

_____)	
MASSABESIC EDUCATION)	
ASSOCIATION/MEA/NEA,)	
)	
Complainant,)	
)	DECISION
v.)	AND
)	ORDER
RSU 57 BOARD OF DIRECTORS,)	
)	
Respondent.)	
_____)	

The Massabesic Education Association/MEA/NEA ("Association") filed a prohibited practice complaint on June 7, 2011, in which it alleged that the RSU 57 Board of Directors ("Employer") failed to bargain in good faith as required by 26 M.R.S.A. §965(1)(C) thereby violating section §964(1)(E) of the Municipal Public Employee Labor Relations Act. Specifically, the Association charges that the Employer's conduct and statements violated the parties' agreed-upon ground rule for negotiations regarding the confidentiality of bargaining sessions. The Association further argues that this breach rises to the level of demonstrating a "lack of intent" to bargain in good faith.

On July 21, 2011, the Maine Labor Relations Board's Executive Director held a telephone conference call with the Association's representative, Mr. Gregory Hannaford, and the Employer's representative, Bruce Smith, Esq. The parties agreed that there were no relevant facts in dispute in this case and that they would present their respective positions through simultaneous written submissions. The Association's brief

arguing the merits of the complaint and the Employer's brief arguing for dismissal of the complaint were both received by August 18, 2011. The Association's brief included five exhibits. The Association filed a reply brief on September 1, 2011, while the Employer chose not to file a reply brief. The Board met to deliberate this matter on Tuesday, September 13, 2011.

FACTS AS PRESENTED IN THE COMPLAINT

1. Complainant is the bargaining agent within the meaning of 26 MRSA §962(2) for a unit of educational support personnel employed by Respondent.

2. Complainant is the bargaining agent within the meaning of 26 MRSA §962(2) for a unit of teachers employed by Respondent.

3. Respondent is a public employer within the meaning of 26 MRSA §962(7).

4. Complainant and Respondent are parties to a collective bargaining agreement with the teacher bargaining unit, which expired on 08/31/2011. (Complainant's Exhibit 1.)

5. Complainant requested that Respondent meet for negotiation of a successor agreement to the collective bargaining agreement. On or about March 3, 2011, representatives of the Complainant and Respondent met for such negotiations for the teacher unit.

6. Negotiating representatives designated by the Complainant included six (6) of its members, as well as Catherine Geren, President, Massabesic EA/MEA/NEA, and Gregory C. Hannaford, MEA UniServ Director.

7. Negotiating representatives for the respondent included five (5) of its members, as well as Karla Bergeron, Chair, MSAD/RSU 57 Board of Directors, and Frank Sherburne, Superintendent, MSAD/RSU 57.

8. During the March 3, 2011, negotiating session the representatives of both parties reached an agreement on ground rules regulating how the negotiation process would be conducted by the Complainant and the Respondent. The agreement was reduced to writing and signed by representatives of both parties. (Complainant's Exhibit 2.)

9. On or about March 9, 2011, representatives of the Respondent engaged in a discussion of the Superintendent's Budget Message for 2011-2012. (Complainant's Exhibit 3). The budget document contained specific references to issues in negotiation between the parties. The discussion by the Respondent took place in an open session of a public meeting of the MSAD/RSU 57 Board of Director's Finance Committee.

10. On or about March 30, 2011, Superintendent Frank Sherburne referred to a specific Complainant proposal, included in Complainant's negotiation package, in an email addressed to Catherine Geren, Association president, Terry Gould, Association chief negotiator, Clint Nash, Association grievance representative and negotiator, and Mark Peterson, building administrator in MSAD/RSU 57, who is not a member of the Respondent's negotiation team. (Complainant's Exhibit 4).

11. On or about April 6, 2011, representatives of the Respondent again engaged in a discussion involving issues in negotiation during an open session of a public meeting of the MSAD/RSU 57 Board of Director's Finance Committee (Complainant Exhibit 5).

EXHIBITS WITH RELEVANT EXCERPTS

C-1. Collective Bargaining Agreement between Massabesic Education Association and Board of Directors of MSAD #57, 2007 - 2010 (no relevant excerpts).

C-2. Ground Rules agreed upon on March 3, 2011. Ground rule number 7 states, in full: "All meetings shall be held in closed session and are strictly confidential."

C-3. Superintendent's Budget Message for 2011-2012. This document is ten pages of very small print. The first two pages are the Superintendent's explanation of his budget proposal. Page three is text and a chart on "District Reserves (Fund Balances)". The fourth page describes the budget preparation process and presents data on per pupil expenditures. The fifth through ninth pages cover estimated revenues and expenditures, and data on enrollments, state valuations, tax assessments, and essential programs and services calculations. The last page sets out the Budget Meeting schedule for March through June, 2011.

The specific language that the Association contends is the core of the alleged violation is contained in the textual portion of the Superintendent's Budget Message. The following are the excerpts quoted in the Association's reply brief, with the emphasis supplied by the Association.

. . .
We have asked our school administrators and staff to come together with clarity and commitment to improve the way we do business and position RSU 57 schools for future success. This was not easy, given our reduced revenues and greater responsibilities and expectations of staff. **It required tough choices, including the elimination of 31.75 positions last year,** and, in some cases, will require us to develop new ways to think about how we run our schools and our classrooms this year, so we continue to put student learning first.

I have been and continue to be confident that our staff would/will make the right choices to support all of our students and I am hopeful that our community will make the right choice at the polls, as well.

To accomplish these goals, this budget depended on two critical factors:

First, **We needed all RSU 57 employees**--many of whom have sacrificed raises and even endured pay cuts - **to consider freezes this coming year** in order to preserve all that we can for our students. **The goal is to maintain current-staffing ratios**, as determined by our community forums **and consideration of freezes will insure this can happen. . .**

[Second,] we must be **committed to sharing the sacrifice to preserve needed jobs**. With this budget, **we propose that employees consider, without exception, foregoing pay increases in order to maintain jobs in our schools. . . We believed that all staff within the district understand the stark choices we face, and the trade-off of paying fewer employees more, or paying more employees. . .**

C-4. The Email message from the Superintendent to a building administrator who was not a member of the Respondent's negotiation team. The email was about the use of leave time. The Superintendent's email noted that the practice had been that leave time could not be taken in fragments of days, and that "the Association has proposed to change that language from days to hours, which suggests that the Association agrees with our interpretation of the current language."

C-5. 5-page document. The first page is titled "2011-2012 Superintendent's Recommended Budget, Agenda, Budget Workshop, Wednesday, April 6, 2011". The following 5 pages are headed "Overview-Schools & Programs" and "Revenue and Expenditure Revisions". The Association does not specify which statements in these documents are at issue.

DISCUSSION

The Complainant alleges that the Employer's conduct violated the established ground rule in a manner that demonstrates a lack of intent to bargain in good faith as required by §965(1)(C), which, in turn, constitutes a violation of §964(1)(E). The Association argues in its initial brief that the Employer's actions "were tantamount to a rejection of the Ground Rules that subsequently led to frustration and distrust on the part of the Association's team and a general slowing of the negotiation process and hindering the progress of said process." The Association further argues that the Employer's actions "were deliberate, ongoing and arrogant in nature leading to the creation of an adversarial nature to the negotiations resulting in a deliberate delay in negotiations and which do rise to the level of 'lack of intent' to bargain in good faith."

The established standard for determining whether a party's conduct is consistent with the duty to bargain in good faith imposed by §965(1)(C) requires examining the totality of the charged party's conduct. The central question in this examination is whether the party's actions during negotiations indicate "a present intention to find a basis for agreement." Town of Orono v. IAFF Local 3106, Orono Fire Fighters, No. 11-11 at 7-8 (Aug. 11, 2011), quoting NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943). The Board has described this assessment of the totality of the conduct as follows:

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).

This Board recently addressed the question of whether an admitted violation of a negotiating ground rule barring communication with the press constitutes a violation of the duty to bargain. Town of Orono v. IAFF Local 3106, Orono Fire Fighters, No. 11-11 (Aug. 11, 2011). In that case, the parties agreed that, other than the admitted disclosure to the press, the respondent fully complied with the duty to bargain in all respects. The ground rule violation at issue was the union president's email to the newspaper suggesting an article on the state of negotiations and specifying the positions of the parties on the three remaining issues that were scheduled for fact finding. The Board looked at the very specific terms of the ground rule and the fact that the email was initiated and sent by the union president with the clear intent to disrupt the agreed-upon bargaining process and to use the press to bring public pressure on the employer to alter its bargaining position. The Board concluded that the actions of the union's president were a flagrant violation of the ground rule made with the intent to substantially alter the nature of the bargaining process the parties had agreed upon in violation of §965(1)(C). The facts and circumstances are quite different in the present case.

It is essential to note that the case before us has a very limited record. The case has been submitted to the Board for

resolution on the sole basis of the documents in evidence and briefs. We are restricted to addressing the complaint on the evidence before us which mostly consists of three documents:

1. The Superintendent's written Budget Message presented and discussed in a public meeting on March 6, 2011;
2. An email discussing a grievance and the Association's negotiating position on that issue;
3. An agenda and budget material including revenue and expenditure revisions distributed and discussed at a public 'Budget Workshop' on April 6, 2011.

The Complainant does not specify the offensive statements that were made in these meetings, but simply relies on the documents themselves to prove its case. Furthermore, there was no evidence presented to the Board as to the issues actually discussed in the negotiation sessions, therefore it is impossible to determine whether the statements made in the public meetings actually disclosed information that was provided during a negotiation session. Finally, the ground rule that is alleged to have been violated is very short and not particularly clear as to its intent. Despite these handicaps, we are being asked to determine on the basis of the limited record before us whether the conduct in fact violated the ground rule and, if so, whether that conduct constituted a failure to bargain in good faith. We will also address the coerciveness of the Employer's conduct, even though it was not specifically alleged in the complaint, as both parties raised the issue in their briefs.

We will first address the statements made by the Superintendent in his written Budget Message. The essence of the Superintendent's statements is that if the employees were not committed to "sharing the sacrifice" by "foregoing pay increases," layoffs will occur. The Superintendent said, "I have

been and continue to be confident that our staff would/will make the right choices . . .[and] We believe that all staff . . . understand . . . the tradeoff of paying fewer employees more, or paying more employees." The Complainant argues that this written Budget Message, which was discussed in a public meeting, contained "specific references to issues in negotiation" and therefore was a breach of the ground rule.

The negotiating ground rule that the Employer allegedly violated is not entirely clear as to its scope or its duration, as it simply states, "All meetings shall be held in closed session and are strictly confidential." No evidence was presented that would shed light on any mutual understanding of the parties with respect to the meaning of this ground rule. The rule might be interpreted to mean that negotiating sessions are only open to bargaining team members and that anything disclosed during a meeting is confidential. It is unclear whether bargaining team members can discuss confidential matters among themselves outside of a negotiating session. It is also unclear when it would be permissible to seek further input from the union membership or full school board. A more restrictive reading of the ground rule is that anything related to negotiation is confidential and must not be mentioned outside of a closed session. The latter interpretation is not tenable because it would be inconsistent with the statutory requirements of the budgeting process in Maine's public schools.

Maine's statutes governing the public school budgeting process require the school superintendent to "thoroughly explain the budget" at the annual budget meeting. 20-A M.R.S.A. §1482-B,

sub-§3.¹ For the Employer to fully comply with this statutory directive, the superintendent must disclose the assumptions upon which the budget is developed. In his Budget Message, the MSAD #57 Superintendent did so when he explained that the budget was based on flat funding for employee salaries. Although he went further than necessary when he stated that he considered salary freezes for everyone to be the desired outcome of negotiations, that is not the same as saying that the Employer breached the ground rule by disclosing information obtained during negotiation sessions. Since we have no evidence before us as to the content of any closed negotiating sessions, we are unable to determine whether there was a disclosure of confidential information. There is simply no evidence in the record upon which we could find such a breach. Thus, we are unable to conclude that the statements made in the Superintendent's Budget Message breached the ground rule as the Complainant argues.

The second instance of an alleged violation of the ground rule is the Superintendent's email regarding a grievance on the use of leave time. In this email, the Superintendent made reference to the Association's negotiating position as part of his defense of his view of the established practice on this issue. Even though the ground rule is unclear in many respects, it unquestionably prohibits the disclosure of a negotiating position to someone who is not a member of either bargaining team. We have never held, however, that a mere breach of a ground rule is a per se violation of the duty to bargain in good faith. See Orono v. IAFF Local 3106, No. 11-11 at 8 (a per se

¹Title 20-A, section §1482-B. Annual budget meeting procedures
The following procedures must be used at a regional school unit annual budget meeting. . . .

(sub-§)3. Budget consideration. The superintendent of the regional school unit shall thoroughly explain the budget. The voters must have an opportunity to be heard.

violation occurs when a party fails to meet the minimum statutory requirements or commits an outright refusal to bargain). Unlike the egregious conduct in Orono, the disclosure in this case was limited. While this is a technical breach of the ground rule, it is not sufficient to constitute a violation of the law by itself.

The third and final allegation of a breach of the ground rule concerns statements made by the Employer's representatives during the April 6, 2011, meeting of the Board of Director's Finance Committee. The only evidence before us is the uncontested statement that "representatives of the Respondent again engaged in a discussion involving issues in negotiation during an open session of a public meeting." The Complainant's Exhibit C-5 is a document including the agenda for that meeting, along with 5 pages of charts and data related to the budget. The Complainant does not indicate what portion of this exhibit supports the allegation of a breach of the ground rule, and we are unable to identify any part that is objectionable on its face.

We conclude that the Complainant has failed to provide evidence sufficient to demonstrate that the Employer has breached the negotiating ground rule on confidentiality to such an extent as to constitute a failure to bargain in good faith. We find only a minor violation of the ground rule with the email disclosure; claims that other statements were disclosures that violated the ground rule are speculative, at best.

The briefs of both parties raise the issue of whether the Employer's statements were coercive. The Association asserts in its reply brief that the statements were coercive and potentially a violation of §964(1)(A), which prohibits conduct "interfering with, restraining or coercing employees in the exercise of the

rights guaranteed in section 963." Section 963 includes both organizational activities and collective bargaining. The Association noted that this Board has stated that the analysis to use in determining whether a statement violates §964(1)(A) is to consider "'whether under these circumstances the employees could reasonably conclude that the employer was threatening them with economic reprisals' if they persisted in their organizational activities." Kittery Employees Assoc. v. Eric Strahl, Town of Kittery, No. 86-16 (Aug. 6, 1986) at 11, quoting NLRB v. Saunders Leasing System, Inc., 497 F.2d 453, 457 (8th Cir. 1974). The Association argues that the Employer's statements "clearly and repeatedly imply that any non-acceptance of their position on salary freezes will result in employee layoffs by reminding the employees of recent layoffs and tying any refusal to agree to a salary freeze to additional layoffs."

Although we consider the Superintendent's choice of words to be ill advised, we are reluctant to find a violation of §964(1)(A) on the basis of the coercive nature of the statements in the Budget Message because to do so would come too close to equating a negative economic impact with "economic reprisal." The moment a shrinking budget starts to affect wages, hours, or working conditions, it will have a negative economic impact on the employees, but that does not mean that it is necessarily "economic reprisal." In the present case, it appears from a consideration of the totality of the Superintendent's Budget Message that the shaky economy and the shrinking state budget led to the Superintendent's flat budget proposal, not any intent to threaten employees with economic reprisals for being in the union or taking a particular stance at the table. There is no evidence in the record that the Superintendent's statement was anything but a reference to choosing the lesser of two evils. Whether a wage freeze or a layoff is the lesser evil is a perennial

question on which reasonable minds differ. The question of which is preferable or whether other alternatives are possible are questions that should be addressed at the bargaining table.

With respect to the "coerciveness" of an employer's statements during bargaining in an established union setting (rather than during a union organizing campaign), this Board has issued two decisions that are instructive. In the Oxford Hills case, the Board found a §964(1)(A) violation based on the Superintendent's statement to the union president outside of the bargaining session that they would "reclaim" retroactive payments already made if the union did not sign the contract that week. Oxford Hills Teachers Assoc. v. MSAD #17, No. 88-13 at 43 (June 16, 1989). The Board specifically noted in that case that the issues that were delaying final settlement should be addressed at the bargaining table. In the more recent MSAD #46 case, the Board rejected the Union's argument that the Employer's bargaining stance opposing retroactivity was on its face an interference, restraint or coercion violation. MSAD #46 Education Assoc. v. MSAD #46 Board of Directors, No. 02-09, at 9 (July 3, 2002). In that situation, the union used the same "economic reprisal" argument noted above to argue that the employer's bargaining stance was coercive. After considerable discussion, the Board held that hard bargaining is not, by itself, coercive or interference with the employees' right to bargain collectively. Id. at 8. The present case is distinguishable from Oxford Hills because here the Employer is not threatening a more severe cut or retaliation for the Association taking a particular bargaining position. The Superintendent's statements as to what he considered to be the only two viable options in the circumstances provide an explanation of his budgeting choices and was not coercive in violation of 964(1)(A).

Despite our ultimate finding in this matter, the most troubling aspect of this case is our sense that the Superintendent's wording comes perilously close to language that could be read as interference with the employees' collective bargaining rights. Our concern in this regard starts with the observation made above that the Superintendent's Budget Message went beyond simply explaining the budget and the assumptions underlying its development. The Superintendent's statements about the "right choices" that the employees should make and that everyone "must be committed to sharing the sacrifice to preserve needed jobs" are disturbing. The Association argues that these comments were intended to bypass their bargaining team and "to bring pressure on that team" to accept the salary freeze.

The Association asserts that the Superintendent's statement was "making a bargaining proposal directly to both employees and to the public" in violation of the ground rule, and by extension, was a violation of 964(1)(E), as it was bypassing the bargaining agent and dealing directly or indirectly with employees. A direct-dealing violation occurs when the employer makes a proposal directly or indirectly to the employees or solicits input from the employees on a mandatory subject of bargaining. See, e.g., Teamsters v. Jay School Dept., No. 06-22 at 8 (Nov. 21, 2006) and MSEA v. Dept. of Public Safety, No. 09-10 at 16 (July 9, 2010). Here, the Employer was not making a proposal to employees that had not already been made to the Association. The evidence indicates that the Employer and the Association began negotiations several days before the Superintendent presented his budget and there is no suggestion that the Superintendent's message presented a new proposal.

Similarly, we do not consider the Superintendent's comments to be direct dealing because they do not seek a response from the

employees, nor do they suggest that the employees would be better off dealing directly with the employer. See, e.g., Teamsters v. Jay School Dept., No. 06-22 at 8 (Nov. 21, 2006) (informing employees of an opportunity to request a transfer was not direct dealing because the memo did not make a proposal or seek a response from the employees), and Teamsters v. Aroostook County, No. 92-28 at 24 (Nov. 5, 1992) (questionnaires asking employees to choose among alternatives for scheduling furlough days was direct dealing because it was seeking employee input on negotiable issues). Here, the Superintendent's comments did not seek a direct response from the employees, but, rather, implicitly suggest that the employees should try to persuade the Association to alter its bargaining position.

That portion of the Budget Message that goes beyond an explanation of the budget is language that appears to be aimed at convincing the employees and the citizens of the district to try to influence the Association's bargaining team to change its position. While we do not find a violation in this case, we do not condone such statements because, as we have noted in a previous case, it "is a type of meddling which makes it more difficult for the Union to compromise at the bargaining table and is likely to harden resistance and foment antagonism." Teachers Assoc. of MSAD 49 v. Board of Directors of MSAD 49, No. 80-49 at 7 (November 18, 1980). Clearly, the expression of employer opinion and informational statements, if accurate and non-coercive, are both constitutionally protected free speech. MSEA v. Maine, No. 82-01 (April 5, 1982); Associated Faculties of the Univ. of Maine v. Assoc. of Independent Professionals, No. 81-22 (Aug. 19, 1981); Kittery Employees Assoc. v. Strahl, No. 86-16. But meddling in the employees' right to freely participate in collective bargaining, if continued, will at some point be transformed into interference with those rights, in violation of

§964(1)(A). Although we do not find a violation in this case, we caution the Employer that there are times when sticking to the facts and arguments supporting your position is more productive than attempting to tell others what the "right choices" are.

In summary, we conclude that the conduct complained of does not constitute a failure to bargain in good faith as required by 26 M.R.S.A. §965(1)(C), nor does it constitute interference, restraint or coercion of employees in the exercise of the rights granted to them by 26 M.R.S.A. §963.

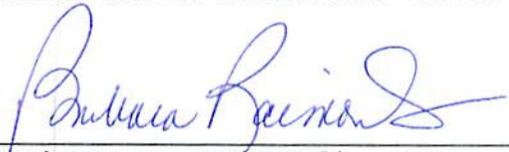
ORDER

On the basis of the foregoing findings of facts 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, it is hereby ORDERED that the Complaint be DISMISSED.

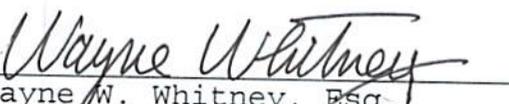
Dated at Augusta, Maine, this 10th day of November, 2011.

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.


Barbara L. Raimondi, Esq.
Chair


Richard L. Hornbeck, Esq.
Employer Representative


Wayne W. Whitney, Esq.
Employee Representative