Why Factfinding Needs Baseball

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Introduction

Bargaining impasse factfinding in California needs baseball. Not because the employers are offering "peanuts." Or that the unions are trying to "stretch a single into a double." I'm not talking about the sacrifice fly, although many trees are sacrificed to the cause of presentation binders. I'm also not referring to the "ground rule double," although many neutrals would like the parties to follow those ground rules a little more closely. And not even "three strikes you're out," although many factfinders would like to limit each party to no more than three "strikes" on each disputed issue.

Factfinding needs baseball in the sense that Major League Baseball and the Players' Association utilize "baseball-style" decision-making rules in salary disputes. Under those parties' collective bargaining agreement, arbitrators selected to hear player compensation disputes must choose one party's proposal or the other's – not invent a middle ground or a third way. The theory behind this rule is that it brings the parties closer together by creating an incentive for both sides to modify their proposals in the hopes of winning the neutral's support. They can't rely on the neutral to make the ultimate compromise. Once the parties move closer together, settlements often result before a decision is rendered or a report issued.

Some interest arbitration statutes in California, such as the one for the City and County of San Francisco, incorporate baseball-style rules into arbitrators' award parameters.

The author has utilized a "baseball-style" approach to factfinding as the panel chairperson in more than a dozen local government, K-12, and higher education disputes in California over the last three years. In my experience, this tool helps make factfinding a process that solves the problem, rather than escalates the conflict.

The Statutes Imply That a Recommendation Must Have the Support of at Least Two Panel Members

Nothing in the various factfinding laws in California directly addresses whether or not the "baseball" approach is required, or even permitted. However, the author asserts that the use of this method is an implied requirement. To the degree that a neutral strays outside the bounds of recommending one party's proposal or another, he or she has left behind the very nature of the panel process.

The state statutes all refer to a recommendation or recommendations by "the panel." The panels are, by statute, tripartite. They are comprised of three people: one neutral, one representative of management, and one representative of labor. A recommendation by "the panel" is therefore by definition supported by at least two panel members. A recommendation made by the neutral chairperson that neither party panel member will support is, therefore, not a recommendation by the panel.

One could argue that it is permissible for the panel to have a recommendation that is split three ways. And, I expect, no party would ever litigate this issue once a report had been issued. But the spirit of the law calls for a majority recommendation on each disputed issue.

Baseball-Style Decision-making Encourages Settlement

Management, union and neutral participants in factfinding agree that the best outcome is a settlement. When there is no deal, and a report is issued and made public, the stakes are raised and the potential for unilateral impositions and strikes is elevated. To the extent that the neutral can facilitate settlement, he or she is doing a great service to the parties and to the public who rely on government services.

In my experience, it is best to let the parties know from the outset that a "baseball-style" approach will be used in the event a report is written. I have consistently communicated this in pre-hearing conference calls with the advocates and panel members. Parties have never objected to this approach. None have insisted that I reserve the right to "invent" my own solutions. They have been willing to go along with my suggested process.

I also let the parties know that I encourage them to modify their positions as the factfinding process unfolds. While they may enter the hearing with one proposal, they may want to conclude the process with a different proposal that they hope is more likely to gain the support of the neutral. I also let each party know that they will have an opportunity to review the other party's new proposal and respond in kind if they wish. My goal is to encourage a bargaining process under the umbrella of factfinding.

Ideally, the back and forth exchange of new positions leads to more off-the-record discussions that, in turn, may lead to a tentative agreement.

As the process inches toward a public report, the parties often become increasingly motivated to settle. Many parties have concerns that a public factfinding report might cause them discomfort or embarrassment. Parties are often willing to dig a little deeper to find the authority to offer more (in management's case), or to tamp down expectations (in the case of the union).

In my experience, in a minority of disputes one or both parties are relatively impervious to public opinion. They may be sensitive to public views, but they believe that a factfinding report will do little to influence public or constituent attitudes. In those instances, parties are less concerned about making a proposal that might get the support of the neutral. "Baseball-style" decision-making may have little impact on the prospects for settlement in this situation. Nonetheless, it is always worth trying out this process to see where it leads.

The On-the Record Dynamic is Very Different Than the Off-the-Record Dynamic

The neutral's role in mediation portions of factfinding is quite different from the neutral's role as drafter of a report. Inventing new solutions in a report can be counter-productive and may only make it ultimately more difficult for the parties to settle.

The opposite holds for off-the-record mediation discussions. I always encourage the parties to attempt mediation after the presentation of their on-the-record positions. Having heard the presentations by both sides on the issues, I am then in the position of being helpful to them as a

mediator. As a mediator, it is completely appropriate, even desirable, for the neutral to float out new ideas when the parties get stuck. Occasionally, those new ideas form the basis for a deal. Or at least they keep the conversation going, generating other new proposals by the parties themselves.

The mediation phase of factfinding is enhanced by the creativity of the neutral and the parties. Neutrals should not become wedded to any of their own suggestions. For reasons that an outside neutral may never completely understand, an idea that seems brilliant to the neutral may be dead-on-arrival with one or both parties. The rejection of one idea should not discourage the mediator from offering additional suggestions. I have learned these lessons from seventeen years as a mediator of contract impasses.

The factfinding process can derail if the neutral decides to push that same "brilliant" or "wise" idea into the light of day in a public report. A "third way" proposal may not win the support of either party. It may soon become irrelevant. Or, even worse, it could ultimately win the support of one side and not the other. The result could be an exacerbation of the dispute, not a resolution of it.

Exceptions to Baseball-Style Recommendations

On occasion I have made an exception to my preference for a baseball-style approach to factfinding. In one case I handled, the parties were under pressure to have the report issued by a certain date. Then, one of the party panel members became unavailable for personal reasons. I made the decision to issue the report as a report of the neutral chairperson, not the panel. In that case, I was not compelled to adhere quite as strictly to the parties' positions as presented during on-the-record sessions, since there would be no panel recommendations.

I have also made exceptions on a couple of occasions when I believed that both parties' positions dramatically diverged from the statutory factors in the law. Neither side's proposals could be justified by the criteria that factfinders are required to use when making recommendations. Each side was proposing a radical departure from the existing contract, and I had been unable in our off-the-record discussions to shake them from those positions.

In those instances, I shaped my recommendation to conform as closely as possible to the status quo in the parties' collective bargaining agreements. My thinking was that the existing contract provision was at least something that the parties had previously agreed to, even if neither side was willing to accept it in a new agreement. The least disruptive approach I could take, given how far apart they were, was to recommend a continuation of the status quo. At least I would not be introducing a new element of disagreement by creating yet another proposal that neither side liked.

On other occasions, parties were willing to tell me, in off-the-record discussions, that they could support Idea X if it were recommended by the panel in the report. But they could not make Idea X their own position on the record, for reasons having to do with constituent expectations. With that knowledge, I was happy to put forward a recommendation in the report that I knew would not engender dissent from either party.

Conclusion: Help Them Settle, Do No Harm

Factfinding is an extension of the collective bargaining process, with the addition of an outside neutral into the mix. It is like mediation, in that sense, but it is mediation where the neutral has an

additional tool – the public report. Having the license and duty to issue a public report if the parties do not settle gives the neutral additional leverage. Like a mediator, the neutral factfinder can use the power of persuasion and be a calm voice urging resolution. But, absent a settlement, the parties are aware that the neutral holds the power of the pen.

It is important that the neutral exercise that power judiciously. The factfinder is parachuting in and then hiking out – while the parties must remain, continuing to work with each other day to day and year to year.

The neutral chairperson, then, should do everything possible to help the parties settle on their own without need for a public report. This can be done through building robust mediation into the process. It can also be done by creating incentivizes for the parties to move their on-the-record positions closer to one another. Baseball-style panel decision-making is a valuable tool in achieving that goal.

The neutral risks further enflaming an already heated dispute when he or she injects new "good ideas" in a public way into a factfinding report. As tempting as it may be to think that we dispassionate outsiders hold the key to a solution, that very probably is not the case. In an effort to appear more balanced, neutrals can actually bring additional disequilibrium into an unsettled dispute.

Picking one side's proposal or the other can be difficult, particularly when both sides argue passionately and intelligently for their positions. But it is the best course for factfinders to take. At best, it can help induce settlement. At the very least, baseball-style recommendations run the lowest risk of bringing disruptive new elements into the labor-management dispute.