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What's Ahead in Faculty Collective Bargaining? The New and the Déjà Vu

Daniel J. Julius¹ & Nicholas DiGiovanni Jr.²

Our Questions

Academic collective bargaining is fast approaching the half-century mark, from its nascent beginnings at community colleges in Michigan and Wisconsin, and at the City University of New York in the 1960s. Given this history, it seemed timely to the authors to consider two salient sets of questions for those who toil in the collective bargaining arena. The first focuses on how to conceptualize and evaluate the impact of academic collective bargaining. What do we know and what is still unknown about faculty unionization? What contextual, institutional and demographic variables should practitioners focus on in order to evaluate the past and predict what might be in store over the next 50 years? As but one recent example to highlight this question, legal and legislative frameworks, among the most important predictors of bargaining behavior, appear to be undergoing a fresh examination. Change through diminishing union rights legislatively has been headline news in Wisconsin for some time. A former cradle of faculty unionization, Michigan, is now a Right-to-Work state. Is this a developing trend for years to come, or a political aberration to be nullified in due course?

The second issue, closely related to the first, is what contemporary subjects and problems are engaging the parties at the bargaining table. In other words, given the changing organizational environment in which bargaining has occurred, is there an identifiable salient set of bargaining topics? Is there something new, something unique about the scope and context of negotiations today—or is it déjà vu all over again?

In answering these questions, we have tried to offer a snapshot of the organized and organizing post-secondary landscape, examine it closely for new themes or general

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trends, keeping in mind more comprehensive picture albums have been assembled by others over the past fifty years. A picture is simply that; it captures a particular moment. Truly memorable pictures capture images which remain indelibly etched in our consciousness because, when we see them, they evoke a wider reality both real and present and yet are timeless in what is depicted. Our snapshot is two-dimensional in that we look at conceptual ways to understand faculty unionization and areas of contention at the table. We make an effort to compare what we are witnessing today to our personal experiences as practitioners and scholars over the past 40 years.

The Difficulties of Analysis

One immediate challenge in addressing the questions posed is the difficulty of untangling the impact of collective bargaining from other internal and external forces shaping post-secondary education. For example, can the effects of collective bargaining be gauged in an era when other external catalysts appear to be more salient in promoting organization change? We mentioned enabling legislation in some Midwestern states. What about the decline in federal and state support, the increased use of adjuncts and decline in full-time appointments, the presence of free online courses (which may soon be transferable for credit), public pressures for tuition decreases and a growing disenchantment with the benefits of higher education, transition in presidential or decanal leadership, institutional size, or the region in which bargaining occurs all of which have been cited by scholars as catalysts for change in higher education (Pfeffer, 1997; Birnbaum, 1988; Garbarino, Feller, & Finkin, 1977; Kemerer & Baldrige, 1976; Blau, 1973; Hodgkinson, 1971). Or have local labor management relationships and the “personalities” who shape interactions had a greater impact on a particular college or university than the external factors?

The difficulty in assessing the impact of collective bargaining is not confined to the larger organizational questions. Take the issue of bargaining agent effectiveness. Does it matter if faculty or graduate students are represented by a particular union or bargaining agent or do particular agents bargain better agreements? Does the recent union trend towards merger, such as the AAUP-AFT combined units, yield better results at the table? Although there are few objective studies which concern these questions, what evidence there is seems to suggest that what is more important when discussing issues associated with agent effectiveness is *where* the bargaining occurs, i.e. the institutional and demographic characteristics of institutions or systems or *what* particular employee groups are represented, rather than the particular agent (Julius & Chandler, 1989). While we realize such claims may be controversial, the majority of organized faculty members in

the US today are represented by mergers of unions, not one particular bargaining agent; claims that one union is more effective than another would be very difficult to verify.

When trying to discern themes, trends and outcomes, those who have studied collective bargaining in higher education have had difficulty untangling a myriad of internal and external variables from those associated with labor management relations. Nor have we found many studies that identify long-term impacts of bargaining. For example in the area of compensation, the question of whether or not unionization results in higher salaries remains unclear, despite the claims of many, because there is no body of research which objectively demonstrates, after all these years, that faculty unionization results in higher salaries. Indeed, the highest paid faculty members in the U.S. remain unorganized—as do the lowest paid.³ Nor is there much research, despite strongly held opinions, around the issue of student outcomes and whether they are dependent on whether students are taught primarily by adjuncts rather than full-time faculty. Nor can we pinpoint whether or not unionization has made it more difficult to hire more adjunct faculty. In fact, unionized institutions appear to be hiring adjuncts at the same rate as non-unionized institutions.

Another issue concerns the impact of bargaining on shared governance. Our experience indicates it not only survives unionization, but in some cases collective bargaining has resulted in the establishment of additional joint decision-making bodies on campus. To be sure, in some settings, the reality is that the faculty union has trumped the faculty senate in importance and influence, but by no means does it appear that faculty unions have marked the death knell of the governance bodies themselves.

Other important academic concerns, institutional rankings, the teacher mentor relationship, the impact of technology and online courses, the share of full time faculty teaching undergraduate courses, faculty diversity, and student debt ratios—all may be going through profound change, but there is a paucity of evidence pointing to collective bargaining as the reason or cause of transformation in these areas.

What We Do Know

When we endeavor to wrap our arms around the historiography of unionization, or review the institutional landscape associated with faculty unionization, generalizations about the terrain, as we argue, are not easy to measure. There are always exceptions

³ One reviewer reading this manuscript suggested the following: “It could be said that any salary advantage to faculty bargaining collectively is time limited and subject to general market forces affecting faculty salaries by sector, region and discipline.”

attributable to particular personalities and situational concerns. We know that the process unfolds somewhat differently in different universities or systems, such as at Rutgers, the University of California at Santa Cruz, University of Montana or Cincinnati, the University System of New Hampshire, the State Colleges and Universities in Pennsylvania, the University of Florida, the Graduate Center at City University of New York, Westchester Community College, not to mention private institutions like the University of San Francisco, Long Island University or Rider University. Colleges and universities are different in mission, culture, management practices, funding, the type of students they serve, and therefore it comes as no surprise that collective bargaining and faculty administration relationships play out in different ways in different institutions and systems. In such contexts collective bargaining reflects varying legal structures, cultures and personalities, but is anything unique or truly new?

We certainly believe from our experience that leadership matters, but few studies seem to be able to substantiate this point. The leadership issue is complicated due to the glacial pace of change in colleges and universities, high turnover rates for administrators, and the oddity of institutions where the progressives of one era are invariably pegged as the reactionaries of the next.

There are other observations where we feel more comfortable making generalizations. We now know that collective bargaining has served to codify previously informal policies so that overall administrative and human resources practices have become more structured, transparent and standardized. Unionization has brought consistency and more equity to compensation practices, finality to governance interactions and “binding arbitration” to issues covered in labor agreements (many of which are very similar). Collective bargaining has invariably (in the areas of compensation and grievance administration) shifted authority upwards to the presidential and system offices. In institutions and systems where faculty and non-faculty are organized, collective bargaining has served to standardize human resources practices for all categories of employees, although there often remains the struggle to equalize benefits across campus where different union constituencies may have sharply different goals and do not always share in a desire for a common interest in standard benefits.

We know that unionization has served to identify supervisory responsibilities (for deans and chairs) and necessitated a more standardized way of managing. Unionization has inevitably ushered third parties into the decision-making process (arbitrators, mediators, legislators), and in general it has led to the involvement of union leaders in institutional decision making in more formal ways and under the protection of state and, in the private sector, federal legislation.

We know where unionization has thrived and where it has not. For example, faculty collective bargaining is most closely associated with public systems in approximately 15 states, where there is enabling public sector legislation. Roughly half of the unionized professoriate (public and private sectors) work in California or New York.⁴ Collective bargaining may spur organizational realignment in systems, and in certain states it has encouraged greater involvement of the Governor and other publicly elected officials. In the private sector, as will be noted below, we know that organizing of full-time tenure-track faculty has not succeeded to any degree, largely, although certainly not exclusively, because of the Supreme Court's decision in *Yeshiva University*. However, there are greater numbers of private institutions and faculty under contract now, by almost 50% according to data compiled by the National Center for the Study of Collective Bargaining in Higher Education and the Professions, than was the case before the now infamous *Yeshiva* decision, although by comparison to the public sector the numbers are small.

We know that, despite early misgivings, the collective bargaining process itself, one that accommodated a wide range of workers and professions since the late 1930s, also proved adaptable to faculty collective bargaining. This is not too surprising considering that ballet dancers, musicians, engineers, journalists, teachers and other professionals, not to mention other types of industrial workers, public sector professionals and, in some cases, military personnel have bargained collectively for years.

The Broader Industrial Labor Relations Context: The Craft Analogy

Earlier studies of unions in higher education made many claims about the probable impact of unions on campus (Duryea & Fisk, 1973; Carr & Van Eyck, 1973; Gabarino, 1975). Many suggested that collective bargaining may be incompatible with the dictates of professionalism and values of the professoriate. However, as we have noted, there is very little research that establishes a causal relationship, particularly in regard to professionalization. Perhaps a better lens through which to evaluate the actions of organized faculty is through a comparison to craft unions in industrial or corporate settings (e.g., electricians, plumbers, musicians, printers, journalists, etc.) (Chandler, 1967; Julius, 1993). While such comparisons are by no means exact, it is useful perhaps to consider the similarities between faculty and craft unions.

Crafts are known to be flexible within their own groups but rigid in their external relations. They can be adaptable, but this is not one of their prime characteristics. If craft

⁴ Data compiled by the National Center for the Study of Collective Bargaining in Higher Education and the Professions (<http://www.hunter.cuny.edu/ncscbhep>) demonstrate these statements.

employment conditions and rights are provided for, the craft will concern itself with administering these. If seniority or craft entrance criteria are threatened, for example, rigid reactions can occur. The group may rise to defend its jurisdictions and a great deal of non-productive activity may take place. Crafts have the ability to participate well in the managerial process, but the relationship of a craft to the management with which it deals can become destructive if both parties focus on the defense of their respective rights to the neglect of the problem both are trying to solve.

Craft employees who work on project-type tasks usually have the freedom to run their affairs autonomously; the contractor for whom they work counts on this. However, when craftspeople work in large organizations, the relationship with managers who head the organization can cause problems. The cause of these difficulties is, however, frequently misstated. Observers perceive a clash of viewpoints because the “craft orientation” often is contrasted with that of the “bureaucrat.” In reality, there are some marked *similarities* between craftspeople and bureaucrats. Both stress universal standards, specialization, and evaluation of competence on the basis of performance. Conflicts arise not because of the differences but because of the similarities (Chandler, 1967; Chandler & Julius, 1979) .

As colleges and universities evolved in the early 1900s, professional specialists (faculty) confronted another emerging group of specialists, academic administrators, who claimed responsibility for many the same functions and prerogatives. Indeed, the role of faculty and administration in shared governance matters has never been clearly delineated.⁵ With the arrival of collective bargaining 60 years later the inevitable jurisdictional disputes arose. In the 1960s and 1970s, as well as today in locations where faculty are organizing, these disputes were hastened by enrollment-related factors, public calls for institutional accountability and the loss of legislative funding. As administrators (and legislators) endeavored to assert control over faculty workloads, promotion and tenure standards, job security and the like, faculty (who, in addition, may have experienced a real decline in salaries and decision-making prerogatives), joined unions in states where enabling legislation facilitates collective bargaining.

Faculty unionization can be attributed more to the craft orientation of the professoriate, rather than economic factors. Assertion of craft rights (i.e. control of work

⁵ The AAUP has issued statements concerning shared authority and the delineation of the territorial boundaries of the respective parties. Various state statutes and accreditation bodies have also addressed these matters. However, these issues are by no means settled and remain salient and often undefined in both unionized and non-unionized institutions. The issues that are shared depend on a variety of factors which include the nature of what is being decided, whether a crisis exists, the culture and history attendant to shared decision making in the institution, as well as other systemic and personality based factors.

schedules; selection of course content; defense of appointment; promotion and tenure policies; and protection of the faculty's role in curriculum and teaching methodology) arguably remain the most important stimulus for unionization. This observation is borne out by reviewing collective bargaining agreements which safeguard these prerogatives. Economic issues are important but are not, in our opinion, a primary cause of collective bargaining.

If the analogy of crafts to traditional professional orientations is accepted, the debate over professionalism versus unionism becomes less meaningful. If, by unionism we mean seniority-determined work rights, uniform procedures and policies in the workplace, and guaranteed job security, a potential conflict may exist with professional academic values. However, the above analogy fits with what is thought of as the "industrial" approach to unionism, not the craft approach.

As craft-type unions, academic employees have negotiated provisions into labor contracts which reflect a professional/craft orientation. For example, bargaining agreements do not usually specify the use of standardized personnel policies. Nor do they dispense with traditional academic criteria used to assess intellectual quality. The majority of labor agreements contain language protecting tenure. The traditional argument for tenure is based on its relationship to academic freedom. Without the tenure process, it can be argued, the professor is merely an "employee," directly dependent on the administration. For the professional craft group, however, tenure is the keystone to its existence. Through the tenure process, traditional craft controls can be exercised. Perhaps in this context it is the equivalent of the hiring hall in the construction trades.

Organizing Issues

The Growth of Adjunct Organizing

In looking ahead to the challenges of the next decade for academic labor relations personnel, another question to address is where future unionization on campuses is likely to occur. We know that as long as the Supreme Court's decision in *Yeshiva University* remains good law, unionization of tenured faculty in the private sector is likely to proceed slowly.⁶ But there will undoubtedly be an increase in unionization in some other key academic employment areas.

⁶ *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). As noted *infra*, the Circuit Court of Appeals for the District of Columbia remanded to the NLRB a case dealing with the Board's interpretation of *Yeshiva* asking for greater clarity as to how it reached the result it did in determining that faculty at Point Park University were not managerial. *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The

First of all, it is likely that the growth areas for faculty organizing in the immediate years ahead will undoubtedly be among part-time/adjunct faculty and, perhaps, graduate teaching assistants. Unionization efforts among adjunct and part time faculty, and to some degree, among non-tenure track full time faculty, is particularly noteworthy. Recent data establishes this reality. In 1998, the National Center for the Study of Collective Bargaining in Higher Education and the Professions reported in its Directory of Faculty Contracts (Hurd, R., Bloom, J., & Johnson, B. H. 1998) a total of 75,882 adjunct and part time faculty represented by unions. By 2012, that number had risen to 147,021, almost double the number in 14 years (Berry & Savarese, 2012, p. vii). There are 107 free-standing units of adjunct, part-time faculty members, not counting the units that include part timers along with full time faculty. New units are being added on a regular basis, and these numbers are likely to climb as attention is being focused on the increased use of adjunct faculty as well as the relatively lower compensation and troublesome working conditions for many such faculty around the country. That being said, our experience is that some adjuncts in the professional fields or in applied graduate disciplines are working in postsecondary institutions because they desire to teach; many have highly compensated positions in other organizations.

While organizing adjuncts in the public sector will continue, it is also true that, in the private sector, union organizing of adjuncts will be easier than organizing full-time faculty, because they will be unencumbered by the *Yeshiva University* decision. Adjuncts simply do not have the managerial involvement in running their institutions that full-time tenured and tenure-track faculty have to make such a managerial argument credible. Indeed, a growing number of major private universities—like the University of San Francisco, George Washington University, American University, and Syracuse University to name a few—already have adjunct bargaining units.

New Life to Graduate Teaching Assistant Unionization

Currently, over 64,000 graduate student employees are represented by unions, distributed among 28 institutions of higher education, all in the public sector (Berry & Savarese, 2012). However, this number is likely to rise if the National Labor Relations Board (NLRB), now firmly on labor's side for the next four years, reverses the *Brown University* decision and give bargaining rights to graduate teaching assistants and perhaps research assistants as well in the private sector.⁷

Board recently asked for briefs from the public on the issue. While the NLRB is re-examining the application of the criteria set forth in the Supreme Court's decision, it cannot reverse that decision.

⁷ Another complicating factor in any case pending before the Board, as well as those decided since January 2012, is the recent decision *Noel Canning Divisions of Noel Corp. v. NLRB*, D.C. Cir., No. 12-1115

Indeed, on June 22, 2012, the Board invited briefs from interested parties in two cases, *New York University*, Case No. 2-RC-23481 and *Polytechnic Institute of New York University*, Case No. 29-RC-12054. Both cases dealt with the overall issue of the employee status of graduate teaching and research assistants and whether or not such individuals have a right to unionize under the National Labor Relations Act (NLRA).

The Board wrote that parties and *amici* specifically were invited to address the following questions:

1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the NLRA, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.
2. If the Board modifies or overrules *Brown University*, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).
3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?
4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

It is expected in most labor circles that the Board will undoubtedly abandon the *Brown University* decision and revert to the *New York University* decision in 2000 which gave such graduate teaching assistants the right to organize.

(January 25, 2013). In that case, the U.S. Circuit Court for the District of Columbia decided that President Obama’s three “recess” appointments to the NLRB in early 2012 were not valid. This meant that the Board had acted without a quorum in cases decided over the past year, effectively vacating those decisions. In the eyes of the D.C. Circuit, the Board is still without a quorum for adjudication, although the Board has indicated it will continue to decide cases. This case will likely be reviewed before the Supreme Court. (NOTE: Republican Sen. John Barrasso introduced legislation on January 30 that would freeze or overturn virtually every decision the National Labor Relations Board has made in the past year. As with all future Board decisions, it now remains unclear as to whether the Board has a quorum to act.)

Organizing Among Full-Time Faculty in the Private Sector: NLRB Asks *Amici* Briefs on *Yeshiva University* Factors

Organizing among full-time faculty in the private sector slowed down considerably after the Supreme Court's *Yeshiva University* decision in 1980, where the Court found that faculty at mature⁸ colleges and universities might collectively be found to be managerial employees, and thus not afforded coverage under the NLRA. While *Yeshiva University* remains the law of the land, the NLRB, in May 2012, requested briefs in the case of Point Park University on the issue of whether the faculty members at that institution are statutory employees or rather should be excluded as managerial employees under *Yeshiva*.

In his original decision and direction of election at Point Park, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." (National Labor Relations Board, 2006) The court instructed the NLRB to identify which of the relevant factors set forth in *Yeshiva University* are significant and which less so in its determination that the employer's faculty members are not managerial employees and to explain why the factors are so weighted. Following the court's remand, the Regional Director issued a Supplemental Decision on remand. The employer sought review of that decision, which the NLRB granted on November 28, 2007.

The Board—after a five-year wait—asked for briefs from interested parties to help it decide the case. Specifically, the Board said the briefs should address some or all of the following questions:

1. Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

⁸ The Supreme Court wrote in the decision: "Unlike the purely hierarchical decision-making structure that prevails in the typical industrial organization, the bureaucratic foundation of most "mature" universities is characterized by dual authority systems. The primary decisional network is hierarchical in nature: Authority is lodged in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process." 444 U.S. 672, 696-697.

2. In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?
3. Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?
4. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
5. Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?
6. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
7. Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?
8. As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty--such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty--depending on the faculty's structure and practices?

In response to this request, the AAUP filed an extensive brief urging the Board to read *Yeshiva* narrowly. It went on to offer additional factors the Board should consider. The thrust of the AAUP’s brief essentially is that since the 1980 decision, the growth of the corporate business model of running colleges and universities has increased dramatically and is now pervasive. The increase in administrators, the growing percentage of budgets now devoted to administration rather than instruction, and the examples of faculty advice being ignored on key educational matters were all cited by the AAUP as factors for the Board to consider in future *Yeshiva* cases. It might be interesting to note, however, that at private universities whose faculty were unionized prior to *Yeshiva* the majority have remained unionized, and in almost all cases shared governance has survived or been brought into existence in these institutions.

If the Board adopts some of the principles set forth by the AAUP in its amicus brief, it is very likely that it will become more difficult for institutions to prove managerial status in the future. Such a pro-labor slant might encourage unions to make new efforts to organize some of the thousands of private sector full-time faculty that remain unorganized and who may desire more formal union representation. Regardless, organizing efforts in the private sector will remain difficult. In these jurisdictions university leaders have more options respond to what unions ask for or promise new members, and the union must now move out from under the protective umbrella of state labor laws and proceed under the NLRA, not always a welcome prospect. Here too, unions must proceed in organizing efforts away from weary and vote-hungry state legislators who not infrequently succumb to public sector union demands, of which the faculty are but one constituency.

Bargaining Units: NLRB Decision in *Specialty Healthcare* Will Allow For Smaller Bargaining Units and May Mean Some Private Sector Faculty and Academic Professionals May End Up With Their Own Bargaining Units

Another reality that may impact the degree of future organizing is a recent decision by the NLRB on the proper scope of bargaining units. The Board issued this major decision on bargaining units at the end of 2010 which has had and will continue to have a ripple effect on organizing in all industries, including higher education. The case was *Specialty Healthcare & Rehabilitation Center of Mobile* (National Labor Relations Board, 2010) where the Board drastically altered its approach to bargaining units and indicated that it would look favorably on units with a small grouping of employees who share a community of interest, even if a larger unit makes more sense in light of all community of interest factors. In particular, the Board held that:

...in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.

This approach will make it very difficult for employers to seek to expand the scope of petitioned units and may lead to the so-called “micro-units” where small clusters of employees who are identifiable as a group and who share a community of interest will now have the right to unionize *even if* they have a considerable amount of connection to and community of interest with other employees. Standard bargaining units like production and maintenance units or service and maintenance units – common throughout the country – may now be subdivided by craft or department or job function.

The Board's use of the term "overwhelming" is a clear signal that it will not lightly accept employer arguments that only a larger unit of employees is appropriate.

The *Specialty Healthcare* case is now on appeal in the 6th Circuit, as the employer engaged in a technical refusal to bargain in order to test the composition of the unit. The companion unfair labor practice case is *Specialty Healthcare & Rehabilitation Center of Mobile* 357 NLRB No. 83, at *1 (Aug. 26, 2011) *cross-appeals pending sub nom. Kindred Nursing Ctrs.E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (U.S. Court of Appeals for the 6th Circuit.).

In the world of higher education, one can imagine a myriad of potential bargaining units that now might ordinarily been seen as inappropriate fragments of larger units of employees. For example, a unit of lab technicians might be deemed appropriate as opposed to a broad unit of all technical employees, or all clerical and technical employees. A unit of academic counselors might be distinct enough in job function to constitute its own unit as opposed to being in a broad unit of all professionals. Similarly, a unit of admissions counselors who travel around the country on behalf of an institution might be an appropriate unit based on the unique nature of their work.

Indeed, even certain departments of faculty, or divisions of faculty, or schools of faculty may have enough distinctive qualities to be certified as an appropriate bargaining unit. Would a unit of the faculty of a School of Education have enough of a community of interest unto itself such that it could stand separate and apart from all other faculty at a major university? Certainly this has been the case for schools of law, dentistry, or allied Health. Putting aside *Yeshiva* arguments, these smaller units may be the wave of the future—and an easier way for a union to establish a beachhead on college and university campuses.

Which Unions Are In Play?

The traditional education labor unions—AAUP, AFT, and NEA—still are the prime movers when it comes to faculty and professional staff organizing, and there are no signs that they will yield the field to other labor organizations when it comes to organizational activity. All three unions pledge support for adjunct and graduate teaching assistant unionization, for example, and all have active organizing wings. Like other unions in the U.S., issues of bread and butter outweigh ideology, and all higher education bargaining agents have proved willing and able to merge in various institutions. According to the National Center for the Study of Collective Bargaining in Higher Education and the Professions (Berry & Savarese, 2012), those three labor organizations represent 54% of

all unionized faculty; however, it is frequent to see collaboration between unions, and indeed a number of merged unions now represent many bargaining units. As one example, United Academics, an affiliate of both the AAUP and AFT, currently represent faculty in several places around the country, including the University of Alaska, University of Vermont and Rutgers University.

Gradations of academic status and economic differentiation among full-time faculty, graduate students or adjunct faculty remain very salient, particularly in institutions where the full-time faculty remain unorganized and where other professionals seek representation. In such cases, it is not politically feasible for traditional faculty agents (or associations, terminology which still is difficult to pinpoint in many locales) to jump into the fray; particularly when, as is often the case, the full-time faculty may not support collective bargaining. While the administration is often cast as recalcitrant, administrators are often responding to subtle cues from full-time faculty. This is reflected in the types of relationships that occur when those with less status and prestige endeavor to seek representation, and in the agents—more often industrial unions seeking new clientele for additional dues—which more often represent these groups. For example, the United Auto Workers (UAW) represent graduate students at the University of California, and part-time faculty in several locations including New York University and Goddard College. The United Electrical Workers represent graduate teaching assistants at the State University of New York and the University of Iowa, and the Service Employees International Union (SEIU), in addition to their active organizing among staff on college campuses, also represent faculty at Plymouth State University in New Hampshire and the Community College System of New Hampshire.

The introduction of such historically “industrial” unions into faculty organizing is partly by design, as in the case of the SEIU that has consciously sought to expand its organizing activity among faculty,⁹ and partly by necessity, as in the case of the UAW, which suffered dramatic loss of membership in their traditional industry.

Table Talk: What Issues Will Be Front and Center in Faculty Negotiations?

What will the central issues for negotiations look like in the next decade? As always, administrators at the bargaining table will hear familiar themes. Faculty will complain of too many students who are ill prepared for college, too little time, and not enough autonomy or resources. They will complain about too much pressure to publish or

⁹ Already with over 2 million members and growing, the SEIU specifically highlights its recent activity in trying to organize adjunct faculty. See www.seiu.org.

engage in meaningful research. They will rail about the amount of time spent in service activities, and how the decline in staffing the institution with tenure track faculty has only added to their burdens. They will grumble about process issues, unfair evaluations, and too much emphasis on student evaluations. They will insist that benefits be kept untouched, salaries increased, the benefits enjoyed prior to bargaining be added to those now being negotiated, release time for every manner of activity be instituted, and in many locales, work for the union be recognized as academic service for promotion and tenure. Of course, there will be lectures about arbitrary decision-making of executives, their embrace of new “corporate models,” the increasing number of administrators, and the lack of attention to the basic values of the academy in pursuit of goals of legislators or other outsiders. All these will sound familiar, some of it is true, and we would agree that faculty are at the core of what universities represent and do. Students, research funding, academic distinction, and the like come to universities because of faculty expertise; faculty are the ones who make the lifelong commitment to teach, research, and serve, and it is faculty, not administrators, whom students remember.

Simultaneously, collective bargaining often uncovers deep suspicions and fractures between schools and disciplines, exposes the haves and have nots among senior and less senior (untenured) teachers, and causes an examination of the inequality of treatment by faculty against others who may also call themselves faculty, but who are not be part of the inner power structure within departments or schools. Faculty view collective bargaining more often than not, as an “add-on” to existing arrangements, benefits, policies and practices; this is a situation that may indeed change. Added to these dynamics will be new and emerging areas of conflict as well.

Online courses and distance learning. Front and center will be the myriad of issues surrounding online courses and distance education. Some of the likely areas of discussion will focus on workload; other areas will include the question of ownership of such courses and what compensation, if any, faculty should receive for developing such courses or for having others teach such courses. As online education advances in the years ahead, and as more and more faculty are engaged in developing and teaching online courses, there will inevitably be difficult negotiations over such issues as:

- Whether such online course work can be assigned or will it remain voluntary?
- How much training will institutions give faculty for online teaching?
- Will there be incentive compensation for faculty who choose to teach online? Incentives for those who choose to develop courses online?

- Should teaching an online course count equally for workload purposes as live classroom instruction? Is it more difficult or easier or the equivalent?
- Who owns the intellectual property to such courses?
- Will faculty who develop a course receive royalties when someone else teaches it?
- Who owns the courses? The institution, the faculty member or is it shared?
- Is there room for some profit sharing for developing online programs?

Some of these issues are already being dealt with in collective bargaining agreements. No doubt where an institution has made a substantial investment in online education, there will be added pressure to share the “profits” of their endeavors with the faculty involved. Long discussions on the vagaries and intricacies of copyright law will ensue.

Family-centered issues. Here, colleges and universities will inevitably be faced at the bargaining table with demands to accommodate family needs and to strike the proper balance between work and family. This is the era when all employers have had to modify their work requirements with the realities of family life in the 21st century.¹⁰ Unions have made, and will continue to advocate for, provisions in collective bargaining agreements that focus management’s attention on the needs of individual workers in all aspects of their personal lives from the challenges of child rearing and the poignant and time-consuming care of elderly parents to the complex issues of mental health, the all-consuming emotions of divorce and other personal crises. Time off for such events—with or without pay—will likely be a benefit that unions will strive to achieve in their negotiations with administrations.

On this point, many faculty contracts already embrace not only the basics of the Family Medical Leave Act but other family-friendly policies that are not required by law. These include paid time for certain family emergencies, suspending the tenure clock for pregnancies and early child rearing, special provisions to cover adoptions, and other family-friendly policies.

¹⁰ Indeed, polling results from the National Partnership for Women & Families, issued on December 3, 2012, indicate that regardless of party affiliation, a majority of respondents struggle with the balance between work and family responsibilities. The majority feel that Congress should pass legislation that would require paid sick days and paid family and medical leave insurances. The proposed Health Families Act (H.R. 1876, S. 984) currently pending in Congress would require businesses with 15 or more employees to let workers accrue up to seven job-protected paid sick days per year so they could recover from their own illness, access preventative care, or care for a sick family member. (see Daily Labor Report, (Bureau of National Affairs, Washington, DC: December 6, 2012)

In dealing with such issues at the table, institutions of higher education will not have the option that non-educational employers have to argue that personal life issues must sometimes yield to the competitive need for high production and achievement of maximum profit. And while the daily business of the university needs to be attended to, unions can make compelling cases that education will not be ruined by accommodating the personal vagaries of individual faculty life and that indeed campuses should lead the way on this movement.

The impact of technology on doing business. In addition to the focused issue of online education mentioned above, the new ways of communicating—email, texting, Twitter, Facebook, and other social media—will be part of the dialogue at the table. For example, students may still need face-to-face office time, but they are much more likely to communicate with their professors via email—and to assume they can do it at any time of the day or night. Indeed, thousands of students taking online courses never see their professor; in some locales students can get a degree without attending a traditional class. What are the 21st century means of communications between faculty member and student? Administrations will rightfully expect faculty to respond to student needs, but to what degree? This becomes a workload issue in contract talks. What faculty post on Facebook for their students will be a new area of concern, particularly as to the scope and propriety of such postings. Other issues that entangle new technologies with the educational process may also find their way to the bargaining table.

For those who teach online, how will they be evaluated by students and administration? How does a colleague, chair or administrator “observe” an online course in action, and how is such information incorporated into rank and tenure considerations? What changes will need to be made to the methods of evaluating faculty?

Regarding student evaluations, most institutions still might use paper course evaluations but they are fast giving way to online evaluations. This raises questions about when such online evaluations should be done; what form they should take; what type of access professors will have to such evaluations; and what they can be used for. Again, all these are items for discussion at the table.

The right to criticize administrations. Academic freedom has always been a major subject of bargaining as well as a major historical issue concerning academic professionalization and autonomy. Here the AAUP deserves credit for its pioneering role in the development of policies protecting academic freedom. Most labor agreements covering faculty contain academic freedom provisions adopted from original AAUP

statements. Such provisions remain at the heart of virtually all faculty contracts and can be the third rail of negotiations if administrators seek to restrict them in any way.

Of course, it should be noted that, while faculty unions vigorously have fought, and will continue to fight, for academic freedom, they can ironically also undermine academic freedom because of their organizational goals. At the University of San Francisco, for example, for many years, tenured faculty could be fired for not paying union dues, academic freedom, also covered in the labor agreement, notwithstanding.¹¹ The dilemma of union solidarity, the need for dues and the rights of faculty to exercise freedom of conscience when it comes to joining or criticizing the union are also part and parcel of the bargaining environment. Here unions have had more difficulty reconciling competing definitions of academic freedom.

On the nature of academic freedom itself, we have observed that unions have already started to push for more expansive visions of what academic freedom means. They have sought and will continue to seek to have academic freedom embrace far more than speech in the classroom or freedom of research. We believe that with court restrictions on First Amendment rights of public employees,¹² public sector faculty especially may seek broader contractual guarantees of their right to criticize administration policies, and force-fitting it under the umbrella of academic freedom.

This discussion may also include what faculty choose to say on Facebook posts as well. The growing volume of advice and case law from the NLRB on what constitutes protected concerted activity and the limits on the degree to which management can limit

¹¹ Efforts to have the University of San Francisco faculty accept something less than forced dues payment upon employment, a provision based on freedom of conscience to mandatory union membership, where faculty could pay an equivalent amount in dues to another organization, led to significant labor strife in the 1980s.

¹² The lead case in this area is *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In that case, a California district attorney, Richard Ceballos, was demoted and transferred after he wrote a memorandum to his supervisors in which he criticized the sheriff's department and its practices. His suit against his supervisors claimed that he has been retaliated against for exercising his First Amendment free speech rights. The Supreme Court ruled against Ceballos holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court reasoned that public employers must have the ability to restrict the speech of their employees in order for public institutions to operate efficiently and effectively. Since then, some other federal court decisions have limited free speech rights of public employees in different settings. See, for example, *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012); *Demers v. Austin*, 2011 U.S. Dist. LEXIS 60481 (E.D. Wash. 2011); *McArdle v. Peoria School District*, 7th Cir., No. 11-2437 (Jan.31, 2013) (An Illinois middle school principal fired after she charged her predecessor and immediate supervisor with misuse of public funds lacks a First Amendment retaliation claim because she spoke as a public employee on a job-related matter rather than as a citizen on a matter of public concern.).

criticism of the employer on social media sites is still evolving and has already been a source of litigation.¹³

Faculty unions will press for contractual guarantees of their right to criticize the administration, an easy target, in social media settings and elsewhere, armed with the guidance and rationale of the NLRB. Even though the Board only covers the private sector, public sector unions, hamstrung by the Supreme Court's *Garcetti* ruling,¹⁴ will push administrations at the table to provide the protections that the Court has not given.

Merit pay and compensation issues. On the administration side, there will be a loud and growing demand to pay faculty based on performance as well as student and institutional outcomes measures. Merit pay—frequently a contentious issue now—will only grow in importance, as students, legislators, and parents demand accountability. Administrations will ask “what is working and what is not?” How can merit be woven into the collective bargaining agreement in a way that respects and rewards faculty efforts and success (we would argue only with the faculty union as a partner not as an adversary) and is not merely perfunctory window dressing? The format for deciding upon merit pay, the criteria to be used, the amount of the raise dedicated to merit, and the link of compensation to institutional outcomes, will be salient topics.

Regardless of how salary money is distributed, administrations—both public and private—will struggle with raising revenues to support such increases. The reality facing virtually every institution in the country is that tuition can only be raised so much. The

¹³ *Hispanic United of Buffalo*, 359 NLRB No. 37 (December 14, 2012); *Costco Wholesale Corporation*, 358 NLRB No. 106 (Sept. 7, 2012); *Knauz BMW*, 358 NLRB No. 164 (Sept. 28, 2012). See also *Direct TV*, 359 NLRB No. 54 (January 25, 2013) (Board strikes down several employer restrictions on what employees may say and post regarding employer). In addition to the cases cited, the General Counsel for the NLRB has also issued Advice Memoranda on these subjects. All these Advice Memos can be found on the Board's web site www.nlr.gov. The first Memo was issued in 2011, the second in January of 2012 and the most recent was on May 30, 2012. General Counsel's Memorandum OM 11-74, issued in August of 2011, was the first report from the General Counsel's office on emerging issues triggered by today's extensive use of social media and a review of fourteen cases that were decided by the General Counsel upon a request for advice from a regional director. In it, the GC discusses a variety of social media cases and how Advice ruled. A second memo, Memorandum OM-12-31, issued on January 24, 2012 supplemented the first Memo with additional cases. In the latest Advice Memo, OM-12-59, the General Counsel did not address individual discipline situations but instead discussed seven different cases dealing with social media policies and particularly whether or not the policies on their face violated the Act, even if no one had yet been disciplined under them.

¹⁴ *Garcetti v. Ceballos*, 547 U.S. 410 (2006). See footnote 12. The trouble posed by *Garcetti* for those in the public sector is the Court's exclusion of First Amendment protection for a public employee when she/he is speaking “pursuant to his official duties” as a public employee. Thus, criticism of administration policies might not enjoy the protection of the First Amendment in many settings. See, for example, *Demers v. Austin*, *supra* where a claim by a Washington State University faculty member that he was retaliated against for publishing a criticism of the administration and his own School of Communication failed in federal court.

drive to keep tuition increases very low (fueled by the realities of low inflation¹⁵); the recession; the currently high cost of tuition, room and board at many institutions; and growing student debt will likely be maintained in all quarters. On top of that, public institutions will continue to deal with the fact that they will not be well-funded by the state for the foreseeable future and that consequently new revenue will be limited. In response unions will continue to attack what they will suggest are needless (i.e. non-faculty) expenditures on campus. They will demand an increasing amount of data and information from administrators on how money is spent and criticize the growth in the number of administrators, and they may suggest linking pay increases to tuition increases, or linking the size of the entering class to a certain pay raise, much like there have been conditional salary increases in the public sector based on state funding.

Everyone will continue to look for solutions to the rising cost of health insurance. The passage of the Affordable Care Act—now assured of continued existence with President Obama’s reelection—will present new challenges, particularly with part-time faculty, as noted below. Moreover, many institutions and states will finally be forced to pay attention to the debt they have incurred promising post-retirement medical benefits. Aggressive proposals from the administration side of the table will seek to lower future retiree benefits for current faculty and perhaps eliminate them all together for new faculty. These will pose immense challenges at the table to find some common ground.

The special issues in adjunct faculty negotiations. Adjunct faculty negotiations will present special challenges in the years ahead. Here many administrations are still in virgin territory. While there are a growing number of adjunct contracts already in effect, the field is still relatively new. As more and more adjunct units come into being, new approaches to handling common issues may emerge, especially in areas like course assignments. This will include what will be the perpetual tension between the need for administrative flexibility to deal with the vagaries of student enrollment and the adjuncts’ desire for commitment as to how much and when they will teach.

Adjunct faculty are a diverse group, with some teaching for an occasional supplement to income or to share their professional expertise in the classroom but with others desperately seeking to cobble together a living from part time assignments, often at more than one institution. They are integral to many colleges and universities particularly in the graduate and professional areas. Such faculty members, especially those who are in the liberal arts and in the forefront of unionizing efforts, are looking for guaranteed

¹⁵ According to the Bureau of National Affairs, the annual inflation rates for 2010-2012 have been 1.6%, 3.2%, 2.1% respectively. In 2009, the inflation rate was actually down 0.4%.

commitment and respect not only from institutions but from full-time colleagues as well. Some may ultimately seek a pathway to full time status but at the very least, they would like the certitude of knowing they can teach two, three or four courses a semester. Given the semester-to-semester adjustments in course offerings, this is difficult for administrations to accept and, we would argue, might not be supported by the full-time faculty as well. Moreover, when budgets are trimmed, courses taught by adjuncts, not full-time faculty, are the first to go, thus exacerbating the problem of guaranteed work. Administrations will balk at providing too much security for this last remaining faculty group over whom considerable flexibility now exists.

On a related issue, adjuncts will seek greater job security for more senior members of the group, asking for commitments in offered classes especially desirable to them. Here, administrations will counter with the need to put the best possible adjunct faculty member in the classroom taking into account academic credentials; past teaching experience in the particular course; qualifications and sub-qualifications; curriculum needs in general; teaching effectiveness; and, of course, student demand. But compromises in these areas can be reached. As but one example, there are now preferred hiring pools at some institutions where adjuncts, once accepted into the “pool,” have a reasonable guarantee of employment for classes they have been teaching, sometimes for many years. In other contracts, seniority is a tie-breaker for assigning courses only after analyzing relative credentials, teaching experience and performance and determining that all such factors are equal.

Another issue for the adjunct table will be how to deal with reductions in offered courses. The idea of retrenchment, in its traditional sense, does not quite fit the world of contingent faculty because unlike tenured faculty, they do not have contractual ongoing employment. It is likely that parties will at some point have to address the issue of how to deal with large-scale cutbacks in available adjunct assignments. When an institution needs to cut budgets, adjuncts who traditionally might have been given three or four courses per semester to teach may find that they are only given one course. Thus, while not technically without work, or “laid off,” the bulk of their income may be severely reduced. Regardless of contract language, the practical expectations that long-term adjuncts develop *vis-à-vis* workload and income will have to be reconciled with an institution’s need to reduce costs and courses. These issues may be dominant in bargaining and functionally equivalent to traditional layoff arguments in other employment sectors.

Another growing area of concern is how institutions will measure performance. In trying to establish reasonable procedures for determining teaching effectiveness,

evaluations will play a new role in adjunct negotiations. Given their sheer numbers, adjuncts have rarely been systematically evaluated. But in bargaining, it is likely that administrations—desirous of avoiding straight seniority assignments—will seek to establish clarity in this area so they can reasonably measure the performance of one adjunct against another. The need for greater accountability from adjuncts will necessitate such evaluations, and perhaps equally as important, will also usher in an era of greater training and much improved professional support for these faculty members. An attendant complication where both full time and adjunct faculty are unionized is that the burden of evaluating adjuncts may fall on department chairs. In many cases, such chairs are also unionized, sometimes residing in the same bargaining unit with adjuncts, sometimes not. Thus, changes in an adjunct collective bargaining agreement with regard to chairs' duties to evaluate adjuncts may spawn workload disputes with the full-time faculty union that represents chairs.

Because negotiations with adjuncts are still relatively new, and because there is no pre-existing template such as a tenure system to accommodate, adjunct bargaining will potentially be highly creative in terms of how the parties address job security protections, pay systems, and other working conditions. Lacking the traditional but rigid tenure system and lacking a large number of comparators, adjuncts and their bargaining partners can literally create new schemes of contract sequences, compensation options, performance pay, training and professional development, and other areas.

Also, it is likely that, little-by-little, adjuncts will attain some success in negotiating benefits for themselves, albeit on a modest level. One can see small incursions into this territory. Some adjunct contracts already provide limited health insurance benefits to more senior adjuncts, for example. In addition we are seeing limited contributions to pensions (a benefit that, unlike health insurance, can be specifically calculated and budgeted) and some access to tuition reimbursement. This benefit trend is probably going to continue, though slowly, as it will simply be too difficult to maintain the structure of half the curriculum taught by faculty members who have no benefits.

And finally, and perhaps most imminently, the impact of the Affordable Care Act will loom large, as institutions try to understand the Act's 30-hour provision for defining full-time work and try to ascertain how many hours a week their adjunct faculty really spend working. How this law is interpreted will be a major factor as to whether or not adjuncts begin to attain health insurance coverage. In some situations, administrations will be faced with a new reality that some of the adjuncts they considered "part-time" are really "full-time" under the Act. That, in turn, will lead to new internal administrative debates about assessing the cost of providing health insurance to such individuals versus

incurring government penalties for not doing so. This will be immensely complicated and, at present, stands as a question without any firm guidelines or regulations from the federal government.

What Has Not Changed Over the Years in Collective Bargaining

Trust and honesty. If one searches for those bargaining realities that are no different today than in the early days of academic bargaining, there is no doubt that the relationship between negotiators still remains of crucial importance. A relationship characterized by trust and honesty between chief negotiators remains a *sine qua non* for successful negotiations. Ultimately negotiators must shake hands and sell the agreement to constituencies over whom they have no formal authority, keeping in mind some will be displeased with final outcomes, compromises, and tradeoffs necessary in all negotiations. End runs and related tactics notwithstanding, in the final analysis negotiators must deliver what was promised at the table. In academic settings, the actions and behavior of union and employer representatives are subject to frequent criticism by those who are not experienced or conversant with bargaining; often authority and legitimacy are questioned. Absent trust and an established relationship between negotiators, the bargaining process fails because in the political world of higher education, decision-makers on both sides of the table will not risk exposing vulnerabilities to would-be competitors or to constituencies to whom they report. Without honesty, negotiators will not conclude a final deal (the test of a successful relationship, we would argue) and will instead be held hostage to those who wish to see them fail, or be blamed for lofty promises about the impact of unionization or provisions in the “new agreement.”

History intrudes. History has always played its role in bargaining and still does. People in academic organizations have very long memories; particularly on the faculty side of the table. Personal history, disciplinary feuds, perceived slights that occurred years ago, the desire to “even the score” impact bargaining in a myriad of ways (DiGiovanni, 2011). Activists in the union, sometimes referred to as true believers or those with whom peace and reconciliation are impossible, endeavor to address grievances decades in the making. Professors who have spent an entire professional career in one school or college remember conversations or personnel actions years before any of the current administration arrived, and they are not shy about airing a point of view which may have been true 20 or 30 years ago. Bargaining reflects the “history” between the parties, and we define history in this context as long-term perceptions about “injustices” nurtured over years (and there is always some truth on both sides of an issue). Because of the history, there is a tendency to blame others for situations that were, in retrospect, difficult to predict.

In addition to the influence of past perceptions is the nature of leadership in academic organizations. By and large, and there are exceptions, the road to the office of president or provost requires avoidance (at least outwardly) of controversy and conflict. Engagement in collective bargaining is a non-starter to search committees who want a charismatic (seasoned executive; renowned scientist; community builder; already a president at a place like this; inspirational fund raiser; repair our reputation; understands our culture; dispassionate scholar; will take us to AAU status; non-traditional; stand up to the system head or governor; obtain Ph.D. programs...pick your favorite) academic leader “acceptable” to faculty on the search committee. Many who secure positions of leadership in academic organizations often arrive unprepared for what it is they have to do to be successful. This too presents problems because leaders in such situations may not understand why the history, coupled with particular issues and individuals, is so important in the academic environment. Often leaders lose patience with the management negotiator who tries to explain why a proposal, so simple and rational to the president, will not fly. In such cases negotiators are vulnerable and achieving agreement is far more complex (and a major reason why many management negotiators have the professional life span of field goal kickers in the NFL).

Ground rules that work. Ground rules remain a key ingredient today in most negotiations. Parties to negotiations are well served by a set of written ground rules that serve as an umbrella for bargaining. Often ground rules provide the rules of engagement and some degree of shelter (privacy) to those who must explore difficult and complex issues at the table. While it is always the case there is some old-fashioned blustering, saber-rattling, and posturing—all are part-and-parcel of the process—the parties need freedom to float trial balloons or tentatively advance an idea in order to gauge constituent reaction when taken out of context such ideas might seem draconian. Bargaining cannot take place in a fish bowl, a certain amount of privacy is needed and ground rules are essential in this regard.¹⁶ The faculty member who sits behind the chief negotiator, glaring at the management representative, tweeting out each response and counter response, makes it immeasurably harder to reach agreement and in worst cases erodes trust and respect between the parties because most understand that such actions are in fact a violation of the spirit of the ground rules. Union spokespersons who invariably take the position they cannot control or censure such faculty, even when what is being tweeted is inaccurate, are not believed to be credible by management negotiators. They clearly see

¹⁶ No better example exists of the success of closed and secret bargaining than the work of the men of 1787 who locked themselves in Constitution Hall, issued no statements to the press, kept no detailed notes of their proceedings, and yet, in one summer, negotiated the most perfect model of democratic governance that had ever been seen (notwithstanding the unfortunate acceptance of slavery and the initial lack of universal suffrage, errors thankfully corrected by future generations).

this behavior as a tactic to whip up constituent support and pressure the university into succumbing to union demands. We might add that this does in fact sometimes occur, but it is more often very counterproductive to negotiations. Ultimately the “angry tweeter” violating ground rules becomes a problem for his own chief negotiator who needs some privacy and orderly engagement to reach agreement.

Credible data. Data drive perceptions, and in the academic environment, those who marshal good data with believable assumptions underpinning the data, win negotiations arguments. Said another way, power and influence in the academic setting cannot be exercised without credible data to support proposals and ideas because many require objective evidence for arguments being made on behalf of one position or another. We know that managing perceptions remains an important aspect of all successful negotiations. In higher education the Holy Grail is “evidence-based validity,” not always easy to pursue in collective bargaining. Of course, the challenge here is self-evident as well because many on both sides of the table, trained to deconstruct ideas and question assumptions, arrive at very opposite views about what constitutes reliable and valid data to support bargaining positions.

The question of reliable data is complicated by additional factors. First, because so many harbor varying notions about institutional priorities in academic organizations, the use of data by the administration at the table can be suspect from the beginning. Faculty may view it as skewed to support a management position. Second, a culture of dissent coupled with negative perceptions about the nature of management make it harder to use data and persuade faculty that just because the idea comes from the administrative side, does not make it anathema.

The challenge of arriving at a mutual understanding of what constitutes credible data and their relationship to issues at hand, is daunting and yet is essential for success. Both sides will use data to support positions across the table and at time, the presentation of data can help persuade the other side to modify positions. Finally, should negotiations proceed to mediation, fact finding or arbitration, data assume a new critical role. There, data are used not just to persuade a skeptical opponent but instead a dispassionate neutral. Those skilled in organizing and presenting data to support bargaining positions, including comparative data of peer institutions and systems, will be more successful in these forums. It has been our experience, that outside mediators, fact finders, and arbitrators, those involved in the later stages of collective bargaining, will pay close attention to data because ultimately they will have to justify their findings based on the information presented. They will also have much less patience with data purporting to show that

faculty are exploited, that issues being debated are truly unique, or that valid peer institutions are too difficult to identify.

Managing conflict. Ultimately, collective bargaining has always been a process to manage disagreements about rights, authority, and the roles of important constituencies in academic organizations. Managing conflict is not easy, particularly in first-time negotiations, where long-standing (sometimes a century old) policies, procedures and statutes concerning “legal” authority, the nature of shared governance and the like, must now be interpreted. In these contexts, the parties must also accommodate informal practices that have grown up around statutes and incorporate these into labor agreements, subject to binding arbitration. After all the reality is that while formal authority may have been invested in a president or board, it falls to the faculty to implement and deliver what colleges and universities do. Further, whatever polices and statutes may say, and it has been our experience there are always exceptions made for any number of reasons. Conflict arises when policies and procedures are formalized and standardized, one of the key results of collective bargaining. Conflict also arises because much of what is negotiated or renegotiated, as we discussed earlier, strikes at the heart of professional autonomy and perceptions about what is reasonable, fair, or just. In such cases there is a continuing need to manage, or at least contain, conflict accompanying negotiations and this, in turn, requires a decision-making architecture allowing for debate and communication among senior leaders, deans, and others, academic and non-academic, who may find themselves being marginalized as bargaining unfolds. In worst case scenarios, work stoppages or strikes occur and while these too are part of the process and sometimes necessary when negotiations break down, the resulting polarization between the parties can be a factor for years to come, cause the exit of respected leaders (from both sides) as well as damage students and the institution.

What Has Changed Over the Years in Collective Bargaining

Technology and the Internet. When the authors first worked together in the mid-1970s negotiating with organized faculty at the Vermont State Colleges, proposals were assembled on typewriters, no one owned a cell phone, words like “online,” “tweeting,” “blogging,” or “YouTube” did not exist or meant something entirely different than they do today. The negotiating environment has changed. We do not carry vials of “white-out” anymore. The computer has altered how we negotiate, and how others are involved in negotiations. Members of negotiating teams come to the table today with iPads or laptops, not yellow pads. Emails are checked routinely and links to principals who may be in the background are available as never before. Dramatic arguments as to the need for proposals may be accompanied by PowerPoint presentations. Proposals and counter-

proposals are routinely sent between the parties by email. The historical record of bargaining can be neatly, and usefully, filed away on one's computer, with no need to check reams of paper in dusty files to ascertain bargaining history. The evolution of an article can be seen quite clearly, in its dated proposal/counterproposal history between the parties. All of this has made bargaining easier, for the most part, and provided a clarity as to what parties meant that may not have existed before.

In addition, the challenges of working in real time are also evident. This is a new dimension of bargaining which we believe has made the process more inclusive and more complex because additional players are involved; those with ulterior motives have a far easier time upending the process.

Less authority for negotiators. Collective bargaining in higher education is no longer a new phenomenon. In the early years negotiators, many of whom learned on the job (and some of whom had worked as labor arbitrators or mediators or came from industrial relations or legal departments in business and law schools or an occasional dean) were charged with managing a critically new organizational challenge. Union negotiators, the "true believers" with organizing experience, joined management counterparts; both were likened to gunslingers shooting it out at the "OK Corral." Corporate law firms were involved, but here too many of the labor lawyers negotiating agreements had not worked in the higher education sector and certainly not with organized faculty. Even for advanced labor negotiators, there was really no template to utilize in negotiating with faculty. Everything was new. A cadre of home grown management negotiators soon emerged, many from Michigan and New York, and founded their own professional association in 1972 (which still meets each year).

In the early years, and in first-time contract situations, negotiators reported directly to presidents and chancellors. Many assumed executive positions and served as institutional leaders following their time managing negotiations. Those who bargained were given wide latitude and assumed a fair amount of authority needed to effectuate negotiations successfully. As collective bargaining became more institutionalized; as outcomes became more routine and knowable; as the number of successor agreements grew; as compensation for labor relations staff stabilized; and as other organizational crises edged out collective bargaining, the role and authority of negotiators diminished in many cases. Many now report to the general counsel, a human resources professional, or a senior administrative vice president. Labor relations is handled lower down in the organizational hierarchy and, while it may be that legitimacy or credentials are no longer questioned, as a group negotiators and those who handle academic bargaining in large systems or institutions have less access to senior decision-makers, less organizational

clout, and less ability to control processes attendant to negotiations.¹⁷ This is a new situation, and where it exists, we would argue, it makes the process more cumbersome, time consuming, and expensive.

The post-secondary context. All historical periods are turbulent in retrospect, and the current period will be no exception. We would argue, however, there may be several other new factors that will shape collective bargaining processes in ways unimagined in the past. The first, while not entirely new (few things are) concerns the evolving nature of higher education. The late Clark Kerr's line about common themes in the university—complaints over parking or coffee pots in communal areas—presaged a more autonomous and fragmented post-secondary environment. As state support and federal funding continue to decline, institutions and systems will evolve, and units based on the ability to generate revenue or meet a particular student or constituent demand will grow in importance. In several states, flagship schools are leaving or endeavoring to leave systems. Fragmentation and specialization, coupled with previously union-friendly states abandoning enabling labor legislation, and, as bargaining units become smaller and more homogenous, the tenor, scope, and reach of collective bargaining will be altered.

Simultaneously, as more adjuncts, graduate students and part-time employees join unions, how colleges and universities are funded, assessed, and governed will also change because authority will be more decentralized, a counterintuitive observation from what has occurred to date. Not long ago it would have been unimaginable to think that AT&T or Lehman Brothers, not to mention U.S. Steel or other large banks, would be organizations of the past. We believe the same may be true for a number of organized public systems and smaller private institutions where bargaining has occurred. We have yet to witness the level of foreign competition that will challenge us in the future. Technology and the Internet will continue to change the way we approach and deliver higher education. All of which reminds us of the ancient Chinese proverb, may you continue to live in exciting times. Count on it.

¹⁷ The authors would acknowledge that this is not a universal development, and, particularly in smaller colleges and institutions, the negotiator may still report directly to the President or Provost and carry the same influence as in early years.

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