employment.

11. Work Rules: In FOP Rose of Sharon Lodge #3 v. City of Sharon, 28 PPER 28218 (1997), the FOP charged that the City violated Act 111 by unilaterally implementing new work rules which changed the officers’ terms and conditions of employment. The hearing examiner held that the City was privileged unilaterally to implement a work rule prohibiting police officers from carrying firearms while intoxicated. The hearing examiner concluded that the City’s managerial concern for public safety and departmental integrity substantially outweighed any impact on the officers’ terms and conditions of employment.

12. Post-retirement Benefits:
a. Payment to Existing Retirees: In Township of Wilkins v. Wage & Policy Committee of the Wilkins Township Police Department, 696 A.2d 917 (Pa. Commw. 1997), the Commonwealth Court held that “…the trial court was correct in its determination that providing new benefits to former retirees is unlawful…” The court further held that “Under Act 111, municipalities may not enter into a collective bargaining agreement over the rights of individuals, who have already retired and are no longer members of the bargaining unit.” Township of Wilkins at 920.

b. Payment to Further Retirees: Officers have a right to bargain with the municipality over their future postretirement benefits. Fairview Township v. Fairview Township Police Association, 795 A.2d 463 (Pa Commw. 2002). Section 1512(d) of the Second Class Township Code authorizes the second class townships to provide medical insurance coverage to its “employes and their dependants.” In Fairview the Court held that “When the term ‘employes’ in Section 1512(d) of the Second Class Township Code is construed in conjunction with Section 1 of the Act 111 granting the police officers the right to collectively bargain with their public employers over ‘retirement, pension, and other benefits,’ it is clear that the medical insurance coverage of ‘employes’ under Section 1215(d) should include postretirement medical benefits of the police officers.” Fairview at 470. The Court went on to hold that “In the instant case, the postretirement medical benefits requested by appellant are deferred compensation for the compensation forgone during active employment in exchange for benefits and security upon retirement.” Id. at 470-471.

13. Locker Size: In Dormont Borough v. PLRB,
794 A.2d 402 (Pa. Commw. 2002), the Commonwealth Court affirmed the PLRB decision holding that the Borough’s interest in construction and design of a physical plant does not substantially outweigh the impact on the officers’ duties. The Court found that there was an abundance of evidence establishing that the issue of locker size is rationally related to the duties of police officers. For example, the police are required to wear clean uniforms on a daily basis. Also, the police officers must maintain a change of clothes in the event that their uniform becomes soiled during a shift.

III. How One Issue can constitute both a Mandatory Subject of Bargaining and a Managerial Prerogative depending on the circumstances

a. Smoking Bans:

i. In Chambersburg Area School District v. PLRB, 430 A.2d 740 (Pa. Commw. 1981), the Commonwealth Court reversed the PLRB’s determination that the School District had committed an unfair labor practice by unilaterally imposing a smoking policy. The Court concluded that the School District acted in furtherance of its duty to promote education when it adopted the policy. The court held that “Even if it is a working condition, we are convinced in striking a balance the education motive behind the policy outweighs any impact on the employees’ interests. We repeat that the paramount consideration in reaching this balance is the public interest in providing effective and efficient education for the School District’s students. We, therefore, conclude that the smoking ban is an inherent managerial policy and not a mandatory subject of bargaining.” Chambersburg at 744.

ii. At issue in Crawford County v. PLRB, 659 A.2d 1078 (Pa. Commw. 1995) was the unilateral implementation of a no-smoking policy in the jail facility. The County argued that the implementation of the policy was a matter of inherent managerial policy. The County argued that it had an interest in the health concerns of the exposure to second-hand
smoke by inmates and employees and there was a safety concern over fires at the prison. In applying the balancing test, the Commonwealth Court held that “…the PLRB acted reasonably in concluding that the County committed an unfair labor practice by unilaterally implementing a no-smoking ban…and that it failed to meet its burden demonstrating that the smoking ban in the jail facility was essential to the County’s basic mission.” Crawford County at 1082.

IV. Past Practice

a. Applicability of Past Practice in the Public Sector

i. Can it really be a problem for me to provide a Thanksgiving turkey?

ii. The extension of past practice from the private sector to the public sector in Pennsylvania was confirmed in County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1977). In that case, the court extended the use of past practice to the public sector in four circumstances:

1. to clarify ambiguous language;

2. to implement contract language which sets forth only a general rule;

3. to modify or amend apparently unambiguous language which has arguably been waived by the parties; and

4. to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement.

b. First, determine whether there is in fact a practice at issue.

i. A noted arbitrator defined a practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It
must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented.

This “definition” of a practice set forth by Sylvester Garrett, was adopted by the Pennsylvania Supreme Court in Allegheny County, supra.

ii. Apparently, the Pennsylvania Labor Relations Board has not reviewed the Allegheny County decision in some time. See, Wilkes-Barre Police Benevolent Association v. City of Wilkes Barre, 33 PPER 33087 (2002) (a Pennsylvania Labor Relations Board hearing examiner determined that by permitting police officers to donate sick leave on two instances in the past, the Township was precluded from stopping the past practice without collective bargaining and therefore committed an unfair practice when it refused to permit the donation of sick days in this instance.

c. Some considerations as to whether an alleged practice should be considered a binding past practice.

i. Is there mutuality? See, Ellwood City Police Wage and Policy Unit v. PLRB, 731 A.2d 670 (Pa. Commw. 1999) (the employer did not commit an unfair practice when it successfully urged a magistrate to schedule hearings during an officer’s regular work schedule.

ii. Is the alleged practice one relating to a managerial prerogative or is it a term and condition of employment that would otherwise be subject to bargaining. Management may not ordinarily waive a managerial prerogative through practice (i.e., the fact that you have not assigned an officer to walk a beat does not mean that you have forfeited, through an alleged past practice, the right to make such an assignment).

iii. Can the Union demonstrate a consistency required to establish a past practice? Or, stated conversely, can you establish the absence of consistency? Despite the
recent PLRB case to the contrary, when arbitrating cases of past practice, well-settled consistency, or the absence of it, is a critical factor. Ordinarily, an action must be clear and consistent and must have a sufficient amount of longevity and repetition and must therefore evidence mutual acceptability in order to be enforced as a binding practice.

iv. Have the underlying circumstances which gave rise to the practice remained unchanged? A practice, because it is borne out of specific facts, must be carefully related to its original origin and purpose. A change in underlying circumstances may result in the ability to change the practice.

d. How do you extinguish a practice?

i. It depends upon the type of practice at issue.

ii. Ordinarily an employer must “bargain it out” in negotiations.

iii. One way, when dealing with a term or condition not expressed anywhere in writing (the fourth type of past practice in the Allegheny County case) is to place the union on notice of the intent to do away with the practice absent language bargained into the contract. East Stroudsburg Area School District v. East Stroudsburg Area Education Association (Joseph B. Bloom, Arbitrator, 1997) (arbitrator denied a grievance seeking to continue a “past practice” of paying lump sum summer payments because the district put the union on notice during the negotiations of its intent and the parties did not negotiate such language into a successor agreement. The contract provided for 26 annual pay periods).

iv. When dealing with practices interpreting language, implementing a general rule or rewriting the contract in the event of an alleged waiver, the best advice is to bargain language into the contract concerning the specific practice and how it has been changed prospectively.

e. What is the effect of a zipper clause?

i. In Commonwealth v. PLRB, 459 A.2d 452 (Pa. Commw. 1983), the Commonwealth Court held that
zipper clauses would only be used as a “shield by either party to prevent incessant demands during contract term” but that use of this clause as a “sword by one seeking to impose unilateral changes without first bargaining is not favored.”

ii. A zipper clause by itself is insufficient to indicate a clear and conscious waiver of a right to bargain. See, Commonwealth of Pennsylvania v. PLRB, 474 A.2d 1213 (Pa. Commw. 1983).

V. What is an employer to do when it has bargained or arbitrated an illegal provision or otherwise bargained away a managerial prerogative?

a. Once again, the employer must bargain it out.

b. Under Act 111 and Act 195, arbitrators are precluded from requiring an employer to perform an illegal act. However, when the employer fails to appeal an improper award, the employer must subsequently seek to bargain out the unlawful provision.

c. “An unlawful provision voluntarily agreed to by the public employer which is then carried forward in an ‘as is’ clause in successive contracts without ever being challenged, may not subsequently be ignored under the argument that it is ‘illegal’.” Hickey, supra. What an employer may do is bargain to have the provision removed from future contracts. City of Scranton v. Local Union No. 669, IAFF, 551 A.2d 643 (Pa. Commw. 1988).

d. The fact that a predecessor agreement contained a provision identical to the one challenged as illegal in interest arbitration does not preclude the party from making such a challenge. Police Bargaining Unit of Borough of Montoursville Police Department v. The Borough of Montoursville, 25 PPER 25011 (Pa. Commw. 1993).

A “broadly worded management rights clause” will not be interpreted as a waiver and will not constitute a clear and unmistakable waiver of the Union’s right to bargain over a mandatory subject of bargaining. Lackawanna County, 27 PPER 27121 (1996).