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TOWN OF ORONO,)	
)	
Complainant,)	
)	DECISION
v.)	AND
)	ORDER
IAFF LOCAL 3106,)	
Orono Fire Fighters,)	
)	
Respondent.)	
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The Town of Orono filed a prohibited practice complaint on January 15, 2011, in which it alleged that IAFF Local 3106 ("Union") violated section 964(2)(B) of the Municipal Public Employees Labor Relations Law, Title 26, §961 et seq. (the "Act"), by communicating details of the on-going negotiations to the media in direct violation of the parties' written ground rules. The Union submitted a response to the complaint on February 16, 2011, in which it admitted that the Union president did communicate with the press in violation of the ground rules but argued that such a breach did not constitute a failure to bargain in good faith.

During a telephone conference call with the Board's executive director on April 15, 2011, the parties agreed to submit various documents as joint submissions that would constitute the full record for the Board. Subsequently, the parties established a briefing scheduling with the final brief filed with the Board on May 25, 2011. Throughout this

proceeding, the Town of Orono was represented by Matthew Tarasevich, Esq., and the Union was represented by Robert F. Bourgault. The Maine Labor Relations Board met on June 23, 2011, to consider the arguments and deliberate on this matter.

JURISDICTION

The Town of Orono is the public employer within the meaning of 26 M.R.S.A. § 962(7), and IAFF Local 3106 - Orono Fire Fighters is the bargaining agent within the meaning of 26 M.R.S.A. §962(2) for the employees in the Orono 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).

FACTS

1. At all times relevant to the alleged violation, Mr. Kevin Peary was the president of IAFF Local Union 3106 - Orono Fire Fighters, and Mr. Robert Bourgault served as the labor consultant for the IAFF.
2. In early March of 2010, the Union agreed to all 13 of the negotiating ground rules proposed by the Town. The ground rules included provisions stating:

the parties will conduct negotiations in executive session,

and

Each party recognizes the need for the other to inform its constituents on the progress of negotiations; however, both parties agree that bargaining, including proposals, counter proposals, discussion of fiscal

matters, and tentative agreements shall take place only between the designated bargaining teams through their designated spokespersons. In addition, no press releases regarding negotiations shall be made by either party until after negotiations have concluded.

3. Over the next several months, the parties met a number of times for purposes of collective bargaining, they exchanged proposals and counter-proposals, and they participated in mediation. Both parties exhibited a constant intention to find a basis for agreement and a number of issues were either settled or withdrawn. Only three issues remained for submission to the fact-finding panel.

4. On December 17, 2010, at 7:26 p.m., Mr. Peary sent a short email to Mr. Bourgault saying only "Checking in to see how things are going?" Two days later, Mr. Peary sent Mr. Bourgault another email stating, "I left you a message. In the ground rules for negotiation, how long are they in effect. Now that we are at impasse can we go to the press." Mr. Bourgault was unable to respond to either email until December 21, 2010.

5. On December 17, 2010, at 8:22 p.m., less than an hour after sending the first e-mail to Mr. Bourgault, Mr. Peary sent an email to the Bangor Daily News which said:

How about a story about the on going negotiations between Orono Fire Fighters Association and the Town of Orono?

The FF's have said they would agree to no C.O.L.A., and an Insurance plan change that they would pay more for, they are only asking for a couple things that have no monetary value.

We asked for:

1- an "evergreen clause" - keeps the current contract in place after expiration until replaced by a new contract (does not include any pay raises COLAs), keeps the employees covered as contract

union employees until contract is replaced.

2- nothing longer than a 2 year contract without COLAs or negotiation for a cola on the second year. Wages are non binding-

3-Swaps or trading of time- in other words one employee works for another in agreement to be repaid at a later date. Time for time without the fire chief deciding who, or for what reason is acceptable (prevents favoritism, and personal agendas). The time is repaid so there is no loss of funds or incurred debt. They are most often used for short term leave. We work 24 hours straight then have 48 hours off. This is a revolving schedule. When a swap is used there is no chance of overtime being created or someone being forced in to work for a short time frame (less than 8 hours typically).

The Town to date has spent thousands on attorney's fees and accused the union of causing them to have to pay for the higher insurance plan. Yes the Union has rejected two contract offers, only because they did not include swaps, they only had the town's requests not ours. We are willing to do our part. We are just asking to get something for giving up something (most would agree this is only fair).

Kevin Peary
Union President

6. The negotiation details in this email were reported in an article published in the Bangor Daily News on December 29, 2010, entitled "Firefighter contract talks stall in Orono."

7. On December 21, 2010, when Mr. Bourgault was able to reply to Mr. Peary's emails of December 17th and December 19th, quoted above, he responded that the ground rules were in effect until negotiations are completed. The following day, Mr. Peary emailed a reply to Mr. Bourgault saying, "So I am interpreting that as covering mediation, the fact finding and the arbitration as well, is that correct?" Mr. Peary also suggested that in the future

they should seek to limit the duration of that ground rule.

8. On December 28, 2010, Mr. Bourgault emailed Mr. Peary stating that he had just heard from the Town's attorney that the acting town manager had been contacted by the Bangor Daily News asking about negotiations. The reporter claimed that Mr. Peary had contacted the paper. Mr. Bourgault warned Mr. Peary that if he had violated the ground rules by releasing information to the press, the Town would file a prohibited practice complaint with the Maine Labor Relations Board.

9. Mr. Peary responded to the email with a claim that "I only contacted the paper about a possible story. I had not emailed any more than that, as I had not heard from you about the scope of the ground rules. I thought we were at impasse and the ground rules only covered the negotiations. I don't see fact finding and arbitration as negotiating, evidently I am wrong. I am sorry if it was out of turn, I have never had the isolation before with negotiations." He went on to complain about the behavior of management at a chiefs meeting.

10. After the Town's attorney notified Mr. Bourgault that a Union member had gone to the press and that an article would be published, Mr. Bourgault and the attorney exchanged emails over the next couple of days which indicate that Mr. Bourgault did not authorize or condone the breach and that the Town understood that.

11. Two days later (the day after the newspaper article was published), Mr. Peary again emailed Mr. Bourgault, saying "Again I apologize. I was not trying to be a problem. I don't have a copy of what I sent as it was on their website

and not my email. I basically stated that the negotiations stalled. They were asking for insurance, cola and we were asking for swaps that is it, anything beyond that is not gotten from me."

12. The Bangor Daily News article dated December 29, 2010, titled "Firefighter contract talks stall in Orono", included the following paragraph:

A source familiar with the negotiations said the union has agreed to a contract that has no cost-of-living wage increases as well as a new insurance plan that costs firefighters more money. The town has not agreed to some smaller requests, including allowing firefighters to swap or trade time and not allowing contracts to exceed two years without approving cost-of-living increases after the second year, the source said.

13. In addition, the Bangor Daily News article said that when contacted, the interim town manager, Maria Weinberger, stated that she could not comment on the Town's negotiating position. The article said Mr. Ronald Green, the regional vice president for the firefighters union and a member of the union's bargaining team, was also contacted and responded that negotiations are held in executive session and the details would not be made public until a deal is reached.

14. Ms. Weinberger was initially contacted by the reporter sometime around December 23, 2010, seeking comment about the ongoing negotiations. She declined based on the ground rules. The reporter told her he had received an e-mail from Local President Kevin Peary who had described the Union's position. On December 28, 2010, Ms. Weinberger was again contacted by the reporter asking if she wanted to comment on the negotiations for an upcoming article. The reporter told Ms. Weinberger that he

initially believed Mr. Peary was conducting official Town business in sending his December 17, 2010, e-mail, because it had been sent to the reporter from a Town e-mail account. The reporter told Ms. Weinberger that during a follow-up conversation with Mr. Peary, he appeared reluctant to provide any additional information beyond the assertions and allegations set forth in his December 17, 2010, e-mail. The reporter told Ms. Weinberger that Mr. Peary voiced concern to the reporter that his name might appear in any pending newspaper article about the contract negotiations.

15. The Town initiated an internal investigation and confirmed that Mr. Peary's email had been sent from a Town e-mail address. After a hearing on January 14, 2011, Mr. Peary was found to have violated the Town's Code of Conduct and its Internet and Electronic Mail Policy. A written warning was issued to Mr. Peary in early February, which he did not grieve.

DISCUSSION

The question presented in this case is whether the admitted violation of the ground rule barring communication with the press regarding negotiations constitutes a violation of the duty to bargain. Section 965 requires the parties to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." This Board's 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). The evidence presented demonstrates that in all respects other than the contact with the press, the Union's conduct does indicate a sincere desire to reach an agreement: they met and negotiated several times, made proposals and counterproposals, participated in mediation, and settled or withdrew various issues so that only three issues remained for the fact-finding panel to address. There is no suggestion that the Union failed to comply with any of ground rules other than the one central to this prohibited practice complaint. There is also no suggestion that the Union committed a per se violation of the duty to bargain by failing to meet the minimum statutory requirements or by committing an outright refusal to bargain.

The Union argues that in reviewing the totality of the circumstances, even including the violation of the ground rule, it is clear that the Union engaged in good faith bargaining

because its conduct demonstrated "a sincere desire to reach an agreement," Union brief at 2, citing Waterville Teachers Assoc., No. 82-11. The Union asserts that because the admitted breach of the ground rule was an isolated incident, there is no justification for a finding of bad faith. We would be remiss if we were to dismiss the complaint simply because the breach was an isolated incident because such an approach implies that an isolated incident is, by definition, insignificant. Our responsibility is to look at the totality of the circumstances: in this case, we must consider the specific facts regarding the breach of the ground rule and the circumstances surrounding that breach. We must also consider the importance of the ground rule.

Analytically, we consider a ground rule concerning disclosures of bargaining positions or tactics outside of negotiations, particularly to the press, to be substantively different than other types of ground rules. We note that negotiating ground rules have never been held to be a mandatory subject of bargaining. See, Sanford Firefighters, Local 1624, IAFF v. Sanford Fire Commission, No. 79-62 at 6-7 (Dec. 5, 1979) (negotiation ground rules are "probably not" a mandatory subject). Furthermore, while very common and encouraged by this Board, ground rules are not universally adopted. See, e.g., Minot Education Assoc. v. Minot School Committee, No. 96-27 at p. 3 and p. 14, n. 6 (June 30, 1997); and Westbrook Police Unit v. City of Westbrook, No. 78-25 at p. 4 (Sept. 5, 1978). We also note that not every ground rule on media contact bans all disclosures at all times. Some parties may agree that after a specified time or event (such as completion of mediation), their restrictions on disclosures to the media are lifted; some parties limit press contact to joint statements; and others may require advance notice to the other party before a statement to the press

can be made. If the parties prefer to negotiate in closed session, that is their right. If the parties prefer to negotiate in open session, that is their right as well. The important point is that the parties' negotiations strategies and tactics may differ significantly depending on the nature of their agreement on what, if any, information can be released as negotiation progresses. A rule limiting disclosure outside of negotiations goes to the very heart of the bargaining process.

Maine's law on whether collective bargaining can be conducted in public meetings states clearly,

. . . Negotiations between the representatives of a public employer and public employees may be open to the public if both parties agree to conduct negotiations in open sessions.

1 M.R.S.A. §405(6)(D). While this statutory provision is from the Freedom of Access Law, it was enacted in 1975, not long after this Board's decision in Quampegan Teachers Association v. SAD No. 35, No. 73-05 (April 20, 1973). There, the Board addressed the issue of whether a party could insist that negotiations sessions be held in public and concluded that such insistence did not constitute good faith bargaining. The Board held that the subject was not a mandatory subject of bargaining and explained that:

[It is] our belief that the use of a stenographer, recording device, or presence of the press and public to report the happenings of a negotiation session or to create a verbatim transcript of that meeting 'does tend to encourage negotiators to concentrate upon and speak for the purpose of making a record rather than directing their efforts towards a solution of the issues before them.'

Quamphagan Teachers, No. 73-05 at 6, quoted in MSAD #24 v. Van Buren Custodian/Bus Driver/Maint. Assoc., No. 79-16 (March 27, 1979). Clearly, it is has been the law for decades that the default starting point for collective bargaining is for it to occur in closed sessions, unless the parties agree otherwise.

The statutory impasse-resolution procedures in the collective bargaining statute recognize that as the parties continue beyond mediation, through fact finding and to interest arbitration, the utility of public pressure increases. Mediation sessions are strictly confidential¹ and fact-finding sessions may only be public if all the parties and all the fact finders agree to have it public. MLRB Rules Ch. 13 §31. Once the fact-finding panel's report is submitted to the parties, the report may not be made public for 30 days unless the parties agree. After 30 days, if the parties have not resolved the controversy, the Board's executive director or either party may make the report public. 26 M.R.S.A. §965(3)(C). If the dispute goes on to interest arbitration, the statute requires an even faster public disclosure of the report. 26 M.R.S.A. §965(4)(par. 4). All of these steps in the statutory impasse-resolution procedures are part of negotiation. They all reflect the legislative recognition that as the parties' controversy continues, the need to engage the public in the discourse increases and the required disclosure may help by enabling informed public pressure.

We review these provisions allowing, but not requiring, the parties to bargain in closed sessions because the ground rule in question embodies the parties' agreement on how public they want their bargaining to be. The violation of this ground rule is a serious breach. When both sides are proceeding from the start of

¹During mediation, any disclosure made to a mediator is privileged.

bargaining on the assumption that the press will not be part of the process, a sudden disclosure of the type here can profoundly alter the dynamics of the bargaining process. On the other hand, if the decision had been made to allow contacts with the press from the start, each party would factor that dynamic into their bargaining strategy and tactics.

Upon reviewing the record before us, we conclude that Mr. Peary's conduct in contacting the press was a deliberate act, taken with knowledge of the existence of the ground rule, which included detailed information about the parties' bargaining positions, and was made with the intent to put public pressure on the Employer. The disclosure to the press was a flagrant violation of the ground rule made with the intent of substantially altering the dynamics of the bargaining process that the parties had agreed upon.

At the time of the email to the newspaper, Mr. Peary was the president of the Union and had been a member of the bargaining team since the parties agreed upon the ground rules and began negotiations. The parties had been negotiating for several months, had participated in mediation sessions, and were in the process of selecting a fact-finding panel. Mr. Peary's first email to the Union's labor consultant asked only how things were going. This may have been an effort to initiate a conversation in which Mr. Peary could inquire about the status of the ground rule barring contact with the media. In any event, the email Mr. Peary sent to Mr. Bourgault two days later² indicated that he knew of the ground rule and had a concern that it was still in effect.

26 M.R.S.A. §965(2)(G).

² As well as the message he left for Mr. Bourgault (presumably a telephone message).

Mr. Peary could have, and should have, either waited for a response from Mr. Bourgault or contacted Richard Green, the regional vice president for the IAFF, who was also a bargaining team member. This was not a situation where he was cornered by the press and badgered into an inadvertent disclosure. Mr. Peary initiated the contact with the press in order to generate publicity. Mr. Peary could have waited to discuss the matter with Mr. Bourgault or Mr. Green, but he chose not to.

The level of detail Mr. Peary provided to the Bangor Daily News also indicates the seriousness of the breach because it goes to the heart of the ban and provides compelling evidence of his intent to disrupt the agreed-upon process. His disclosure gave the details of the three remaining issues on the table, and was not merely a general assertion that the Town should be pressured to come to an agreement. By providing the details of the issues in dispute, and accusing the Town of being unfair, he tried to use public opinion to sway the bargaining process in the Union's favor. Mr. Peary added weight to his arguments by signing the email as president of the Union. The timing of the disclosure adds to the seriousness of the breach as well, as it occurred before the parties had even started fact finding and well before the time the statute authorizes the release of the fact-finding report. Mr. Peary's contact with the press was deliberate and made with the intent to bring public pressure on the Employer to alter its bargaining position in direct contravention of the purpose of the ground rule. Peary's use of the media to place pressure on the town destroyed the trust between parties that is fundamental to good faith bargaining. Such an action undermines the basic integrity of the bargaining process.

The Union argues that the Board should not find a violation in this case because Mr. Peary was disciplined for his contacting the press and because the parties were ultimately able to reach an agreement. Neither argument is convincing. Mr. Peary was disciplined for violating the employer's code of conduct and email policy, not for violating the negotiation ground rule. Even if the Employer had the authority to discipline Mr. Peary for his violation of the negotiating ground rule, that would have no bearing on this Board's authority to find a violation of the law. With respect to the ultimate ratification of a successor agreement, this Board has repeatedly held that a charge of failing to bargain in good faith is not rendered moot by the subsequent execution of a collective bargaining agreement. Teamsters Local Union No. 48 v. City of Bangor, No. 79-29 (Interim Order) at 1-2 (March 2, 1979), cited in MSEA v. State of Maine, No. 84-17 at 2, n.1 (July 17, 1986).

In summary, we conclude that the conduct of the Union President in contacting the press was a deliberate act, taken with knowledge of the existence of the ground rule, which included detailed information about the parties' bargaining positions, and was made with the intent to put public pressure on the Employer. The disclosure to the press was a flagrant violation of the ground rule made with the intent of substantially altering the dynamics of the bargaining process that the parties had agreed upon. After considering the totality of the circumstances, including the nature of the breach and the importance of that particular ground rule to the bargaining process, we conclude that the Union violated 965(1)(C) by failing to bargain in good faith.

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 the provisions of 26 M.R.S.A. § 968(5), it is hereby ORDERED that the IAFF, Local 3106 Orono Fire Fighters cease and desist from failing to bargain in good faith by failing to comply with the negotiating ground rule agreed upon with the Town of Orono in March of 2010 regarding disclosures to the press.

Dated at Augusta, Maine, this day of August, 2011.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right, pursuant to 26 M.R.S.A. § 968(5)(F), to seek review of this decision and order by the Superior Court. To initiate such a review, an Appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80C of the Maine Rules of Civil Procedure.

Barbara L. Raimondi, Esq.
Chair

Carol B. Gilmore
Employee Representative

Richard L. Hornbeck, Esq.
Employer Representative