STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 11-03
Issued: December 15, 2011

IAFF LOCAL 1650, AUGUSTA FIRE FIGHTERS, Complainant, v. CITY OF AUGUSTA, Respondent.	DECISION AND ORDER

The IAFF Local 1650, Augusta Fire Fighters filed a prohibited practice complaint on September 1, 2010, in which it alleged that the City of Augusta violated section 964(1)(E) of the Municipal Public Employees Labor Relations Law, Title 26, §961 et seq. (the "Act"). Specifically, the Union alleges that the City's failure to honor the "evergreen clause" contained in the agreed-upon negotiating ground rules constituted a failure to bargain in good faith. The City admits that their negotiator signed ground rules containing an evergreen clause but argues that the negotiator did not possess the authority to bind the City to an extension of the agreement and that the Union was notified as soon as the City learned of the error.

PROCEDURAL SUMMARY

A prehearing conference was scheduled for November 19, 2010, but was postponed at the joint request of the parties. It was eventually rescheduled for March 8, 2011, and was presided over by Board Chair David C. Elliott. The Prehearing Order issued on March 15, 2011, identified the parties' exhibits and witnesses, potential stipulations, and the expected duration of the hearing. The Prehearing Order also required the Complainant to submit an

offer of proof to support its request to present evidence of alleged acts of bad faith by the City during previous negotiations, something that was not mentioned in the Complaint itself. After reviewing the offer of proof and the Respondent's reply, the Prehearing Officer issued a "Prehearing Order on Proposed Testimony" on April 29, 2011, in which the Complainant's request to offer evidence of the City's conduct in prior negotiating sessions was denied, but evidence of the authority of the City's negotiator in previous years was permitted.

The evidentiary hearing was held on May 11, 2011, and was expected to last one day. Board Chair David C. Elliott, Esq., presided, with Employer Representative Patricia M. Dunn, Esq., and Employee Representative Carol B. Gilmore also serving on the Board. At the start of the hearing, the Complainant indicated an intent to call various witnesses to testify on matters related to the City's unilateral changes to three mandatory subjects of bargaining that were covered by the expired collective bargaining agreement. The City objected to the expanded focus of the hearing because the allegations in the Complaint concerned only the evergreen clause in the ground rules and did not relate to unilateral changes made after the expiration of the collective bargaining agreement. The City argued they did not have the notice necessary to prepare a proper defense. The parties noted that grievances had been filed on these issues and they had previously agreed to hold them in abeyance pending the resolution of the prohibited practice complaint. After considering the parties' arguments, the Board decided to proceed with the hearing on the Complaint as presented, that is, the evidence related to the failure to comply with the evergreen clause, and revisit the unilateral change issues at the end of hearing the testimony.

Once the parties had presented their evidence regarding the original prohibited practice complaint, the parties again stated their positions on whether it was appropriate to allow additional testimony on the City's alleged failure to maintain the level of benefits provided in the expired contract. After some discussion about the different options available to the Board and the potential relevance of 26 M.R.S.A. §964-A(2), the parties agreed to brief the issue. The Complainant's brief would identify the three unilateral changes the City allegedly made and would present legal arguments on how the alleged unilateral changes were relevant to the present complaint. The City would be able to file a responsive brief. The Board would then determine if an additional day of hearing should be scheduled, and, if not, what the next step should be.

In the Interim Order dated August 9, 2011, the Board concluded that testimony concerning the alleged unilateral changes made by the City was not appropriate because the matter was not relevant to the allegations in the complaint. The Board also addressed 26 M.R.S.A. §964-A(2), which continues a collective bargaining agreement's grievance arbitration provision after the expiration of the agreement for certain matters. The Board concluded that §964-A(2) expressly obligates the Board to determine which provisions are subject to post-expiration arbitration. As a result, the Board ordered the parties to submit written argument on two issues: the merits of the prohibited practice complaint heard on May 11, 2011, and the question of whether the three issues identified are enforceable under §964-A(2), that is, "enforceable by virtue of the static status quo doctrine." The City filed a Motion to Reconsider that Order, which was denied on September 13, 2011. The parties agreed upon a revised briefing schedule and both briefs were filed with the Board by October 17, 2011.

Between the issuance of the September 13, 2011, Order and the deliberation of this case, Board Chair David C. Elliott's term expired. Barbara L. Raimondi, Esq., was appointed to take over and was provided with the record and a copy of the transcript to read before the deliberation. The other two members of the Board, Patricia M. Dunn and Carol M. Gilmore, joined Chair Raimondi to deliberate this matter on November 9, 2011.

The merits of the prohibited practice complaint and the Board's determination of whether particular issues must be maintained pursuant to the status quo doctrine are distinct legal issues for which the Board has different sources of statutory authority. Consequently, we will be issuing two separate decisions. This decision addresses the prohibited practice complaint pursuant to the authority granted to the Board in §968(5)(A)-(C). A companion decision regarding status quo determinations will be issued under the authority granted to the Board in §964-A(2).

JURISDICTION

The City of Augusta is the public employer within the meaning of 26 M.R.S.A. § 962(7), and IAFF Local 1650, Augusta Fire Fighters is the bargaining agent within the meaning of 26 M.R.S.A. §962(2) for employees in the Augusta Fire Department. The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §968(5)(A)-(C).

FACTUAL FINDINGS

1. The Complainant is the bargaining agent for two bargaining units in the City of Augusta Fire Department, one unit of uniformed firefighters (Local 1650) and one unit of battalion

chiefs (Local 1650A). The duration of the most recent collective bargaining agreements for the two units was six months, from January 1, 2010, to June 30, 2010. The prior collective bargaining agreements had expired on December 31, 2009. Although the Union would have preferred to negotiate a one-year extension to take them to the end of 2010, the City wanted all of its bargaining agreements to terminate at the same time, which was the end of June.

2. Sometime in January of 2010, the Union contacted the City in an effort to make an early start to negotiating successor contracts. The Union offered several dates on which to negotiate, but they were all rejected by the City.

3. The Augusta City Manager presented his proposed budget for 2010/2011 in an executive session of the Augusta City Council on March 18, 2010. After noting the reductions made in the prior budget, the "budget message" stated:

> . . .[The budget] continues to require that City employees (with the exception of uniform police and fire personnel) incur eight "shut down" days and it makes no provision for cost-of-living or step increases for the workforce (all of our collective bargaining agreements expire this June 30th so there is no breach of contractual commitments–understanding that we will nonetheless honor our statutory obligation to bargain in "good faith" and address any financial implications of that as they may arise).
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> Exhibit R-6 at p. v.[1]

4. The City's Finance Director testified that the City Manager's budget included a zero wage increase and freezing of

[1]The City Manager's "Budget Message", presented by the City as exhibit R-6, is an 11-page verbal description of the budget, but it is not a financial document. Neither party offered as evidence the actual budget that was adopted by the City.

step increases, but that in all the other respects the budget did not assume any change to the status quo. During the March executive session, the City Council discussed the potential impact of the City's obligation to maintain the status quo if the collective bargaining agreements expired, but no consensus was reached on the extent of this obligation.

5. On April 13, 2010, the City held a "pre-negotiations meeting," during which the City Manager and the City's Finance Director met with bargaining team members from the various unions representing City employees, including members of the fire department. Copies of the budget message of March 18, 2010, were distributed. The City Manager and Finance Director outlined the unfunded liabilities that the City was facing and various items like increases in pension costs, bonded debt for pension obligations, retiree health insurance and active health insurance. The purpose of this meeting was to advise the unions that the financial situation was serious and there would be difficult times ahead. There was no discussion at this meeting about the status quo to be maintained if any of the collective bargaining agreements expired without a successor agreement in place.

6. Dave Barrett is the Director of Personnel Services and Labor Relations at the Maine Municipal Association. Mr. Barrett has represented the City at the bargaining table with their various bargaining units for at least 10 years. During that period, he has signed ground rules on behalf of the City that are the same as the ground rules in this case. In addition, during that period he has had the authority to sign tentative agreements and present the agreements to the City Council.

7. Mr. Barrett met with the City Manager, the Finance Director and the Human Resources Director on May 18, 2010, for

guidance on what they and the City Council had determined to be the City's range of options at the bargaining table. Mr. Barrett received the same financial document (the budget message) that had been distributed at the "pre-negotiations" meeting in April. He and the city managers discussed how the financial situation was going to impact bargaining for a successor agreement. There was no discussion about the evergreen clause nor was there any specific discussion about the scope of the status quo. The guidelines for the first year of the contract were a zero percent wage increase and freezing all longevity steps.

8. The first negotiating session occurred on June 10, 2010, and was attended by Brian Chamberlain, the Union President, the Fire Fighters negotiating team, and for the City, Mr. Barrett, the City's Human Resources Director, and the City's Finance Director. At this first meeting, the ground rules were signed by Mr. Chamberlain and Mr. Barrett on behalf of their respective bargaining teams. They did not discuss each ground rule, but agreed that the ground rules they were signing were essentially the same ground rules that they had signed in previous bargaining sessions. During this first meeting, the parties discussed how negotiations were going to proceed from that point forward.

9. The ground rules consisted of eight numbered items covering such matters as confidentiality, authority to make and amend tentative agreements, scheduling, and the time frame for presenting proposals. Rule number 8, referred to by the parties as the "evergreen clause," states:

> In the event that collective bargaining shall not have been successfully completed prior to the expiration of the current agreement the parties hereto agree that said agreement will remain in full force and effect until a successor agreement has been negotiated.

10. Mr. Barrett testified that he signed the ground rules without really considering the impact of this evergreen clause on the City's situation.

11. The second negotiating session occurred on June 30, 2010. The meeting started with the City's proposal to reduce the benefit for retiree health insurance from the City paying 100% of the cost for the retiree to an 80/20 split between the City and the employee. The City realized that some employees were close to retirement, so they offered a 30-day extension to allow those individuals to retire and still retain the 100% coverage. The Union's chief negotiator pointed out to the City that the evergreen clause in the ground rules would preclude the City from making such a change. The City's negotiating team caucused and, upon return, agreed that the evergreen clause was "in play" and said they were withdrawing their 30-day extension of the retirement health benefit.

12. Although Mr. Barrett testified that the City "deliberately limited its proposal to some big ticket financial items: overtime, active health insurance contributions and the retiree health issue," there was no testimony as to whether other matters beside the retiree health insurance were discussed at the June 30, 2010, negotiating session.

13. After the session ended, the City's negotiating team went to the City Manager's office and explained the situation. The City Manager asked Mr. Barrett to be available the next night for an executive session of the City Council.

14. The following day, William Bridgeo, the City Manager, played golf with the City's attorney and told him that the City had mistakenly agreed to an evergreen clause in the ground rules that had been signed earlier in June. The City's attorney stated

that he did not believe that the City's negotiator had the authority to sign an evergreen clause.

15. On the evening of July 1, 2010, the City Council met in executive session and discussed the issue of the evergreen clause in the ground rules. The City's attorney stated his opinion that a vote of the City Council was necessary to make an evergreen clause effective. At this meeting, the City Council made it clear that the negotiator did not have the authority to extend the agreement and that the "static status quo" would be implemented, as advised by the City attorney. The City Council directed the City Manager and the Finance Manager to communicate that position to the Union.

16. A letter dated July 9, 2010, from William R. Bridgeo, the City Manager, to Brian Chamberlin, Local 1650 President, stated, in full:

> As you are aware, the collective bargaining agreement between the Local 1650 and the City of Augusta expired on June 30, 2010. Pursuant to Maine law, certain aspects of the collective bargaining agreement continue in place pursuant to the doctrine of status quo. Our research shows that status quo means that employees will continue to be paid pursuant to the terms existing as of June 30, 2010. Employees will not be eligible for increases in pay or benefits such as step increases, increases in longevity pay, increases in pay due to obtaining professional status or qualification, or increased benefits due to longevity, such as additional vacation for reaching 20 years or the like. Additionally, pursuant to law, the obligations addressing retiree health benefits that existed in those expired agreements have also expired. All other pay and benefits which are included as part of the salary package will continue to be paid pursuant to the expired collective bargaining agreement.
> If your understanding with respect to the current situation is different, please notify me as soon as possible.

17. The July 9, 2010, letter was mailed to the Union's post office box, but no one in the Union had retrieved the mail from the box prior to the next meeting on July 21, 2010. The Union President stated that they had never previously received this kind of mail through the Union's post office box. He testified that it had been their experience that the City would call them or somehow notify them if there was significant mail that they should come by and pick up.

18. In a memo to the Mayor and City Council dated July 10, 2010, the City Manager outlined various staffing matters and described the bargaining situation with:

> The budget adopted for 2010/2011 contained no provision for wage or step increases [as] well as the need for concessions on benefit payments from the unions. All of our union contracts expired on June 30th and, based on advice from the City Attorney, I have notified the representatives of the affected bargaining units that to the extent permitted by state law, the City has frozen compensation and benefit payments consistent with your budget parameters. I do not expect that this will be well received, but I see no choice absent proper financial authorization (which would need to have been in the budget appropriation) from you.
>
> We are, of course, bargaining in good faith despite our financial constraints. We have explained to the workforce and their representatives the City's financial dilemma–especially the heavy current and future costs that just honoring pre-existing contractual commitments for pension payments and retiree and active health insurance payments requires (on the order of the equivalent of a 2% - 3% tax increase in each of the next eight years). . . . As things develop in negotiations, I will brief you in executive session and seek your guidance.
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> These are difficult times for all parties. On the negotiations front, I expect that we will soon want to seek the assistance of dispute resolution professionals. Our employees and their professional

representatives have been patient and civil in our meetings and I expect that to continue.

19. The parties stipulated that during the previous ten years, "the City had maintained a dynamic status quo whenever an agreement expired prior to the conclusion of negotiations for a successor agreement." Mr. Barrett testified that it was his understanding that 2010 was the first time that step increases had not been continued after the expiration of an agreement.

20. The third negotiating meeting occurred on July 21, 2010. It was at this time that the Union first saw the City's letter of July 9, 2010, and learned that the City had adopted what the City considered to be the static status quo.

21. The letter dated July 21, 2010, from the Acting City Manager to the Union President explained the City's position on the evergreen clause. The letter states, in full:

> As stated in the city manager's July 9 letter to you, the City's position is that since the collective bargaining agreements between Local 1650 and Local 1650A and the City have expired, certain aspects of the CBA cease with the expiration of the contract. These include increases in pay or benefits above what employees currently receive. Additionally, pursuant to the law, the obligations addressing retiree health benefits that existed in those expired agreements have also expired.
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> You have asserted that since the City's bargaining team signed ground rules which contained an 'evergreen' clause, this obligates the City to continue all terms of the expired agreement until a successor agreement is reached. The bargaining team is authorized to enter into ground rules and bargain collectively for the purposes of reaching a tentative agreement to be submitted to City Council for ratification. However, it is the City's position that agreeing to the evergreen clause in the ground rules exceeded the authority of the bargaining team and that the decision

> to extend the contract past its expiration is a decision that can only be made by a vote of the City Council. Therefore, the City considers the ground rules in effect with the exception of that one provision. The City has been, and will continue, to bargain in good faith.

22. On September 2, 2010, the City Council voted to allow the City Manager to execute an agreement with the Fire Fighters Local 1650 with respect to retiree health insurance. The Union obtained the approval of its membership as well. The following Agreement on retiree health was executed on September 7, 2010:

> The provisions of Section 3 (Retirement Health) of Article 12 (Insurance Benefits) of the Contract shall be deemed to be in full force and effect from the date set forth below through to the end of the day on Thursday, 30 September 2010.
>
> This agreement is without prejudice to the position of either party concerning the enforceability of the Ground Rules signed on June 10, 2010 and shall not in any way, other than as specifically set forth herein, add to, reduce, or alter the contractual or legal rights of the City of Augusta and of Local 1650 arising out of the Contract or out of negotiations for a successor collective bargaining agreement.

23. The City maintains an unappropriated fund balance that could be tapped to finance items that exceed the initial budget. The City Charter indicates that the fund balance should be maintained at 8.33%. As of June 30, 2010, that fund balance was 9.5%. The City Finance Director testified that there is nothing to prevent the negotiating team from making an agreement that differs from the assumptions used in formulating the budget, although the City Council would have to approve the transfer of funds if such an agreement were ratified.

24. Article 25 of the expired collective bargaining agreement, entitled "Acknowledgment," states in full:

> Both parties to this Agreement, the Union and the City, will acknowledge in writing, any written correspondence requesting acknowledgment within ten (10) days from the date of such correspondence being received.
>
> Correspondence to the Union shall be addressed to the Union President at a mailing address furnished to the City. Correspondence to the City shall be addressed to the City Manager at City Center. It shall be the responsibility of the Union to notify in writing, by certified mail, the name of the President and the tenure of office.

DISCUSSION

The question before us is whether the failure to comply with the evergreen clause contained in the ground rules constitutes a violation of the duty to bargain in good faith. We will first address the duty to bargain and in what circumstances a violation of a ground rule might constitute a breach of that duty in violation of §964(1)(E). We will then consider the nature of an evergreen clause and whether the evergreen clause in this particular case is enforceable.

Our well-established standard for considering whether a party's conduct constitutes bad faith bargaining is:

> A bad faith bargaining charge requires that we examine the totality of the charged party's conduct and decide whether the party's actions during negotiations indicate "a present intention to find a basis for agreement." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); see also Caribou School Department v. Caribou Teachers Association, 402 A.2d 1279, 1282-1283 (Me. 1979). Among the factors which we typically look to in making our determination are whether the charged party met and negotiated with the other party at reasonable times, observed the groundrules, offered counter-proposals, made compromises, accepted the other party's positions, put

> tentative agreements in writing, and participated in the dispute resolution procedures. See, e.g., Fox Island Teachers Association v. MSAD #8 Board of Directors, MLRB No. 81-28 (April 22, 1981); Sanford Highway Unit v. Town of Sanford, MLRB No. 79-50 (April 5, 1979). When a party's conduct evinces a sincere desire to reach an agreement, the party has not bargained in bad faith in violation of 26 M.R.S.A. § 964(1)(E) unless its conduct fails to meet the minimum statutory obligations or constitutes an outright refusal to bargain.

Waterville Teachers Assoc. v. Waterville Board of Education, No. 82-11 at 4 (Feb. 4, 1982).

Negotiating ground rules have never been held to be a mandatory subject of bargaining, but the Board continues to encourage parties to have written ground rules to govern the conduct of negotiations. See Town of Orono v. IAFF Local 3106, No. 11-11 at 9 (August 11, 2011). Ground rules are a set of agreed-upon rules to govern the mechanics of negotiations. The purpose of ground rules is to smooth the process of negotiating, thereby improving the chances of the parties ultimately reaching an agreement. Subjects covered in ground rules are typically the manner of scheduling the time and place for negotiating sessions, the composition of bargaining teams, the timing of presentation of bargaining proposals, confidentiality issues and dealings with the press, negotiators' authority to sign tentative agreements, and the reservation of the right to ratify the full agreement.

Nearly thirty years ago, the Board stated, "[c]ontravention of a negotiating ground rule, while not constituting a per se violation of the Act, has been held to be evidence of breach of the duty to bargain in good faith." Teamsters v. Town of Bar Harbor, No. 82-35 at 9 (Nov. 2, 1982), citing Caribou School Dep't v. Caribou Teachers Assoc., 402 A.2d 1279, 1282-1283 (1979). As the standard for determining bad-faith bargaining

recited above indicates, violating a ground rule is not a per se violation because it is not a failure to meet any of the minimum statutory requirements nor is it an outright refusal to bargain. Waterville Teachers Assoc., No. 82-11 at 4.

Over the years, the Board has issued a number of decisions in which the failure to abide by a ground rule was one factor in determining that a party had failed to bargain in good faith. Sanford Fire Fighters Assoc. v. Sanford Fire Commission, No. 79-62 (Dec. 5, 1979); Teamsters v. Town of Bar Harbor, No. 82-35; Kittery Employees Assoc. v. Eric Strahl, Kittery Town Manager, No. 86-23 (Jan. 27, 1987). More recently, the Board issued two decisions which address the question of whether a violation of a ground rule could, by itself, constitute a failure to bargain in good faith. Town of Orono v. IAFF Local 3106, No. 11-11 (August 11, 2011) and Massabesic Education Assoc. v. RSU #57 Board of Directors, No. 11-17 (Nov. 10, 2011). Both cases involved conduct that violated a ground rule prohibiting the disclosure of the substance of negotiation sessions. In both of these cases, the Board looked at the totality of the circumstances to determine whether the breach of the ground rule that occurred was of sufficient magnitude to constitute a violation of the duty to bargain in good faith. In the Orono case, the disruptive intent and the egregiousness of the breach was such that the Board found a violation of the duty to bargain; in the Massabesic case, the Board held that the breach was a minor technical violation of the ground rule and there was no basis for finding a breach of the duty to bargain.

In this case, there is no dispute that the ground rules, including an evergreen clause, were signed and that a similar set of ground rules had been signed for ten years. There is also no dispute that the City essentially reneged on that evergreen

agreement when it became apparent that it was inconsistent with the City's expectation of the bargaining process and their understanding of their legal obligations. There is no question that the City's turnabout on what had been agreed to was a significant change in the dynamics of the negotiating process, as was the case in Orono. The legal impact of the change, however, is a function of the fundamental difference between this ground rule and what is typically included in procedural ground rules governing negotiations.

An evergreen clause is an agreement to continue the terms of a collective bargaining agreement until a specified date or until a specified event has occurred. An evergreen clause establishes the terms and conditions of employment to the same extent as the collective bargaining agreement that is being extended. NCEU v. York County, No. 11-07 at 8 (May 17, 2011). When an evergreen clause is included as a provision of the collective bargaining agreement, the evergreen clause is agreed to and ratified as part of the collective bargaining agreement.[2]

The Union argues that even though neither the City nor the Union actually ratified the evergreen clause in the ground rules, the City's conduct over the past ten years is equivalent to implied ratification. The Union points to the fact that the same ground rule had been agreed to for 10 years, without any

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[2]Indeed, the prior collective bargaining agreements between these parties contain an evergreen clause within the article establishing the contract's term:

> Article 40, Term of Contract
> This Agreement shall be effective upon execution and shall remain in full force and in effect until June 30, 2010. The Contract shall be automatically renewed for succeeding one-year periods unless either party shall notify the other to renegotiate at least 60 days prior to June 30, 2010.
> (Uniformed Firefighters contract)

objection by the City. Therefore, the Union argues, it was led to believe that the negotiator had the authority to bind the City by signing such a ground rule. Without more, this is not sufficient to support a conclusion that the negotiator had the actual or implied authority to bind the City to a continuation of the terms of the expired collective bargaining agreement. We have previously held that a negotiator's apparent authority alone is insufficient if the actual authority does not exist in fact. AFUM v. University of Maine, No. 79-55 at 3 (June 14, 1979). We are unwilling to find that a public employer had unwittingly delegated its right to contract by implication.

Our analysis might have been different if the City's negotiator had possessed the authority to bind the City to a contract in the past and the evidence clearly demonstrated either the grant of that authority or the exercise of it. Here, however, there is no evidence that the City's negotiator had the authority to bind the City to a continuation of the terms of the expired collective bargaining agreement. Although there is a stipulation that the City "maintained a dynamic status quo" following the expiration of agreements in the past, there is no elaboration on what that statement meant to the parties or the actual effect of a dynamic status quo. The only testimony on this history is that step increases were continued after expiration of agreements in the past. That fact says nothing about the authority of the negotiator. It is conjecture to assume that the City continued step payments only because it considered itself bound by the ground rules signed by the negotiator. There are other valid reasons for continuing step increases during the hiatus between contracts, not the least of which is a goal of maintaining a compensation system that can be effective for recruitment and retention of employees. We are unwilling to infer the existence of a negotiator's authority to

bind the City on the basis of such limited and imprecise evidence.

Furthermore, it is particularly difficult to assume that a negotiator had the authority to bind the City to an extension of the collective bargaining agreement where the ground rules themselves make it abundantly clear that the negotiators only had the authority to sign tentative agreements. Ground rule #2 says:

> The signing of these rules attests that: The negotiators have the guidelines and authority to reach a final tentative agreement and that the principal parties reserve the right to ratify the total package reached at the bargaining table.

Furthermore, Ground rules #6 and #7 both reaffirm this ratification requirement:

> 6. If a total package is agreed to at the table, the negotiating teams agree to recommend and advocate ratification of the total package to their respective principals.
>
> 7. If either party's principals reject a total package, each party retains the right to open previous tentative agreements in order to reestablish a balance of interests, subject to the obligation to bargain in good faith.

The duty to bargain requires a party's negotiator to have the knowledge and guidelines from the principal and the authority to sign tentative agreements. Fox Island Teachers Assoc. v. MSAD #8 Board of Educ., No. 81-28 at 6 fn. 1 (April 22, 1981). In public sector bargaining in Maine, unlike what might be found in the private sector, ratification by the principal is the norm. The Board considers the right to ratify of particular importance and it is not something that can be diminished by administrative fiat. "Once a principal party has reserved the right to ratify, any agreement reached by the negotiators will not be concluded or

binding until it is ratified by the principal." Kittery Employees v. Strahl, No. 86-23 at 13, citing Fox Island Teachers Ass'n, No. 81-28, at 6. See also Teamsters v. Town of Lincoln, No. 91-07 at 6 (Dec. 28, 1990).

The internal inconsistency in the ground rules puts the clear and unequivocal reservation of the right to ratify, reaffirmed in two other ground rules, at direct odds with another ground rule purporting to be an evergreen clause. The substantial effect of an evergreen clause is to maintain the wages, hours, and working conditions of unit employees to the extent they were established in the expiring agreement. Thus, by the terms of the ground rules themselves, the evergreen clause would need to be ratified by the principals.

The source of the problem is, of course, that an evergreen clause is really not an appropriate subject for ground rules because it establishes substantive terms, not procedural issues. To illustrate, if a ground rule stated, "Each employee with perfect attendance during the month of November will receive a $100 bonus," that rule would not be enforceable simply because it was signed by the parties' negotiators. No one would question that such provision must be approved by the principals in whatever ratification process has been established for collective bargaining agreements.

The Union also argues that the City's behavior in failing to notify the Union immediately that it was changing the authority of the negotiator should preclude the City from challenging the content of the ground rules. The Union points out that this Board has held that a change in the negotiator's authority "requires actual or constructive notification before it becomes effective," citing MSAD No. 38 Board of Directors v. MSAD No. 38

Teachers Ass'n, No. 76-20 (July 23, 1976). We agree that the City's failure to be forthcoming about its change in position on the evergreen clause was unprofessional and made a bad situation worse. At a minimum, when the City mailed the July 9, 2010, letter, it should have requested that the Union acknowledge receipt of the letter, as the procedure in Article 25 of the expired agreement suggests. Of course, it would also have been helpful if the Union had informed the City of the appropriate address to use for written communication, also covered by that same provision. A phone call or face-to-face conversation would have been even more effective. In any event, it would be beyond our remedial powers to impose an evergreen clause on the City due to its conduct in communicating its changed position on the evergreen clause.

For the foregoing reasons, we conclude that the evergreen clause approved as part of the negotiating ground rules is not enforceable because the negotiator's approval of the ground rules was not the ratification required by the City. The evidence does not support the Complainant's allegation that the City failed to bargain in good faith, in violation of §964(1)(E).

ORDER

On the basis of the foregoing findings of fact and discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. Section 968(5), it is ORDERED that the IAFF Local 1650 Augusta Fire Fighters prohibited practices complaint in this case is DISMISSED.

Dated at Augusta, Maine, this 15th day of December, 2011.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. §968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

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Barbara L. Raimondi, Esq.
Chair

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Patricia M. Dunn, Esq.
Employer Representative

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Carol B. Gilmore
Employee Representative