



REPUBLIC OF KENYA

A photograph of two hands shaking, one in a light blue shirt and the other in a dark grey suit jacket, set against a white background that is shaped like a map of Kenya.

**GUIDELINES FOR NEGOTIATIONS
IN
COLLECTIVE BARGAINING
IN THE
PUBLIC SERVICE**

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SECTION 1

INTRODUCTION

1.0 Preamble

1. This section exposes the reader to the rationale for the development of these Collective Bargaining Guidelines, the background including the International Labour Organization (ILO) Conventions and Recommendations and the advantages of negotiations as well as the nature of collective bargaining in the Public Service.

1.1 Rationale for Collective Bargaining Guidelines

2. The Public Service is the largest formal employer in the Kenyan economy. Salary levels in the Public Service therefore, have a big impact on the performance of the economy. The current practice of wage determination especially through negotiation and collective bargaining in the Public Service depending on how managed, has the potential of adversely impacting on the realization of higher and sustainable economic growth, creation of equitable environment as well as enhancing the competitiveness and development of the Country.
3. Currently, determination of wages in all the sub-sectors of the Public Service is undertaken without properly constituted and legislated wage determination guidelines that are productivity based. Further, public servants participating in the negotiations are not always trained in this area but are identified by virtue of the duty schedule that covers the sub-sector. The parties involved in the wage determination therefore, engage in negotiations using diverse skills and tactics to ensure that they arrive at wage levels, which in most cases do not take into consideration the level of contribution to productivity.
4. The results of this kind of negotiations have been commitment of the public service organizations represented to remuneration levels that are at times beyond what is payable within the sector, available funds or economic growth. This has compromised equity, affordability, sustainability and competitiveness. As a result, there is a tendency of not honouring the agreements. The subsequent non-compliance has triggered industrial unrest, further compounding the performance of the organizations and the economy. It is against this background that it has become prudent for Public Service to have a set of procedures that can be followed by officers participating in collective bargaining on behalf of the Government, or their respective Public Service organizations, as employers.

1.2 Background to Negotiation and Collective Bargaining

5. The concept of Collective Bargaining was conceived in the 19th century following the emergence of industrial conflict and growth of trade unions. The advocates of collective bargaining believed that it would promote a system of peaceful and routine bargaining that would eliminate industrial strife and violence, create industrial democracy and make capitalism work.

1.2.1 International Labour Organization and Collective Bargaining

6. The International Labour Organization (ILO) was subsequently established at the conclusion of the First World War, to champion collective bargaining as a mode of determining working conditions. The goal was to improve working conditions (by regulating the hours of work, conditions of work and the labour supply to prevent unemployment and protect workers against work related hazards including sickness, diseases and employment injuries). Later, the Declaration of Philadelphia (1944) recognized the "solemn obligation" of the ILO to promote

programmes that would achieve full employment and raise living standards, protect the life and health of workers in all occupations, provide for child welfare and maternity protection and assure equality of education.

7. To achieve these objectives, the ILO develops regulations and standards to guide countries in the Collective Bargaining process and other labour and employment activities in form of Conventions and Recommendations. Key Conventions and Recommendations in collective bargaining include:
 - (i) The Right to Organize and Collective Bargaining Convention, 1949 (No. 98);
 - (ii) The Collective Agreements Recommendation, 1951 (No. 91);
 - (iii) The Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92);
 - (iv) The Labour Administration Convention, 1978 (No. 150);
 - (v) The Labour Administration Recommendation, 1978 (No.158);
 - (vi) The Labour Relations (Public Service) Convention, 1978 (No. 151);
 - (vii) The Labour Relations (Public Service) Recommendation, 1978 (No. 159);
 - (viii) The Collective Bargaining Convention, 1981 (No. 154); and
 - (ix) The Collective Bargaining Recommendation, 1981 (No. 163).
8. Nations are therefore, expected to adopt these ILO Conventions and use the Recommendations to guide labour relations and collective bargaining process.
9. The ***Right to Organize and Collective Bargaining Convention, No. 98 of 1949*** is among the well-known and widely ratified Conventions. It stipulates that Member States should encourage systems of voluntary negotiations in order to regulate terms and conditions of employment through collective agreements. All the other Conventions and Recommendations afore-mentioned, complement Convention No. 98 by clarifying concepts and supporting the principles contained therein.
10. Collective Bargaining is therefore, fundamental to the International Labour Organization (ILO) and has been acknowledged as an instrument of social justice. The other related Convention is the ***1998, ILO Declaration of Fundamental Principles and Rights at Work*** which reminds all Member States of the obligation to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant Conventions. These fundamental rights include freedom of association and effective recognition of the right to collective bargaining.

1.2.2 Advantages of Collective Bargaining

11. Collective Bargaining as a process by which workers and employers organizations (or individual employers) negotiate on areas relating to wages and terms of employment, involves decision making between parties representing employer and employee interests. The goal of collective bargaining is to agree upon rules and compromise between conflicting interests over the terms and conditions of employment.
12. For workers, Collective Bargaining has therefore, introduced: an element of industrial democracy into the workplace where workers, gain through protective function (ensuring adequate wages and good working conditions); a voice function (by influencing personnel and labour relations practices); and a distributive function (sharing in the fruits of technological

progress and productivity). For employers, Collective Bargaining is a means to attaining: social peace; collective goods; and standardization of working conditions and wages, leading to the growth of both enterprise and overall economy. Governments also benefit from collective bargaining as it provides: social dialogue; protection of fundamental rights of workers; social protection; and promotion of sound industrial relations which is an attribute of good governance.

13. Depending on the country, Collective Bargaining takes many different forms and takes place at different levels. It occurs between trade unions and individual companies (single-employer bargaining), or between union federations and employer associations (multi-employer bargaining). Collective bargaining coverage not only reflects the number of collective agreements, but also how administrative regulations and labour laws interact with the collective bargaining processes, although there are important differences in the extent to which each government intervenes in labour-management relations.
14. Whereas Collective Bargaining can be adversarial, it is effective in building trust between parties and the resultant agreement should bind the signatories and those on whose behalf it is concluded. Stipulations in contracts of employment which are contrary to the Collective Bargaining Agreement unless renegotiated and agreed upon by both parties should be regarded as null and void and automatically replaced by the provisions in the corresponding Collective Agreement. Those stipulations that are however, favourable to the worker are to be treated as part of the Collective Bargaining Agreement.

1.3 Collective Bargaining in the Public Service

15. ***The ILO Convention 154*** acknowledges that collective bargaining in the Public Service may need to be addressed differently from other branches of economic activity since conditions in the Public Service are usually designed to achieve uniformity. Further, the terms and conditions of work in the Public Service are often contained in legislations, covering rights, duties and conditions of service, that leave little room for negotiation. Consequently, any collective bargaining agreement contrary to the provisions of the law, would presumably require amendment to the laws. To avoid such circumstances, negotiations are often centralized. As a result, the Convention allows for exclusion from the subject of negotiation those conditions which require approval by Parliament in most countries and matters which are for employers to decide upon as part of freedom to manage the organizations. For the example, assignment of duties, appointments and structuring or restructuring of the organization.
16. This scenario applied to Kenya would include the conditions contained in the Constitution of Kenya, 2010, provisions in Labour legislations of 2007 in so far as they comply with the Constitution, 2010 and those regulations and statutes developed by Ministries/Departments/Agencies charged with the responsibility to determine terms and conditions of service that apply to all public servants.
17. Convention 154 also highlights financing as the other unique situation impacting on collective bargaining in the Public Service. Wages and other employment conditions of public servants with financial implications must be reflected in public budgets which are approved by bodies such as parliaments which are not always the direct employers or organization where the public servants work. Negotiations with financial implications regarding the Public Service are

therefore, frequently centralized or determined by overall funds available to the Government or macro economic status of the country and are subject to control by external bodies, outside negotiations, such as the Finance Ministry or inter-ministerial committees or Parliament.

18. Collective bargaining in the Public Service is further impacted on by other issues such as the determination of the subjects that can be negotiated, the jurisdiction of the various State structures, as well as the determination of negotiating parties at different levels. This is because, there are Public Service issues of terms and conditions of work that are negotiated while others by their nature and impact on the entire country's governance only call for consultation.
19. For the Public Service, social dialogue is therefore a very important aspect of labour relations as it encourages consultations. The consultations ensure that the voices of those concerned on the matter are heard before a decision is taken, especially where legal, financial and governance circumstances do not allow for negotiation. This approach guarantees that the parties concerned become partners in decision making process on matters of common interest.
20. The Convention also allows for special approaches for Public Service negotiation process as determined and provided in the national laws, regulations or national practice.

1.3.1 Trade Unions Exclusive Bargaining Rights

21. Due to the unique nature of the Public Service, Convention 154 provides for exclusive rights to a trade union, where necessary. This is when the trade union is the most representative union, based on objective and pre-established criteria. It however, states that where a distinction is made between the most representative trade union and other trade unions, minority unions should not be prevented from functioning and should have the right to make representations on behalf of their Members and to represent them in individual grievances.

1.4 Training in Collective Bargaining

22. Appropriate training in negotiation skills is essential for fruitful collective bargaining. **ILO Recommendation No. 163** recognizes the importance of such training, and states that measures should be taken by the parties so that negotiators have the opportunity to obtain appropriate training. At the request of workers' or employers' organizations, the government may provide assistance for training, but the government is under no obligation to do so. Governments however, are obligated as an employer to train enough staff that represents it during negotiations. This Guidelines is therefore, developed to enable the Government to fulfill its obligations in this area.

SECTION 2

SITUATION ANALYSIS

2.0 Preamble

23. This section provides information on the Kenyan current practices in wage determination and collective bargaining process. Kenya being a Member of International Labour Organization (ILO), supports ILO laws that govern freedom of association as well as Collective Bargaining. As a result, the Kenyan Labour laws have incorporated most of the principles of the respective ILO Conventions and Recommendations. The practice similarly, endeavors to comply with both the provisions of International Conventions and Recommendations including the national laws.

2.1 Current Practice in Determination of Remuneration in Kenya

24. The major practices in the determination of remuneration in the Kenyan Private and Public Sector include: minimum wage; flexible/near market approach; administrative approach; institutional processes; and collective bargaining.

(i) Minimum Wage

25. In Kenya, the minimum wages are set and revised annually by the Ministry of Labour and adopted by trade unions and employers including the Government. The process is provided for in law and carried out by the Wages Councils appointed by the Minister in charge of Labour matters. The Councils, in determining the level of minimum wage applies: the general level of wages in the country; cost of living and changes therein; economic factors, including requirements of economic development; and the capacity to pay.

26. Setting minimum wage to give wage-earners the necessary social protection as required by the ILO Recommendation No. 135, has been a challenge in Kenya due to affordability, sustainability and inappropriate or lack of productivity measurement framework. Subsequently, there is no standardized measurement system for determining the minimum wage level as the parameters are determined during the process.

(ii) Near Market Wage Rate

27. The near market wage rate is mostly applied in wage determination for the non-unionized category of staff. It is influenced by both internal and external factors such as: individual negotiations; prerogative of employers; company boards of directors; market rate wages; occupational and overall unemployment rates; productivity level; legislative factors; spillover effects of unionism; general economic conditions; and the cost of living. The near market wage rate setting as a mechanism is ideal when used against job evaluation and market surveys. The successful application of near market wage rate in Kenya has however, been a challenge as the results of job evaluation and market surveys are at times influenced by conflict of interest or hardly applied.

(iii) Administrative System

28. The public sector like the private sector has both unionizable and non-unionizable staff. As a result, the system of wage determination for both the unionizable and non-unionizable staff varies. Notwithstanding the above, the public sector, because of the nature of its operation and the impact of its wage bill on the economy, relies more on administrative method of wage setting through commissions and committees that base such wage levels on Government's ability to pay and sustainability.

(iv) Institutional Process

29. This process has been applicable in institutions established by the Government through Acts of Parliament to set and review terms and conditions of service for their respective workers. The process is normally stated in the enabling legislation providing for the cycle and the system or methodology. The process for determining pay through the institutions has not however, provided for consideration of fiscal sustainability, market comparability, equity or growth of the economy.

(v) Collective Bargaining

30. Kenya has a large unionized work force with a relatively active trade union movement. As a result, Collective Bargaining is a major approach to determining wage levels in Kenya. The process is informed by: market analysis; economic factors; the internal value of the job; and past wage awards by Industrial Court or administrative system. It is used to determine wages of unionized staff in compliance with the ILO Conventions and Recommendations on Collective Bargaining and the Wage Policy Instrument issued under Labour Institutions Act, 2007. The policy outlines the compensation factors for negotiation of terms and conditions of service which the negotiating parties have to follow in arriving at a level of salary, namely:
- (i) Minimum standard of living determined by the rise in cost of living index since the last wage increase or economic performance;
 - (ii) The performance or productivity increase in the specific sub-sector over the period in question; and
 - (iii) Ability of the employer to pay.
31. The agreement arrived at is recognized as a legally binding Collective Bargaining Agreement.
32. Due to the number of sub-sectors represented in the Kenyan Public Service, collective bargaining for the unionized staff is undertaken by different trade unions representing the respective sub-sectors. For example: the Teaching Service is represented by the Kenya National Union of Teachers (KNUT) and Kenya Union of Post Primary Education Teachers (KUPPET); Local Authorities, Association of Local Government Authorities of Kenya (ALGAK); Public Universities have more than one union with the Universities Academic Staff Union (UASU) representing the academic staff, Universities No-Teaching Staff Union (UNTESU) representing non-teaching Staff (Academic staff equivalent) and the Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals, Allied Workers (KUDHEIHA) representing the subordinate Staff ; the Civil Service, the Kenya Union of Civil Servants (KUCS) which represents non-managerial staff excluding the Forces and cadres defined by law; while the State Corporations are represented by unions of their respective sub-sectors. The various unions negotiate on areas relating to wages and conditions of employment not excluded by law or centralized, on behalf of their respective members.
33. In the event that the negotiating parties fail to reach an agreement, the matter in dispute is referred to the Minister responsible for Labour matters who may appoint a conciliator or an arbitrator to settle the dispute or advice on referral to the Industrial Court for arbitration as need be, in accordance with the provision of the Labour Relations Act, 2007 of the Laws of Kenya.
34. Collective bargaining landscape in Kenya is however, set to change given the provisions of the Constitution of Kenya, 2010.

SECTION 3

COLLECTIVE BARGAINING AND THE KENYA LAWS

3.0 Preamble

35. This section highlights the major laws that guide the process of Collective Bargaining and wage determination in Kenya.
36. The employment relationship in Kenya is guided by law to ensure maintenance of harmonious industrial relations. Collective Bargaining is therefore, undertaken guided by the provisions of the laws that have been passed to legislate labour relations in the Country for purposes of attaining and maintaining industrial peace. The major laws providing guidelines include:
- (i) The Constitution of Kenya, 2010;
 - (ii) The Employment Act, 2007;
 - (iii) The Labour Relations Act, 2007;
 - (iv) The Labour Institutions Act, 2007;
 - (v) The Occupation Safety and Health Act, 2007;
 - (vi) Retirement Benefits Act; and
 - (vii) The Work Injury Benefits Act, 2007.
37. There are other laws that also provide direction on labour relations including wage determination such as the: Law of Contract Act, 23; Teachers Service Commission Act Cap, 212; and various Acts establishing specific State Corporations. In this Guideline, the discussion on Collective Bargaining process however, focuses on the provisions in the Constitution of Kenya, 2010, the afore-mentioned five Labour Laws revised in 2007, the Wage Guidelines and the Industrial Relations Chatter.

3.1 *The Constitution of Kenya, 2010*

38. *The Constitution of Kenya, 2010* which is the supreme law of the land, provides for extensive rights and privileges of the employees and trade unions as well as employers and employers organizations on matters concerning industrial relations. For example, the **Bill of Rights** under **Article 41 on Labour Relations** provides for: workers right to fair practices; fair remuneration; reasonable working conditions and participation in the programs of trade unions. The Article also provides for trade unions and employers right to: form and join organizations; determine own administration programs and activities; and engage in collective bargaining. **Articles 36 and 37 of the Constitution** further, provides for freedom of association and rights to assembly, demonstration, picketing and petition, while **Article 43** provides for the basic standards of health, accessible and adequate housing and clean and safe water in adequate quantities.
39. **Articles 54 and 56** provide for equitable treatment for persons with disabilities, minorities and marginalized groups. Further, **Chapter 11** provides for devolved government and subsequent creation of counties giving a new structure of administration which will impact on employment of workers. **Article 230** further provides for the establishment of Salaries and Remuneration Commission with representation from umbrella trade union and employer organization including public service organizations. The Commission has the mandate for setting and reviewing remuneration and benefits for all State Officers and advising the

national and county governments on remuneration and benefits of all other public offices. Article 230(5) further provides that in performing its functions, the Commission will take into account a number of principles one of them being the need to ensure that the total public compensation bill is fiscally sustainable. In essence the Constitution is giving more weight to the advisory role of the commission on remuneration and benefits for all public offices.

40. The collective bargaining process and determination of terms and conditions of service of essence will comply with the provisions of the Constitution.

3.2 The Employment Act, 2007

41. This Act has incorporated the provisions of the ILO Conventions and Recommendations on Collective Bargaining and rights at work. It defines the fundamental rights of employees, provides basic conditions of employment and regulates terms of employment that are likely to form issues for collective bargaining. Specifically, **Part II** of the Act provides for the principles governing employment such as equity in employment, while **Part III** provides for the terms and conditions of employment service including the rights of employees at work and those of accessing the related documents including collective bargaining agreements.

42. **Part IV** of the Act provides for the protection of wages outlining: the mode of payment; when salaries and wages are due; how, when and what deductions should be made; and provisions of itemized statements of what comprises salaries and wages that is payable to the employees, including statutory deductions. In addition, the section stipulates powers to amend pay and statements of deductions.

43. **Part V** highlights the rights and duties in employment that constitutes the basic terms and conditions of employment, hours of work, leave, housing and basic amenities that includes water, food and medical attention. **Part VI** further, provides for the conditions under which an employment contract can be terminated or an employee dismissed. It also provides for conversion in terms of employment and protection of employment contract through a written contract giving all details of employment including remuneration. The section also provides for protection of workers rights in the event of insolvency of an employer.

3.3 The Labour Relations Act, 2007

44. This Act provides for registration, regulations, management and democratization of trade unions and employers organizations, to promote sound labour relations through protection of effective collective bargaining and orderly and expeditious dispute settlement. The Law in **Part II** guarantees the rights, freedom of association and protection of both employees and employers. It further recognizes the rights of trade unions and employers to join and participate in federations of trade unions' and employers' organizations including determination of a constitution, rules and activities. **Part III** of the Act provides for the establishment and registration of trade unions' and employers' organizations including conditions under which the trade unions may be dissolved as a way of ensuring effective collective bargaining process.

45. **Part VII** provides for the recognition of trade unions for purposes of collective bargaining and makes collective bargaining agreements binding to all parties for the period of the agreement, in compliance with the ILO Conventions on Collective Bargaining. The Law further provides for the registration of collective bargaining agreements with the Industrial Court for purposes of enforcement.

46. **Part VIII** provides for trade dispute resolutions and prescribes the procedure for reporting disputes to the Minister for Labour and the Industrial Court. The section gives the Minister specific powers to appoint a Conciliator or Conciliation Committee to resolve any trade dispute. It also provides for referral of the dispute to the Industrial Court for arbitration where conciliation is not successful.
47. **Part X** highlights the circumstances under which strikes and lock-outs are either allowed or prohibited. It stipulates that strikes and lock-outs, are protected (allowed) if: the trade disputes that form the subject of strike or lock-outs, concerns terms and conditions of employment; the trade dispute is unresolved after conciliation; and a seven day written notice of strike or lock-out has been given. The section further provides that strikes or lock-outs are prohibited when: employers and employees are engaged in essential service; dispute has been referred to an arbitrator or the Industrial Court; and strikes or lock-outs is in furtherance of a trade dispute.

3.4 Labour Institutions Act, 2007

48. The Labour Institutions Act, 2007 provides for the establishment of labour institutions, their functions, powers and duties with regard to labour matters in the country. **Part II** of the Act provides for the formation of the National Labour Board which is an advisory body to the Minister for Labour on all matters concerning employment, training, manpower development and labour legislations, industrial relations, issues on ILO Conventions and productivity measurements and improvements.
49. **Part III** establishes the Industrial Court with the role to maintain industrial relations and peace in employment situations. The Court has jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions in the Act. It also provides for an appeal by any party dissatisfied with the final judgment of the Industrial Court, to seek redress at the Court of Appeal.
50. The Act in **Part IV** and **V** empowers the Minister to appoint a committee of inquiry on any matter which appears to be connected with or relevant to any trade dispute whether or not such disputes have been reported to the Minister. It also provides for the establishment of offices to facilitate labour administration and inspection. **Part VI** provides for the formation of the Wages Councils to investigate remuneration and conditions of employment and empowers the Minister in consultation with the Board to establish sectoral wages council if he is of the opinion that a sector is not adequately regulated by collective bargaining agreements.

3.5 Occupational Safety and Health Act, 2007

51. This Act generally provides for safety, health and welfare of workers and all persons lawfully present at work places. It also provides for the establishment of the National Council for Occupational Safety and Health for management of safety and health matters. The Act also addresses government as an employer and requires that it provides safe and healthy working environment for its employees.
52. **Part II** of the Act specifies the general duties and responsibilities of employees and employers in ensuring conducive working environment. It also identifies issues that are essential in work environment that form part of the terms and conditions which is a subject of collective bargaining and stipulates penalties on contravention.

3.6 Work Injury Benefits Act, 2007

53. The Act provides for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. **Part II** of this Act provides that every employer obtains and maintains an insurance policy approved by the Minister for Labour in respect of any liability that an employer may incur to his employees.
54. **Part III** of the Act covers employees right to compensation in case of any injury or incident at the work place and the employer's liability to pay compensation arising from such situations. It further provides for categories of disablement, amount payable and the timeframe within which compensation should be made. It also spells out the circumstances under which an employee may not be compensated.
55. Any collective bargaining negotiations relating to wages or terms of service must therefore, have reference to the provisions of the relevant laws for consistency and legitimacy. For effective collective bargaining or negotiations, it is important that persons identified to participate in the process be conversant with the provisions of the Laws.
56. Besides the above laws, there are two other documents which are relevant to the process of collective bargaining, these are:

3.7 Wage Guidelines

57. These guidelines are recognized under the Powers of the Industrial Court, S.20 (2) of the Labour Institutions Act 2007, as binding the Industrial Court powers. The provision stipulates that "the Industrial Court shall be bound by any guidelines or other directives relating to wage and salary levels and other terms and conditions of employment that may be issued, from time to time, to the Industrial Court by the Minister responsible for Finance". Following the implementation of the Constitution of Kenya, 2010, the Industrial Court in addition to the guidelines would also be bound in respect of public offices by the advise issued by the Salaries and Remuneration Commission and would therefore not register any Collective Bargaining Agreement which provides for payment of wage or salary above what is stipulated in the latest Guidelines and the Commission's advice.

3.8 Industrial Relations Charter

58. The Government, the Federation of Kenya employers and the Kenya Federation of Labour in 1962 signed Industrial Relations Charter. Though not legal, the document has been binding between the parties and has to a very large extent been responsible for ensuring industrial peace in Kenya. The negotiating team should be fully conversant with its content particularly:
 - (i) Agreement Relative to Recognition and Negotiating Procedure that defines responsibilities of management and unions, provision of recognition agreement, principles to be applied in case of redundancy, provisions of employment policy, strikes and lockouts, intimidation, joint consultations and issuance of press statements; and
 - (ii) Levels of persons in the management and staff who should be excluded from Union Representation in the collective bargaining process.

3.9 Institutional Framework for Collective Bargaining

59. The laws highlighted above create the legal framework for collective bargaining. Conducting effective collective bargaining process also, requires that workers unions together with the employers establish institutions through which the collective bargaining is undertaken. The Recognition Agreement which is provided for Labour Relations Act, 2007 makes provisions for establishment of committees through which negotiations are carried out. It also provides for the structures through which collective grievances are addressed including settlement. Each sub-sector Recognition Agreement specifies the details that best serves the sector in the collective bargaining process. For example, the Kenya Union of Civil Servants in the Recognition Agreement, has established the Central Negotiating Committee with Ministerial/Departmental and Provincial Consultative Committees at lower levels. The specific functions of each Committee have been spelt out. Similarly, the Aviation and Allied Workers Union established a Joint Consultative Committee between the management and union representatives that meets quarterly to manage the Staff welfare. The exercise is initiated at sectional level through departmental and subsequently Head office Committees.

SECTION 4

PROCESS AND STRATEGIES FOR EFFECTIVE COLLECTIVE BARGAINING

4.0 Preamble

60. This section highlights the process and some of the key strategies to effective collective bargaining in the Public Service. The identification of the strategies have taken cognizance of the fact that the process of arriving at collective bargaining agreement varies from country to country depending on the administrative and governance system as well as economic conditions of the country and maturity of the workers movement. The strategies discussed herein have been contextualized in the Kenyan situation.
61. The ***Vision 2030*** seeks to make Kenya a globally competitive and prosperous middle level economy with high quality of life for its citizens. This is predicated on having a public service which is citizen focused and results oriented with the ability to serve a rapidly growing economy and society. The public servants must of essence be motivated, adaptive and effective to facilitate the achievement of this Vision.
62. Collective bargaining in the Public Service should therefore, aim at ensuring that the terms and conditions of service are competitive as well as support the required level of performance for attainment of goals outlined in the Vision. Further, the collective bargaining agreements should strive to realize the provisions of ***Article 41 and 43 of the Constitution of Kenya, 2010***. Public servants involved in collective bargaining must therefore, not only be conversant with the goals of the ***Vision 2030***, the provisions of the ***Constitution of Kenya, 2010*** and Labour legislations, but also have basic knowledge of the process and strategies that ensures effective collective bargaining.
63. Currently, most public servants involved in the process of collective bargaining have not been trained on the process and strategies of collective bargaining. As a result, the process tends to lead to stalemate, industrial unrest or agreements that are not fiscally sustainable. The Government has therefore, taken cognizance of this situation and has in this section identified and discussed process and key strategies of collective bargaining that have been successfully used in vibrant economies to facilitate public servants involved in collective bargaining to effectively undertake the exercise.

4.1 Negotiation Process

64. Most collective bargaining agreements have a fixed time scale/cycle following which collective bargaining process is initiated. The initial timeframe and subsequent changes can however, be reviewed on mutual agreement by both parties to enhance the collective bargaining exercise and labour relations.
65. The collective bargaining process has six core steps namely; identification of representatives, preparation, discussion, proposition, bargaining and settlement.

4.1.1 Identification of Representatives

66. The ILO recommendation No. 163 ***Collective Bargaining Recommendation, 1981***, requires that parties identified to engage in Collective Bargaining should be given the necessary mandate to conduct and conclude negotiations with a proviso for consultations within their respective organizations.

67. This step would involve the Government departments (with stake in the issue to be negotiated) or the Public Service Organization as an employer, holding an initial meeting to:
- (i) Iron out any internal differences and create a common understanding on the issues to be engaged in during negotiations; and
 - (ii) Identify persons with relevant knowledge and skills on issues under negotiations including; finance, human resource, labour issues, negotiation skills, and legal expertise, to represent it on the employers' side in negotiations.
68. The identified representatives to such Collective Bargaining should be personally appointed in writing by the respective Permanent Secretaries/ Accounting Officers in those organizations and should be senior and in charge of the negotiation function, conversant with the organizations mission, policy, interest and can be held accountable for the decisions taken during the negotiations.

4.1.2 Preparation for Negotiation

69. This phase involves:
- (i) The composition of the negotiation team which should consist of persons with adequate knowledge and skills for negotiation. In the case of the Public Service, the team negotiating for Government or the public service employer must comprise of persons who understand the issues at stake, persons who can advise on the financial position and persons who can advise on the implication of the decisions on the issues under negotiation
 - (ii) The negotiating team analyzing the previous agreement if any or the current situation to identify and develop important issues that need to be brought for negotiation or which the other negotiating team is likely to bring for negotiations;
 - (iii) Researching on the issues identified to get adequate information including seeking from management, legal and policy provisions, clarification on Government/public service organizations (employer) position on;
 - (a) Provisions of the Labour Laws,
 - (b) Economic performance,
 - (c) Current remuneration policies e.g. competitiveness, harmonization, review cycles,
 - (d) Productivity,
 - (e) Employment levels of the affected cadres,
 - (f) Prevailing market rates of comparable cadres,
 - (g) Affordability and sustainability of proposals,
 - (h) Current wage bill, and
 - (i) Cost of Living;
 - (iv) Consulting with relevant government organizations and in particular the Salaries and Remuneration Commission to get their advice on remuneration levels as well as indices that are to be applied for the particular negotiation.
 - (v) Developing negotiation strategies, setting the internal negotiation parameters and preparing a worksheet to guide the negotiation to avoid being caught off guard and identifying the team leader;

- (vi) Where the proposals have been received, analysis of the proposal by the negotiating team (government side) to identify the general implication, government policy, the legal provisions and any other necessary information for effective deliberations on the proposals; and
- (vii) Where proposals have not been received and the cycle is due, the convener of the negotiating team (government side) to advise or call for submissions from the employees side to facilitate the necessary preparation.

4.1.3 Discussion

70. This phase follows after the meeting for collective bargaining has been convened. During the first meeting:

- (i) Ensure that the ground rules that will guide the negotiations on collective bargaining agreed upon by the parties. It is also important that an environment of mutual trust and understanding is created (establishing the spirit of good faith) so that a collective bargaining agreement can be reached amicably;
- (ii) Where a proposal has been received, the government/public service organization team (employer) should seek clarification on the issues presented but avoid responding verbally;
- (iii) On receiving the clarification and developing a common understanding on the issues presented, the employer side should seek for an adjournment to enable them respond in writing; and
- (iv) Where the submissions from the employees' representatives have not been received and the meeting has been convened by the chairman, the employer side through the chairman to request for the submissions to be made in writing and delivered to them in good time.

4.1.4 Proposition

71. This phase can be described as brainstorming session and involves initial opening statements. Both parties are expected to:

- (i) Make submissions (which are presented in writing) regarding the matter under negotiation with the proposing party making the first presentation;
- (ii) Present options that exist to resolve the issue and seek opinions of both parties;
- (iii) Make any alteration in the proposals at this point which should be presented in writing and on time to allow for analysis before discussions, and
- (iv) If upon receiving the presentation, the Government/public service organization/employer side realize that there are issues that had hitherto not been communicated to them, they may seek adjournment to go and study the same, seek clarification or consent where necessary and prepare the response in writing (avoid verbal response to new issues).

4.1.5 Bargaining/Negotiation

72. This phase comprises of the time when '*what ifs*' and '*supposals*' are set forth. Negotiations are made easy if a problem solving attitude and good faith is adopted. The Government or public service organization side should therefore:

- (i) Seek to understand the other party, know what they want, must have, intend to get

and nice to get and avoid taking and indicating their position too early. They should also seek a win-win result. Whenever possible try and manage both parties' key expectations and assumptions;

- (ii) Use persuasive arguments, be rational, reasonable and use reliable information in support of any claim while making powerful arguments and have strong rationale for each preferred position which should be in writing supported by documents such as survey results, legal provisions and statistics;
- (iii) Create scenarios of options that may provide settlement, taking note of any signals (words and body language) that sends a message that the proposal is not acceptable, acceptable with some modification or have low chances of success in the negotiation. This observation should help in rewording or reprioritizing the proposals and make concessions with a view to reaching agreement;
- (iv) In the event that none of the options given is acceptable, seek to adjourn to give time for consultation and analysis of the options available and the possibility of making concessions to facilitate agreement. Such consultations should be with higher authorities within the management to ensure that when finally agreed upon, it will be adopted;
- (v) After consultations and concessions are agreed upon, make it conditional to the other party, giving reasons on the change of mind taking care to focus on the problem that needs to be resolved, steering away from personality differences and focusing on what the other party stands to gain from the concessions made;
- (vi) In case the negotiation efforts appear to be reaching a deadlock, ask for time to consult and if the issue causing dispute is beyond the immediate negotiating team requiring higher consultation, seek for adjournment. This is to give time for reflection over the options and their mutual benefits and where tempers had flared to allow for cooling off;
- (vii) The bargaining process should lead to drafting of an agreement. On resumption of the negotiations, it's important to weigh the options and their consequences, make proposals on all elements that are crucial for agreements taking cognizance of the existing policies, labour laws, affordability, sustainability and other critical considerations. Ensure that your proposals are fair, based on objective criteria and will enhance productivity and service delivery; and
- (viii) Where agreement has been reached on an issue/item of negotiation, such an agreement should be recorded and signed to by both parties to signify consent by both parties before proceeding to the next item. This is to ensure that no party changes its mind thereafter as a result of pressure from members on the part of the Union.

4.1.6 Settlement

73. At the end of the bargaining session, the negotiating parties should summarize positions of both parties, note the issues withdrawn, deferred and the agreements reached.
- (i) The agreement should be drafted, vetted and produced in a formal form for signing by the persons authorized. It should be very clear to avoid any ambiguity in its interpretation.
 - (ii) The employer is responsible for gazettelement where the same is required and submitting the signed copy of the agreement to the Industrial Court for registration

- (iii) The signed agreement has the effect of varying/ratifying the issues that were under negotiation and becomes legally binding, remaining in effect for the specified period of time.

4.2 Dispute Resolution

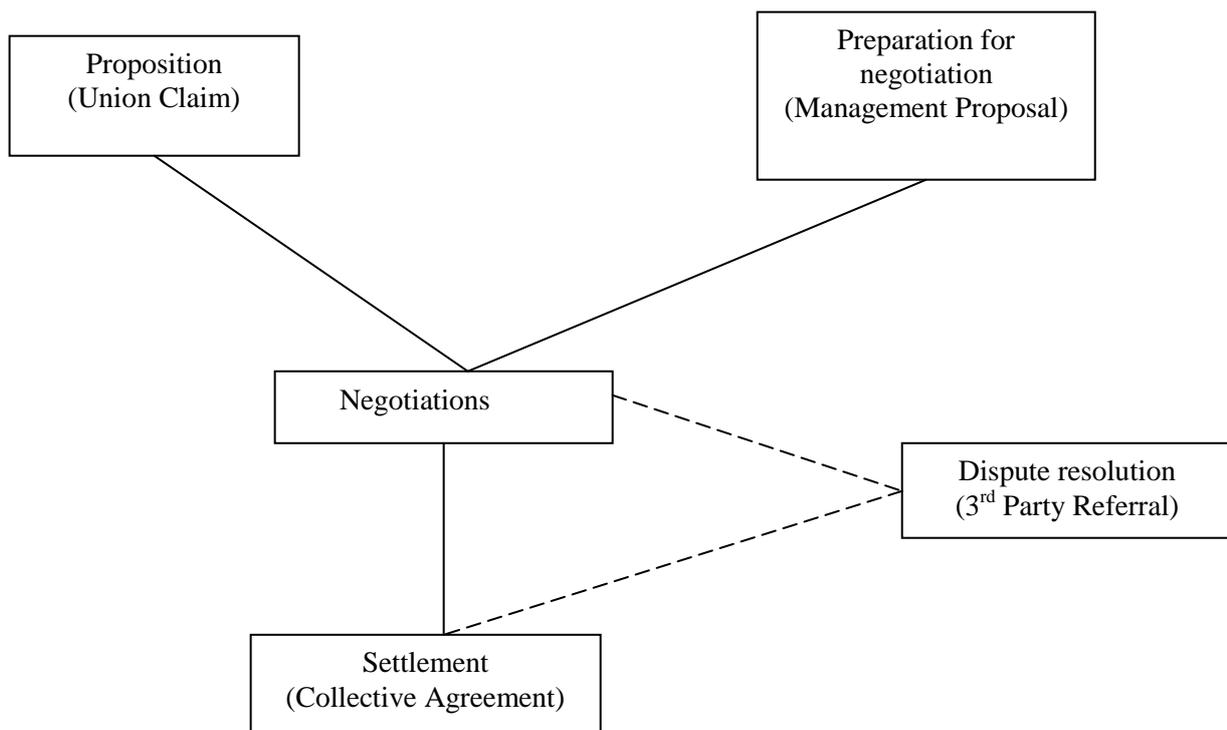
74. In case of a deadlock:

- (i) Either party may report a trade dispute to the Minister, giving a copy to the other party or opt for arbitration in Industrial Court under Certificate of Urgency;
- (ii) The Minister, within 21 days should appoint a Conciliator or a conciliation Committee to resolve the dispute. The conciliator will invite both the parties to conciliation in writing;
- (iii) Conciliation process should ordinarily take 30 days but the period may be extended at the parties request;
- (iv) If a trade dispute is resolved at conciliation level, a signed copy of the agreement shall be lodged with the Minister; and
- (v) Where a trade dispute is not resolved at conciliation level, either party may refer the dispute to the Industrial Court. In cases of Essential Services, the Minister may refer the dispute to the Industrial Court.

75. The dispute resolution process shall be guided by the relevant provisions of the Labour Relations Act, 2007 subject to subsequent amendments thereto.

The following diagram summaries core steps discussed above in Collective Bargaining process.

Figure 1: The Process of Collective Bargaining



76. Throughout the process of negotiation including dispute resolution, it is important that the negotiating party (government/public service organization side): meets before the negotiation to agree on issues and way forward; meets after the negotiation to assess the process and issues deliberated on; and prepares a report to apprise and seek further guidance from the principals (as the members of the negotiating parties are agents of the principal stakeholders). The negotiating and dispute resolution process should also be minuted, key issues highlighted and members present recorded. The minutes of the previous meeting should be confirmed before proceeding with the agenda of the day.

4.3 Negotiation Strategies

77. Most negotiators employ either soft or hard tactics with the soft negotiator striving to keep peace and therefore, readily makes concessions to avoid or resolve conflicts while the hard negotiator sees negotiation as conflict or battle where their position must prevail. Any successful negotiation process however, needs to be guided by mutually acceptable strategies where the negotiators successively take and give up positions focusing on the original purpose for negotiating. Good negotiation strategies should encourage a joint attempt to produce acceptable mutually beneficial solutions.

78. The following are summarized strategies that have successfully been used in arriving at mutually acceptable agreements in negotiations including collective bargaining. The negotiating team should:

- (i) Acquire the right training on collective bargaining
- (ii) Acquire the necessary information;
- (iii) Separate the people from the problem;
- (iv) Focus on interests, not positions;
- (v) Create options for mutual gain; and
- (vi) Use objective criteria to evaluate a proposed solution.

79. Additional information on these strategies is given herein under for benefit, understanding and appreciation by the negotiating team.

4.3.1 Acquire the right training in collective bargaining

80. For effective bargaining to take place, the persons representing the employer in the process should be provided with relevant training on skills and knowledge that are necessary and informative enough to help them achieve the best deal from the process. To achieve this, the government should train adequate pool of manpower who will in effect perform the role of trainers within the Public Service, equally the government can sub-contract other well established institutions with well trained staff in CBA Negotiation skills to train its negotiation team on areas such as finance, productivity including measurement and indices to be used, human resource management, inflation and computation of consumer price index, labour issues, negotiation skills and related legal issues, depending on the issue under negotiation, to enhance the negotiation capacity of the team.

81. The training should be carried out on continuous basis and with particular focus on the team identified to negotiate immediately before they embark on negotiation.

4.3.2 Acquire the Necessary Information

82. Without common base information, it is difficult to have meaningful negotiation. The **ILO Recommendation No. 163** stresses the importance of having requisite information. The information should include the economic and social situation and the undertaking as a whole. The public servants involved in the collective bargaining, as part of the preparation for the negotiation should research and get information on the issues under negotiation. For example, a public servant may need to research and acquire information on but not limited to:

- (i) The market value, skill level, institutional priorities, competition, performance of the economy and pay equity;
- (ii) Willingness of staff to compromise the salary expectations for other benefits
- (iii) Job satisfaction, security and staff development; an
- (iv) Critical issues that enhance productivity, reduce wastages and increase competitiveness.

4.3.3 Separate People from the Problem

83. Negotiating parties in most cases approach negotiations with emotions, deeply held values, different background and viewpoints that are likely to affect the negotiation process. This compounded by the unpredictable human nature and personality differences may be entangled in the collective bargaining causing conflicts unrelated to issues under negotiations.

84. To be effective in negotiations or collective bargaining, one must deal with the problem while maintaining a good working relationship with the negotiating partner that does not conflict with the goals of negotiation. Of essence, the negotiating parties must be committed and psychologically prepared to treat the relationship and the problem separately. Consequently the negotiator should:-

- (i) Not confuse perception with reality, seek to understand the other side's position and make proposals that present what seems to be a fair outcome;
- (ii) Recognize and understand emotions, acknowledge them as legitimate, allowing for 'steam off' to make it easier to talk rationally and not react to emotional outbursts, as it may lead to arguments which hinder negotiations; and
- (iii) Listen actively and acknowledge what is being said, ask the other party to spell out exactly what they mean and speak about your position describing the impact that position is likely to have, with purpose making every word count.

4.3.4 Focus on Interests, Not Positions

85. For a wise and fair negotiation, it is important that persons involved in negotiations focus on interests not positions recognizing that each side has multiple interests. It is therefore, important that the negotiating team:

- (i) Identifies the interests of all the parties involved in the negotiation;
- (ii) Make your sides interest clear and credible without implying that the other side's interests are unimportant or illegitimate;
- (iii) Demonstrate that you appreciate their interest but support the adoption of your interest giving options while holding on to your conclusions or proposals; and
- (iv) Be hard on the problem but soft on the people not looking back to the issues already resolved but focusing on the areas yet to be addressed.

4.3.5 Create Options for Mutual Gain

86. One of the requisite skills in effective negotiations is development of multiple options. By focusing on a single best option too early or taking side, as a negotiator, one is likely to short-circuit a wiser decision-making process in which you select from a large number of possible answers as well as risk an early stalemate. To develop creative options therefore, one needs to:

- (i) Separate the act of creating options from the act of judging them;
- (ii) Broaden the options on the table rather than look for a single answer;
- (iii) Create ways of making decisions easy by coming up with as many ideas as possible to solve the problem at hand providing room within which to negotiate. This may include inviting other professional/disciplines to examine the issue from the perspective of the different professions and disciplines that can offer insights into the situation for the two parties to consider; and
- (iv) Stress on the shared interest, seek to know which is preferable and take the option that is acceptable to the negotiating partner and also supports your position.

4.3.6 Use Objective Criteria

87. Negotiations based on objective criteria are normally seen as fair and lead to a faster and amicable agreement. This is because the use of an objective criterion moves the contest away from individual wills and focuses on specific decisions. Objective criteria include: basing decisions on standards such as market value, precedent, what a court would decide, equal treatment and efficiency. As a negotiator, it is therefore, important:

- (i) To select objective criteria that is mutually acceptable to both parties;
- (ii) Ensure that the criteria applies to both sides;
- (iii) Have an open mind; and
- (iv) Encourage team approach with the other negotiating party. Frame each case as a joint search for solution guided by objective criteria and be open to reason.

4.4 Common Mistakes

88. The following are some of the potential mistakes committed by parties conducting Collective Bargaining that may delay reaching an agreement, lead to undesirable agreement or at times stalemate:

- (i) Failing to plan and get appropriate information for the negotiations in advance;
- (ii) Failing to develop strong rationale for negotiating demands;
- (iii) Omitting to apprise, consult and seek guidance from the principals;
- (iv) Making concessions too early without giving conditions or getting something back;
- (v) Failing to identify the areas that need to be agreed upon up front;
- (vi) Failing to negotiate when it is merited;
- (vii) Viewing the other party as the "enemy" and negotiation as a chance to tame the other party;
- (viii) Not getting information and clear direction in advance and making concessions on issues one does not have power on including getting stuck because of lack of information;

- (ix) Giving too much inappropriate information that weakens ones negotiating position;
- (x) Failing to manage the two sets of expectations;
- (xi) Revealing critical deadlines or bottom lines that will subject ones party to undue pressure; and
- (xii) Failing to establish the basis against which claims/proposals are made.

4.5 **Challenges in collective bargaining process**

89. The following are some of the challenges which were identified as commonly experienced during collective bargaining. Subsequently, the team representing the Public Service as an employer should appreciate and strive to overcome for effective collective bargaining process:

- (i) Misinterpretation of collective bargaining as a forum for negotiating salary reviews as opposed to other aspects that constitute employees responsibility to ensuring productivity and service delivery to the clients and thus the tendency of the negotiating parties and especially the unions to place more emphasis on pay rather than productivity/economic growth;
- (ii) Lack of or inadequate training in negotiation skills in addition to poor attitude and unethical behaviour on the part of the unions which makes the negotiators for employer Public Service concede to unrealistic and excessive demands against available resources, the consequent of which may be redundancy of the affected employees;
- (iii) Tendency to use collective bargaining process as a platform for political activism instead of promoting the original intention of collective bargaining of industrial democracy and rights of employees and the involvement of external forces and other considerations such as political intervention, as a way of reaching at collective bargaining agreements rather than building consensus within the negotiating framework;
- (iv) The inability of negotiators from both sides to identify easy trade offs among the terms being negotiated, to facilitate amicable agreement including failure to optimally utilize and adhere to collective bargaining mechanism provided for under labour laws leading to uncalled for strikes. The negotiating parties could be encouraged to adhere to institutional collective bargaining framework to avoid such situations;
- (v) The perception of wages paid to public servants as an expense rather than productive investment of the Government and the subsequent polarization of the Public Service where Civil Service is perceived as a non-productive sector therefore, deserving only minimal improvement on their terms and conditions of service;
- (vi) The absence of productivity measurement mechanisms denies the collective bargaining process a more probable and realistic productivity/performance measure against which various sub-sectors of the Public Service salaries and remuneration can be based, forcing negotiators to rely more on cost of living and rates of inflation, which is demand driven.

ANNEX

Proposed Negotiations Worksheet

Your proposal	Their proposal
Rationale	Rationale
Opening position?	Opening position?
Concerns about your opening position?	Their concerns about their opening position?
How might they respond to your opening proposal?	How might you respond to their opening proposal?
List concessions/accommodations you are willing to give.	List concessions/accommodations they might be willing to give.
How would a win-win negotiation look from your point of view?	How would a win-win negotiation look from their point of view?
What roadblocks do you foresee in gaining a solid agreement?	What roadblocks might they foresee in gaining a solid ground?
What alternatives do you have if you don't get what you want?	What alternatives might they have if they don't get what they want?
What follow-up steps should you take after the agreement has been made?	What follow-up steps might they take after the agreement has been made?
What would happen to the other party if they were to give you what you wanted?	What would happen to you if you were to give the other party what they wanted?

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