

December 2013

Collective Begging at Its Best: Labor-Management Relations in South Dakota

Gary Aguiar

South Dakota State University, gary.aguiar@rocketmail.com

Follow this and additional works at: <https://thekeep.eiu.edu/jcba>



Part of the [Higher Education Commons](#), [Labor and Employment Law Commons](#), [Labor Relations Commons](#), [Leadership Studies Commons](#), [Political Science Commons](#), and the [Public Policy Commons](#)

Recommended Citation

Aguiar, Gary (2013) "Collective Begging at Its Best: Labor-Management Relations in South Dakota," *Journal of Collective Bargaining in the Academy*. Vol. 5, Article 4.

DOI: <https://doi.org/10.58188/1941-8043.1309>

Available at: <https://thekeep.eiu.edu/jcba/vol5/iss1/4>

This Article is brought to you for free and open access by the Journals at The Keep. It has been accepted for inclusion in *Journal of Collective Bargaining in the Academy* by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.

Collective Begging at Its Best: Labor-Management Relations in South Dakota

Cover Page Footnote

This manuscript was modified from presentations at the Great Plains Political Science Association, University of Nebraska at Kearney, Kearney, NE, September 28, 2013 and The Symposium at West Hall 115, South Dakota State University, Brookings, SD, November 1, 2013. Acknowledgements: I appreciate helpful comments by Joe Blankenau, David Boyles, Del Lonowski, Claude Louishomme, Jason Owens, Greg Peterson, Anne Plooster, Joel Rauber, John Taylor, Gordon Tolle, and CBA anonymous reviewers and editors. I also wish to thank the dues-paying members of the South Dakota Council of Higher Education, for whom I had the honor of serving as their President from 2009 – 2013.

Collective Begging at Its Best: Labor-Management Relations in South Dakota

Gary Aguilar¹

Introduction

South Dakota has a unique set of collective bargaining laws that cause some observers to ponder whether it should even be considered collective bargaining (Finch, 1979). In essence, we have the weakest set of tools available to labor. However, in our most recent round of negotiations, we won some modest victories despite many obstacles. If we can win under these circumstances, our experiences might help other faculty unions who possess similar or stronger legal environments.

It is well-recognized that the rights and prerogatives of public employee labor unions have been under assault in recent years, as witnessed by events in Michigan, Wisconsin and Ohio. In South Dakota, Council of Higher Education (COHE), the faculty labor union, has suffered from a weak legal position for more than thirty years; we have few bargaining tools in our belt. The COHE has primarily played defense, trying to defeat onerous proposals offered by the South Dakota Board of Regents (BOR). Given our weakened status, our past success in killing fashionable management fads derived from our persistence and ability to show how these proposals would play out in the field. In some cases, the BOR imposed provisions that we argued were unworkable and we were proven right over time.

This paper attempts to answer two questions: What lessons can be learned from South Dakota faculty's experience that might help other similarly situated faculty unions? Further, what does this case study teach us about the disparity of power, especially where one party has few legal and political tools in comparison to its counterpart? This paper is written by an insider; I was the labor union president and chief negotiator in the most recent bargaining round with the attendant biases. The paper proceeds in two parts. The first part discusses the legal and political environment of public faculty unions in South Dakota. In the second part, I apply DiGiovanni's (2011) typology of "intangible influences" on collective bargaining to explain our success. The Appendix overviews the most recent bargaining round and the victories achieved.

¹ Gary Aguilar, Ph.D. is Professor, Department of History and Political Science at South Dakota State University. His areas of study/academic interest focus primarily on U.S. politics and comparative democracies and democratic theory; Gary.Aguilar@sdstate.edu.

Context of Faculty Labor Unions in South Dakota

Ostensibly to prevent the rise of aggressive labor unions, South Dakota passed a “right to work” statute in 1945. The Rushmore State was the fourth state in the nation to mandate “open shops,” where employees cannot be required to join a union or to pay an agency fee to the union (Lee 1996). Like much of the country, South Dakota felt the “red scare” of anti-communism. Primarily stirred up by corporate business interests and a few publicity-seeking politicians, it foreshadowed the McCarthyism of the 1950s. In 1946, South Dakota voters approved a “right to work” constitutional amendment (Lee, 1996).

In the 1960s, faculty at many universities throughout the country began organizing labor unions. These activities reflected a larger interest in labor unions among public employees generally (DeCew, 2003; Ladd & Lipset, 1973). In response to this trend, the South Dakota Legislature approved a bill in 1969 that allowed public employers to “meet and confer” with authorized labor representatives (Finch, 1979). This action could be viewed positively as a first step to provide public employees with collective bargaining rights.

The following year, the law was strengthened to require public agencies to “negotiate” with organized labor unions, following the specific meanings as set forth by the National Labor Relations Board. Further, in 1973, a new law defined “good faith” bargaining that required a statement of rationale for all bargaining proposals (Finch, 1979; SDCL § 3-18-2). On their face, these progressive laws would indicate that South Dakota was in step with other states that provided fairer treatment of public employee labor unions.

More cynically, these efforts could be perceived as an effort to circumscribe the power of public employee labor unions (Finch, 1979; Smyser, 1972). By providing a severely restricted space for public employee labor unions to organize and “negotiate” with agency managers, the situation was more sinister than it appears on its face. South Dakota’s public employee labor unions possess few tools to encourage or to force agency managers to an agreement. First, South Dakota law does not allow public employees to strike and it applies a broad definition of strike with severe penalties possible for violators (Finch, 1979; SDCL §§ 3-18-9 to 3-18-14). Second, South Dakota statute does not provide for binding arbitration as a means of conflict resolution. Without the possibility of a strike or binding arbitration, South Dakota’s public employee labor unions do not possess an anvil on which to hammer managers to agree.

After presentation of bargaining proposals, either side may formally declare an impasse. Like many states, the other side may request mediation, which may be followed by fact finding, both administered by the State Department of Labor. In South Dakota, public agencies may completely ignore any suggestions offered by a mediator and are not obliged to follow a fact

finder's opinion. The primary outcome is that either side could use these findings to mobilize public opinion. Nonetheless, at the completion of the fact finding process, *the agency is required by law to impose its last-best offer*, which may be its first-worst offer. Unlike most states, the public employer is not just permitted to impose its last best offer, but is required to do so. Couple the unions' inability to strike and the lack of arbitration with the agency's authority to impose a contract, our system of collective bargaining is better described as *collective begging*.

Since a flurry of legislation four decades ago, South Dakota has made no further moves to empower public employee labor unions. It has killed several proposals for agency fees, which would allow a labor union to charge a fee of non-members to service the contract. And similar to other states, several bills in recent years have attempted to curb union activities, most notably among municipal employees. In 2010, 79% of South Dakota voters approved a measure that requires a secret ballot to form a labor union; this measure resembled a bill debated in Congress at the time.

In South Dakota, municipal employees and teachers unions retain the ability to bargain salary and benefits. However, state employees do not enjoy the same privileges. The state legislature determines salary and benefits for all state employees by statute, not by negotiations, regardless of whether the state employees are represented by labor unions or not.

As state employees, public university faculty members experience the same labor conditions as other state employees, but with the further insult of being deprived of across-the-board salary increases. South Dakota faculty face the opprobrium of being the only employees in the entire state of South Dakota, public or private, who are denied—by state law—the possibility of across-the-board salary increase. When the Legislature grants other state employees an increase in salary, these salary increases are awarded as a percent of their base salary, but not for faculty. In an unfair manner, then, faculty are specifically forbidden from enjoying such an uniform increase. Rather, state law requires that any salary increase must be awarded to individual faculty based on merit, market, and institutional priorities (SDCL 3-18-3).

Currently, faculty are the only state employees who are organized for collective bargaining. The 1,200 faculty at all six public universities organize in a single bargaining unit, represented by COHE, which is affiliated with the South Dakota Education Association/National Education Association. Notwithstanding dramatic differences among the universities in size, mission, research scope, history, and workload expectations, all university faculty are placed in a single bargaining unit.² COHE negotiates directly with the BOR staff for a statewide master contract

² Faculty members at the law and medical schools, as well as certain clinical instructors, are excluded from the higher education bargaining unit. The BOR also administers the state schools for the deaf and the blind. Teachers at both these schools are represented by COHE but negotiate a separate agreement with the BOR.

and local campuses negotiate unique workload agreements, analogous to the New Jersey state colleges' bargaining arrangement (DiObilda, 2012). Similar to the State Universities of New York, all public universities in South Dakota—including the flagships—negotiate a single contract.

Faced with this feeble set of tools, COHE has engaged in a defensive battle for much of its history, attempting to defeat the most onerous BOR proposals to deny faculty rights. Effective July 1, 2013, after 30 months of intensive negotiations, our recent contract produced the first positive victories for faculty at the public universities in more than two decades (BOR/COHE Agreement, 2013). These victories are detailed in the Appendix. In brief, the first round of these negotiations resulted in an imposed contract that produced two modest victories for faculty: a slight increase in pay for overload courses and performance averaging of salary increases. The second round led to a signed contract that included two larger victories: changes in layoffs procedures and non-termination protections for Instructor ranks.

Intangible Influences on Collective Bargaining

We now turn to these central questions: Why did this unusual bargaining round in South Dakota public higher education occur? To what extent did COHE's actions foster our victories? What did COHE do right to win this first victory in decades? I employ DiGiovanni's (2011) intangible influences on collective bargaining to explore the strategy and tactics that led to these bargaining successes. His framework, based on his experience with many rounds of collective bargaining over the years, provides a solid typology to answer these questions.

The Role of History

DiGiovanni indicates that the history is "perhaps the single most distinguishing characteristic of labor negotiations" for three reasons (2011, p. 2). First, negotiations are part of a long-term, ongoing relationship that includes previous bargaining rounds, formal grievance filings, layoffs, and numerous other interactions. Second, particular events tend to loom large in that relationship (e.g., an administrator's poor decisions, a brash union officer's words, or a bitter strike). Third, history is often inaccurately perceived. Poorly remembered events, often retold by others, form the basis for judgment.

While individual slights are important, they pale in comparison to the larger historical factors I identify here. I review some elements of the bargaining history between BOR and COHE above. Simply put, we have an unequal balance of power. Productive bargaining occurs when the parties have mutual respect, which requires equity of resources. The inequality inherent in collective bargaining I describe above produces a dysfunctional relationship. From COHE's

perspective, management has shown only passing interest in our arguments and have persistently discounted our ability to rile up the general faculty on contentious issues.

However, the broader context of higher education policy played a far larger role in labor-management relations in this round of negotiations. Public higher education in South Dakota has seen a dramatic shift to a research focus in the last decade. Gov. Mike Rounds (R, 2003-2010) broke with past tradition, where the universities were seen almost solely as institutions of undergraduate education. Now, research endeavors that might produce economic development in the state and/or additional revenues for the universities are strongly encouraged and supported. Gov. Rounds directed substantial energies to develop the research infrastructure and capacity of the universities; his successor continues that initiative. Although his effort began with commercializable research, the initiative has blossomed to enhance research and creative endeavors across all disciplines, especially at the three doctoral-granting institutions. Of course, much of this new energy has occurred with limited new funding. The state and the universities have successfully leveraged small amounts of internal and external funds as seed money for larger projects.

Besides this research initiative, the arc of public higher education in South Dakota marks the increasing centralization of administrative power by the BOR system office over the last two decades. The implementation of the research initiative has affected all universities, including the faculty at the three smaller undergraduate institutions who continue to have heavy teaching loads. As compared to the past, BOR policy now supplants many decisions made by the local universities. System-wide standardization includes the entire range of university policies affecting both students and faculty in innumerable and far-reaching areas, including (and to mention but a few) curriculum articulation across six diverse universities, common general education and graduation requirements, centrally-mandated purchases of software, and faculty workload.

From the BOR's perspective, centralization is a perfectly rational strategy for the political context in which they find themselves. Faced with an amateur legislature, a very conservative electorate, and limited state revenues, the BOR perceives itself as one state agency in competition with other state agencies for very limited new resources. However, this "one size fits all" approach to higher education policy has been particularly difficult for faculty to embrace as we recognize the uniqueness of our particular programs and the unintended consequences of these system-wide decisions. These "shared business services" often require extended cross-campus negotiations and include additional costs (e.g., for software that was designed for one university, not six). The entire model makes each university less nimble and responsive to

constituents. Standardization comes with a cost, both financial and educational, nor does it always lead to efficiency.³

As a result of declining state support similar to that at other public universities, South Dakota undergraduates pay an increasingly higher proportion of the costs of their education than in the past. Unfortunately, other nationwide trends have also been embraced locally, especially onerous market-driven approaches to higher education. These management fads will be familiar to those in higher education, including “the student as customer,” heavy recruitment of out-of-state students, an explosion of resort-like amenities, and programmatic decisions that reflect head-count demand rather than pedagogy.

In short, in South Dakota, the trajectory of historical and political trends played a substantial role in these negotiations. Two historical facts influenced the outcome of bargaining more than the on-going relationship between the parties. First, COHE could not point to a single significant victory in recent decades. Second, the system-wide rapid transformation to a research focus provided COHE with an opportunity to win.

The Setting of Expectations

DiGiovanni (2011) hypothesizes that initial expectations play a significant role in whether a final settlement will be considered a good or bad deal. In particular, he warns that unrealistically high or poorly informed expectations can severely damage the possibility of a settlement, particularly with new leadership on either side. Perhaps COHE might have proceeded differently, if we had read and followed DiGiovanni’s (2011) sage advice. However, in our case, elevated expectations may have led to more productive engagement by union members in preparation for bargaining than in the past. Further, maybe the lack of victories in the recent past made our main argument valid: doesn’t COHE deserve to win once, for a change?

As part of my presidential campaign in 2009, I produced a “white paper” outlining a two-pronged strategy, which I circulated among COHE activists. In brief, I argued we needed to recruit junior faculty as members and win “something big” in bargaining. The two goals supported each other. While not as comprehensive or detailed as the strategic planning process employed at Rowan University (DiObilda, 2012; Zazzali, 2012), our effort was the first attempt by COHE in recent years to develop proposals with broad-scale participation by members and non-members.

³ We have seen some deviations from the centralization approach in the last couple of years, particularly a new revenue-based budgetary model that returns the bulk of tuition and fees to the university that generated it. Also, BOR policies now recognize the need for campus differences in mobile computing, admissions standards, and tuition rates.

We needed more visibility and an on-going effort to invite faculty to join COHE. We sought the low-hanging fruit; those already inclined to join, but who had not been asked. We created a database of faculty emails, because several universities did not allow us to use their “all-faculty” email distribution list. In this database, each faculty member was categorized by university and whether they were a COHE member or not, so we could target our messages to particular audiences. Thus, began a series of letters and communiqués on various issues. COHE visibility increased and far more information was provided to members and non-members than in the past, and membership grew as a result.

Through the COHE Board of Directors, we reached out to allies and potential allies. Following the *servant-leader* model (Greenleaf, 1977), I used my resources to assist them in their duties, which included substantial mentoring of new local leaders at three campuses. My predecessor secured a grant to support the President’s outreach to the campuses. I used those funds to visit faculty, but especially COHE members, at all six campuses every year during each of the four years of my presidency. Given the vast distances involved, these annual face-to-face meetings had probably never been attempted previously. I engaged COHE Board members one-on-one both in person, and via phone and email. This increased communication—which consumed substantial time—worked because two recalcitrant Board members stepped down and several others came around to support the overall strategy.

Our bargaining strategy was also rather simple. Our Board decided that we would play offense for the first time in a long time. Previously, COHE had rarely offered its own proposals during bargaining. This time, we undertook a year-long process to develop specific, defensible bargaining proposals. It began with a comprehensive list of everything we wanted changed in the contract, more than 70 ideas. The COHE membership was actively engaged in the process of commenting and prioritizing these items. The survey results were analyzed by the Board, who developed 17 specific proposals. These proposals were vetted at meetings on all six campuses.

That process, and its product, supported our determination to win “something big” for the faculty. We would not agree to a contract unless we could point to some fruitful provision that we won. Moreover, we agreed that we were willing to work the bargaining system. We entered the negotiations in good faith; hoping to earn a positive victory for the faculty. We were prepared to do the hard work of negotiating: explaining every nuanced point, deconstructing the legal language, bringing in alternatives, and offering trade deals. We wanted a negotiated agreement, one that both sides could sign. We did not want an imposed contract.

The Nature and Character of the People in the Process

“The role of individuals in the bargaining process may be the single most influential factor that guides the parties” (DiGiovanni, 2011, p. 5). A dozen or more individuals may play a significant role in the bargaining process, including local union leaders, academic officers, and general counsels. In South Dakota, the management team comprises some of the BOR central staff, led by their General Counsel. Very rarely, a campus-based academic administrator or the university attorney may attend, if a bargaining session is held convenient for them. COHE’s team included a bargaining representative from each campus, typically the local president, and the state COHE President served as chief negotiator. I was particularly fortunate to have an active team that included both experienced and new bargainers. Each negotiator was assigned one or two areas of responsibility, which worked well during the early sessions.

Nonetheless, DiGiovanni (2011) contends “the chief negotiator plays the largest role in guiding the outcome of bargaining” (p. 5). He outlines at least five tasks for the chief negotiator, including (1) serving as the public face of the team, (2) explaining and advancing the client’s proposals, (3) crafting, assessing, and judging the impact of the proposals, (4) interpreting what is crucial and what is noise, and (5) setting the overall tone for the discussions.

In South Dakota, the current General Counsel for the BOR has served as management’s chief negotiator for nearly three decades. This decision irrevocably sets the tone of the negotiations from the start. An attorney, a professional primarily concerned with legal language as management’s face implies a confrontational situation. Why not the BOR Executive Director or the system HR director? Indeed, neither the Executive Director nor any Regent has ever participated in a single bargaining session. This suggests that the faculty contract is merely a legal matter, not an opportunity to communicate directly with the most important employees in the BOR system.

The General Counsel leads the BOR’s bargaining efforts, collaborates with his colleagues among the BOR staff, communicates with the university Presidents and academic affairs officers, serves as liaison to the Regents, develops proposals, crafts language, keeps tables notes, and creates a recitation letter for most negotiation sessions. The current individual has served as chief negotiator under several Executive Directors of the Board of Regents, under numerous Regents Presidents, and under several governors. It is safe to say, that he has ownership of the collective bargaining agreement. Virtually every section contains language he crafted. Indeed, far more than half of the total text is words he wrote. He is comfortable and authoritative in the process and has led innumerable contract negotiations.

Like any rational actor, he attempts to routinize and regularize the process. I suspect he did not expect anything extraordinary coming into this bargaining round. In past bargaining sessions, he routinely claimed the head of the table, a simple but effective means of establishing dominance. A decade ago, in one bargaining session when I was our campus representative, I arrived early and sat in “his” chair. He was clearly disconcerted, and it led to a particularly rambunctious meeting. I noticed that when he began bargaining with me as lead negotiator, he choose to sit across from me, perhaps unconsciously signifying the equality of the parties. In short, he is influential in the process. As this individual approaches retirement age, we might contemplate what bargaining would like with a new management lead negotiator. Even if the succeeding BOR General Counsel were to serve as the BOR’s chief negotiator, it would open the prospect of a new tone for negotiations and the possibility of substantial changes in the actual contractual language.

How can I describe myself as chief union negotiator? While it is a difficult proposition, I think my colleagues would agree with the following characterizations. I am passionate about the role of faculty in higher education. I firmly believe in shared governance and oppose the autocratic model we have in South Dakota public higher education. I care about my fellow faculty and believe they are trying to do a good job in a trying situation. I am impatient for changes that would improve the status of faculty, because it is the single most important reform necessary in South Dakota higher education. If faculty experts are consulted, empowered, and united, we could dramatically improve higher education in South Dakota far more substantially than any university president, BOR Executive Director, or governor. In bargaining and other environments, I am very sharp-elbowed, pushing my ideas to the forefront. I am comfortable interrupting a speaker, if they are going down a road that consumes unnecessary time and is not relevant to our conversation.

Early on, I clearly indicated to the BOR’s General Counsel that any prior understandings, ground rules, or other standard procedures with previous COHE Presidents were no longer valid. I stressed that COHE was under new leadership, which was a fundamental break from the past. Also, I repeatedly expressed the idea that COHE members were not satisfied with the current contract and would not agree to an inadequate contract. Indeed, a cadre of members—union activists—were intensely focused on the bargaining and had heightened expectations. They proved to be a stalwart foundation at several points.

Again, it is difficult for me to modest here. Based on my colleagues’ assessments after each session, they report I was articulate, offered good explanations of our proposals, rationally and in logical terms. I explained how our proposals were good for the university and how their proposals were unfair or counterproductive to higher education.

This combination of an experienced management negotiator and a new overly-combative labor leader could have led to disastrous results. Nonetheless, we developed a professional—if strained—relationship, with few distractions from the process. Contrary to DiGiovanni's prediction, an unruly labor negotiator did not prove poisonous to obtaining a signed contract that contained victories for labor.

The Aspects of Timing in Negotiations

DiGiovanni (2011) appropriately identifies timing, the right time to act or delay, as an important influence on negotiation outcomes. He recognizes that external events, which are largely beyond the negotiators' control, often have a dramatic effect on bargaining. However, events internal to the process are also significant. Participants' decisions on when to deliver a proposal or hold tight, when to counter-propose can influence outcomes.

In many ways, timing and history may have joined to create a unique opportunity for COHE to win our recent victory. The BOR engaged in their standard routine, based on years of unaltered experience. The first—and lengthy—stage involved each side presenting their proposals and vetting the other side's proposals. Then began the difficult maneuvering to discover what each side held dear and what was trade bait. Some proposals were withdrawn, some reformed. As often happens in negotiations, we ended up with different perceptions. They thought we had reached an impasse, we thought we could still make a deal. After 18 months, they formally declared an impasse and imposed a contract.

In the second stage, as I detail in Appendix A, we requested a new round of bargaining. The BOR staff were taken aback somewhat, expecting to continue with only the few remaining contentious items. An entirely new round of bargaining likely meant another year or more of negotiations. They followed another standard ploy: when they could not get us to agree, they offered the most draconian proposals they could imagine. They had regularly done this in past rounds, to good effect, for them. Past COHE leaders, fearful that terrible proposals would be imposed and COHE would be blamed, would back off. Labor would quickly agree to withdraw all of our proposals and sign a contract with the trade bait removed.

Of course, we expected them to come up with trade bait, but were surprised by the severity of their two proposals. One was to eliminate tenure. In brief, their proposal was a tenure retention plan; every seven years, every faculty member would be required to re-apply for tenure. The other proposal was to reduce the royalties a faculty member could earn on intellectual property by one-half.

In our view, neither proposal made sense for higher education in South Dakota. In a state where faculty salaries are among the lowest in the country, where there are limited urban amenities, and a near-arctic winter climate, how would we recruit and retain high-quality faculty by being the only public universities in the nation without tenure? The effect would be catastrophic, likely leading to very high turnover, especially among the junior faculty. Faculty impermanence would destroy academic programs and the traditions/cultures of each university.

A cut in royalties on intellectual property would reduce the incentive for faculty to produce commercializable research, which was contrary to the enormous effort to reify research in the last decade. We were sure there would be pushback on this proposal by the state's power elite. Venture capitalists, economic development leaders, and others would not understand how this proposal fit with the effort to create a local knowledge industry.

A couple of local labor leaders argued we should follow the well-tread route: trade our signature for the withdrawal of the two onerous proposals. Our team walked away from the bargaining table convinced the BOR had just painted themselves into a corner. However, the majority of faculty activists understood the BOR was bluffing. The sole asset we possessed that they needed was our signature on a collective bargaining agreement. As it became evident that we were willing to wait, they were faced with three choices: (1) stick to their guns and impose another contract that included these impossible-to-defend provisions; (2) lose face and impose a contract without these provisions; or (3) offer us something substantial to gain our signature.

It is not entirely clear why, but the BOR choose the third option. I have little evidence on which to evaluate their efficacy, but two possibilities exist.

First, maybe there was some pressure on the BOR to get a signed contract. I suspect someone behind the scenes thought that an imposed contract meant that the faculty were not on board with the mission of higher education in South Dakota. Or perhaps, someone thought that it might hurt the recruitment and retention of faculty superstars or, more likely, third-party contributions to the universities. After negotiations, I recently contacted nearly a dozen possible informants to understand these background machinations; none produced any additional insights. Maybe someone with influence wanted the university system to appear to speak with a unified voice before the state's political system.

The second possibility is that our organizing—broadly conceived, including communicating and framing the issues—might have brought the BOR and their staff to prefer a signed contract. Three readers of the earlier manuscript, including an anonymous reviewer of this journal, suggest that our ramped-up communication effort and our drive to change the culture of labor defeatism influenced the outcome. That is, our public release of their draconian trade bait

of tenure removal coupled with our refusal to sign a positive-outcome agreement triggered a change in BOR strategy. Either or both of these possibilities might explain our victory.

Catharsis

DiGiovanni (2011) lists catharsis as the final influence on bargaining; it is “the opportunity for each side to express what they need to say to each other in the safe environment of formal negotiations” (p. 8). Especially in South Dakota, for collective bargaining to function properly, management must truly listen to union concerns. In bargaining, the few angry activists can express the emotions of hundreds of other employees. Responsible managers acknowledge labor’s concerns and will offer a counterproposal to address the issues.

For COHE, a sense of defeatism permeated our organization. Too many faculty, both members and non-members, perceived the labor union as a “toothless tiger” fighting to stay alive. To change the culture, we needed a positive victory. We are an association of professional educators who cared about improving higher education, not a bunch of naysayers and malcontents. If productive bargaining presupposes mutual respect, which requires equitable resources, we were reframing the conversation.

The BOR staff did listen to us on two issues: inept supervisors and salary compression. While they did not agree to our initial proposals on these issues, they agreed to continue the conversation through joint committees on both topics (see Appendix). By removing these discussions from the formal bargaining environment, the BOR counterproposal for these committees provided a non-confrontational avenue to understand the dimensions of the problems and to seek innovative solutions. If necessary, these solutions can be brought into future contractual negotiations.

A further example of management listening closely to our concerns was the BOR’s counterproposal to offer additional protections for contingent faculty (see Appendix). They rejected our initial proposal for continuing contracts “as unworkable at this time.” Nonetheless, once they understood that we represent and care about the unstable employment circumstances of our contingent colleagues, they offered a good proposal, which we accepted.

Assessing the Intangible Factors

Of the five factors assessed here, history and timing played the largest role in influencing the outcome to COHE’s advantage. Even with unrealistic expectations and a combative lead negotiator, our strategy led to labor’s first victories in years. If my conjectures about the unseen actors are right, history and timing were critical to our success. The state’s research initiative brought new players into the higher education labor-management arena. Bringing in new players,

“expanding the conflict,” is often an effective tactic for the weaker party (Schattscheider, 1960). In a one-on-one fight, the weaker individual will inevitably lose. However, when more players arrive, the weight of the new participants may favor the weaker side. In any case, if you are going to lose *mano a mano*, better to take a chance to improve the odds with a new arrangement of the players. In our case, I assume these new players, those outside higher education, wanted a signed contract. COHE, as the weaker party, now possesses a new advantage, if outsiders who support research continue to pressure the BOR.

Perhaps the influence of the DiGiovanni’s (2011) five factors varies by case, but in this case, the historical changes in the public higher education meant that the BOR could no longer play the same game of dominating labor at every turn. If they hope to recruit and retain active, nationally-prominent researchers, the universities must inevitably enhance shared governance and respect faculty voices.

In other states, the faculty voice may be weaker because of nationwide changes. However, in South Dakota, where we had so little power previously, the nationalizing of our universities and the concomitant increased research expectations has created an opening for labor to grab a sliver of power. We possess a simple obstacle to labor peace: our signature on a collective bargaining agreement. New players—venture capitalists, politicians who favor the knowledge industry, and the national market for faculty researchers—mean that COHE has gained potential allies. Like all games, there are temporary winners and losers in politics. Unlike static games, however, political rules are dynamic and constantly evolving. Obstinate and willful disregard for changes in power could return labor to irrelevancy.

We must astutely judge the appropriate balance between cooperation and stubbornness. Staking and holding an early position is an aspect of expectations. Richard Neustadt (1991), in his famous exposition on presidential leadership, argues that a key factor that enhances a president’s power is his professional reputation. Neustadt defines professional reputation as a judgment by Washington elites of a president’s consistency on an issue and his willingness to act. Presidents who perennially change position—who are too easy to roll—lose power as compared to presidents who stake a clear position and stick to it. In many cases, obduracy enhances one’s power, if one has the ability to withhold what the other party needs.

Our steadfastness gave us the determination to fight off the BOR’s horrendous “trade bait” of removing tenure. We made it clear from the beginning and repeatedly throughout the negotiations that we would not be able to sell an agreement to our members without a clear victory, a positive accomplishment, “something big” for the faculty. And we delivered.

References

- BOR/COHE Agreement. (2013). "Higher education agreement between South Dakota Board of Regents and the Council of Higher Education, 2013-2016."
http://www.sdbor.edu/policies_initiatives/univfacubagree.htm
- DeCew, J. W. (2003). *Unionization in the academy: Visions and realities*. Lanham: Rowman & Littlefield.
- DiGiovanni Jr., N. (2011). "This much I know is true: The five intangible influences on collective bargaining." *Journal of Collective Bargaining in the Academy*. Volume 3, Article 5. <http://thekeep.eiu.edu/jcba/>
- DiObilda, N. (2012). "Negotiations behind negotiations: Reaching out to constituents." *Journal of Collective Bargaining in the Academy*. Volume 0, Article 18. <http://thekeep.eiu.edu/jcba/>
- Finch, D. W. (1979). "The South Dakota public employees' union act: Is it really collective bargaining?" *South Dakota Law Review*. 24: 243-250.
- Greenleaf, R. K. (1977). *Servant leadership: A journey into the nature of legitimate power and greatness*. New York: Paulist Press.
- Interim Terms. (2011). "Board of regents action, December 2011." (Imposed Contract)
http://www.sdbor.edu/policies_initiatives/univfacubagree.htm
- Ladd Jr., E. C. & Seymour, M. L. (1973). *Professors, Unions, and American Higher Education*. Berkeley, CA: Carnegie Foundation for the Advancement of Teaching and the Carnegie Commission on Higher Education.
- Langelett, G. (2013). "Faculty below 65% of Oklahoma survey across six South Dakota public universities." Unpublished data tables. Department of Economics, South Dakota State University, Brookings, SD.
- Lee, R. A. (1996). "Reining in the 'union threat': Right-to-work laws in South Dakota." *South Dakota History*, 26: 121-136.
- Neustadt, R. E. (1991). *Presidential power and the modern presidents: The politics of leadership from Roosevelt to Reagan*. New York: Free Press.
- Schattscheider, E. E. (1960). *The semisovereign people: A realist's view of democracy in America*. Holt, Rinehart, and Winston.
- Smyser, M. R. (1972). "Public employers and public employees unions: Their rights and limitations in South Dakota." *South Dakota Law Review*. 17: 65-97.
- South Dakota Codified Law. <http://legis.state.sd.us/statutes/>
- Zazzali, R. (2012). "Negotiations behind negotiations: Reaching out to constituents." *Journal of Collective Bargaining in the Academy*. Volume 0, Article 16. <http://thekeep.eiu.edu/jcba/>

Appendix: Review of Labor Victories in Recent Contract

The recent round of bargaining between the South Dakota Board of Regents (BOR) and the South Dakota Council of Higher Education (COHE) was the most comprehensive review of our agreement since our first contract in 1979. Nearly every section was touched or discussed in some fashion, if not changed. Over 30 months, two dozen negotiating sessions took place in six towns in virtually every corner of the state. The new contract provided significant gains for faculty and the university community in two stages.

The first stage was an imposed contract that included modest victories described below. In this stage, the parties were unable to reach agreement on three proposals, which led to the BOR's imposed contract (Interim Terms 2011). The three unresolved items were:

- (1) A BOR proposal that intellectual property should not be considered a working condition of the faculty and, thus, was no longer a bargainable item, except for the division of royalties.⁴
- (2) A BOR proposal to eliminate tenure for all newly-hired librarian faculty through the creation for librarian faculty of a new series of ranks similar to the newly-created Instructor ranks.
- (3) A COHE proposal to provide additional protections for faculty terminated through the reduction in forces provision (i.e., lay-offs).

This imposed contract included a large number of changes, many of which COHE agreed to. Some changes were good for bargaining unit members and the university at large, including the creation of Instructor ranks for contingent faculty. Under this system, full-time instructors (i.e., those with no research or service obligations) are now assigned a rank (Instructor, Lecturer, and Senior Lecturer) based on education and experience, and earn an associated rank pay increase. COHE also agreed to other provisions, to which we were initially opposed, as part of a trade to obtain the pay increase for summer/overload discussed below. This appendix does not review all changes to our contract, but only those COHE proposed and were successful in obtaining. We considered these COHE proposals as modest victories in the imposed contract:

- (1) An increase in the percent of base salary paid for overload and/or summer courses from seven percent to eight (for a standard three-credit, undergraduate class). This increase is actually a return to a previous standard, when the BOR had imposed seven percent.
- (2) Averaging of our performance evaluations over a three-year period, instead of solely the annual evaluation. As discussed in the article, South Dakota public university faculty are forbidden from earning across-the-board salary increases. Rather, a complex system of annual evaluations, market comparisons, and administrative unit decisions are employed to arrive at a salary increase. With zero salary increases from 2009 - 2011 and volatile salary increases likely in the future, COHE convinced the BOR negotiators that faculty who performed exceptionally well in years with a small pay increase should not be penalized.

⁴ This prime sticking point resulted from the BOR's insistence that intellectual property was no longer a bargaining item and COHE's unwillingness to agree to any contract that removed it. To prevent this disagreement from hampering a final contract, both parties agreed to disagree. The signed agreement (BOR/COHE Agreement 2013) recognizes that the imposed terms removed intellectual property from the bargaining environment, but also recognizes COHE's ongoing legal actions to challenge that decision as an unfair labor practice (ULP). The ULP is working its way through the legal system in South Dakota.

- (3) The creation of two “joint system committees.” For the first time, BOR staffers and academic administrators are meeting with COHE members to discuss these two important issues. This is a success in that we got the BOR to recognize these two issues as important and worthy of further discussion. The two committees are
- a. Salary compression and inversion. A fifteen-year, system-wide effort successfully boosted the salaries of junior faculty. However, combined with the complex salary formula, that effort produced widespread and continuing inequities between junior and senior faculty. The gap between newly-hired and senior faculty in nearly all departments has compressed. In some departments, inversion has occurred; Assistant Professors—freshly-minted PhDs with no experience—are among the highest paid faculty in their departments, receiving a higher salary than top-performing Full Professors who have served for three decades! Moreover, nearly one-quarter of Full Professors are paid 65% or less than their market target (Langelett, 2013). The BOR has made significant strides to improve faculty salaries with a stated goal of 90% of market.
 - b. Inept supervisors. COHE persuaded BOR negotiators that South Dakota’s autocratic management system sometimes produces ineffective department heads. In South Dakota, department heads are managers appointed “for good behavior” and often serve for decades. They completely control faculty careers, including workload, evaluations, grant support, budget, and other resources. Thus, faculty are reticent to identify inept supervisors to upper administration. Further, the grievance process does not reveal the shoddy performance of poor supervisors because faculty are reluctant to file grievances for fear of retaliation, which in some cases were overt. Clearly, it does not serve the public interest or the universities to have incompetent supervisors, especially since the primary means of discovering them can easily derive from faculty communications to upper administration.

After 18 months in this first stage, the BOR negotiators thought the bargaining was done. They declared an impasse; COHE employed the mediation and fact finding steps to no avail. The BOR imposed a contract effective January 1, 2011. A few months later, COHE approached the BOR negotiators with an offer to begin a fresh round of bargaining with new proposals. This request surprised the BOR staff, because they interpreted the law as requiring them only to negotiate on the outstanding, unresolved items from the previous sessions. Our interpretation, based on advice from our attorney, was that after an imposed contract, we entered an entirely new bargaining round. Our request to enter bargaining came with our announcement that we had the right—and intended to act on it—to bring forward new items to negotiations. Needless to say, the BOR negotiators were displeased and frustrated.

After this second stage, a final contract was agreed to by both parties—and signed in June 2013—one that included all unresolved items, except the intellectual property dispute which is being adjudicated by the state courts. In this new master contract (July 1, 2013 – June 30, 2016), COHE won two provisions that significantly protect faculty and promote the well-being of the university system by simultaneously enhancing faculty loyalty to their institutions and recognizing the value of high-performing faculty:

- (1) A reform of Reduction in Force (RIF) retention priorities. Under the previous RIF provision, administrators identified units (e.g., departments or programs) slated for

layoffs. Faculty within these units were ranked for retention according to their performance, based solely on their supervisors' evaluations from the previous three years. So, layoffs occurred among the lowest-rated faculty first, regardless of rank or seniority. The new provision recognizes the achievement of excellence by rank promotions. So, priority for retention under the new RIF procedures employs ranks as the decision rule. Full Professors are retained first, then Associate Professors, followed by Assistant Professors and so forth within the instructor ranks. Moreover, within these ranks, retention is determined by seniority; those with longer service are retained over those with fewer years of service. Restated, future layoffs occur first among the lowest ranks of lecturers and continue up through the ranks of the lecturers and then the professoriate.

- (2) "Tenure-like" protections for instructor ranks. To support the new instructor ranks, to which we prior agreed in the imposed terms, COHE won advance notification of non-renewal of their annual contracts. Previously, a faculty member in the instructor ranks could be notified of non-renewal the day before their contract began (i.e., five days before classes began). Now, Senior Lecturers (i.e., those with a terminal degree and eight years of service) must receive eight months notification that their contract will not be renewed. Moreover, they are entitled to the same grievance procedures as a tenure-track faculty member who is terminated, including a committee of peers to review the non-renewal decision.

While we obviously hope that neither of these provisions will be used, both have occurred in the recent past. South Dakota State University, the state's largest university, suffered layoffs in 2010 with great pain. Fifty-five employees were laid off due to a 10% across-the-board cut in state support for all agencies. These layoffs included eight faculty, two of whom were tenured.