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| TEAMSTERS UNION LOCAL 340, |) |
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| Complainant, |) |
| |) |
| v. |) |
| |) |
| CUMBERLAND COUNTY COMMISSIONERS, |) |
| |) |
| Respondent. |) |
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DECISION AND ORDER

Teamsters Local Union 340 filed a prohibited practice complaint with the Maine Labor Relations Board on September 3, 2014, alleging that the Cumberland County Commissioners refused to bargain in good faith in violation of §964(1)(E) of the Municipal Public Employees Labor Relations Law (the "Act"). Specifically, the Union alleges that the County refused to bargain over subcontracting during negotiations for a successor agreement. The County filed a counter-complaint alleging that the Union violated §964(1)(E) by refusing to continue bargaining unless the County agreed to its subcontracting proposal.

An evidentiary hearing was held on January 20, 2015, with the Union represented by Teamsters Business Agent Lorne Smith, and the County represented by Alyssa C. Tibbetts, Esq. Chair Katharine I. Rand presided at the hearing, with Employer Representative Robert W. Bower, Jr., and Employee Representative Amie M. Parker serving as the other two Board members. Both parties were able to examine and cross-examine witnesses, to offer documentary evidence at the evidentiary hearing, and to provide oral argument at the close of the hearing. After some discussion, the parties were given 10 days in which to submit a post-hearing brief, though the Chair made it clear that it was

not required. The Union elected not to file a post-hearing brief, and the County submitted its brief on January 30, 2015.

JURISDICTION

Teamsters Local Union 340 is a bargaining agent within the meaning of 26 MRSA §962(2), and Cumberland County is the public employer within the meaning of 26 MRSA §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 MRSA §968(5).

FACTS

1. Teamsters Union Local 340 is the certified bargaining agent for the bargaining unit of Cooks at the Cumberland County Jail. The most recent collective bargaining agreement between the parties was effective from July 1, 2012 to June 30, 2014. The expired collective bargaining agreement does not contain any language addressing the issue of subcontracting.
2. Several times over the past few years, the County Manager had considered the possibility of contracting out the Jail's food services. On each occasion, the Cooks and other members of County's Jail department made their case to the Commissioners who decided to keep the work in-house.
3. At some point prior to the parties' first negotiating session, the County Manager and Jail Administrator developed an RFP for food services at the Jail, but by early July had decided not to pursue it.

4. The parties met on July 24, 2014, for their first bargaining session to negotiate a successor agreement. The Employer proposed a set of negotiating ground rules which were discussed but not accepted by the Union. The Union presented its financial proposals regarding wage and stipend increases and proposed the following language on subcontracting:

Management shall maintain the right to establish contract or subcontracts for operations, provided that this right shall not be used for the purpose or intention of undermining the Union or discriminating against its members. The type of work customarily performed by the employees in the bargaining unit shall continue to be so performed.

5. The Union's handwritten notes of the July 24, 2014, bargaining session state:¹

- Union goes over its proposals.
- Subcontracting Big Issue.
- County Manager feels there is Savings to Contracting out Food Services.
- County Not interested in putting language in the contract. We stated this was a big issue for the members, because of the many attempts to subcontract.

6. The issue of subcontracting was a very big issue for the members of the bargaining unit. The Shop Steward testified that in conversations outside of negotiations, the Sheriff and the Chief Deputy were supportive of the Cooks' concerns. They had both indicated that if the food service were contracted out, they would transfer the displaced cooks to the extent there were open positions available. The Union was concerned that there might not be enough open positions

¹ The Union's handwritten notes of the three bargaining sessions were admitted without objection, but little or no reference was made to them during testimony.

for all of the cooks and consequently wanted written assurances of job security in the collective bargaining agreement.

7. Ms. Wanda Pettersen, the Employer's Human Resources Director, was a member of the County Commissioners' bargaining team. She testified that there was extensive discussion during the July meeting about the types of language that the County would consider, and about how other employers and some state agencies handled the issue. She testified that the County's stated position at this meeting was that they were not willing to agree to the language that the Union proposed for inclusion in the collective bargaining agreement.
8. The parties met for their second negotiating session on August 5, 2014. At that time, the County responded to the Union's financial proposals from the prior meeting and indicated that they were not interested in incorporating subcontracting language into the agreement.
9. At this second negotiating, Mr. Lorne Smith, the Union Business Agent, presented the following revised language for the proposed subcontracting article:

Nothing in this contract shall be interpreted as limiting the right of the Cumberland County Commissioners to subcontract work, except that such subcontracting shall not cause the discharge or layoff of any member of the bargaining unit.

Mr. Smith also presented the County with a copy of a decision of the Maine Law Court which stated that the impact of subcontracting on unit members' employment was a mandatory

subject of bargaining. The County did not dispute that subcontracting was a mandatory subject of bargaining.

10. As indicated in Employer exhibit #1, several proposals were initialed as tentatively agreed to during this August 4, 2014, negotiating session, such as the starting date of medical insurance coverage for new hires.
11. Ms. Pettersen testified that she presented the Union's revised subcontracting language to the County Commissioners before the next negotiating session.
12. At the third session on August 19, 2014, Ms. Pettersen explained to the Union bargaining team that the Maine Board of Corrections ("BOC") had the statutory authority to dictate certain matters regarding the operation of the county jail. She stated that the County could not prohibit the subcontracting of food services, that their hands were tied by the BOC's authority. Mr. Smith asked if the BOC were in charge, why wasn't it at the bargaining table?
13. Chief Deputy Gagnon spoke at length at this third meeting about his and the Sheriff's concern for the future of the Cooks if the County or the BOC decided that subcontracting was necessary. He indicated that the Sheriff felt responsible for finding other positions in the jail system for any cooks affected by subcontracting, if indeed it did occur. The County was not willing to agree to language that would prohibit layoffs resulting from subcontracting. In response, Mr. Smith indicated that was "not acceptable" and told the County's bargaining team that meeting was over and the Union was "taking it to the next step."

14. Because the last negotiating session ended abruptly, the County was unable to present its financial package of proposals to the Union. Ms. Pettersen and other members of the County's bargaining team testified that they thought the Union was going to request mediation.

DISCUSSION

Section 964(1)(E) and §964(2)(B) prohibit the employer and the bargaining agent from refusing to bargain collectively with the other party as required by §965. Section 965 is a very lengthy provision detailing the mutual obligation to bargain, starting with negotiations (§965, sub-§1), then, if necessary, through mediation (§965, sub-§2), fact-finding, (§965, sub-§3), and finally interest arbitration (§965, sub-§4).

The subsection describing negotiations, §965(1), defines the mutual obligation to bargain collectively, and states:

1. Negotiations. It is the obligation of the public employer and the bargaining agent to bargain collectively. "Collective bargaining" means, for the purposes of this chapter, their mutual obligation:

A. To meet at reasonable times;

B. To meet within 10 days after receipt of written notice from the other party requesting a meeting for collective bargaining purposes, as long as the parties have not otherwise agreed in a prior written contract. This obligation is suspended during the period between a referendum approving a new regional school unit and the operational date of the regional school unit, as long as the parties meet at reasonable times during that period;

C. To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, except that by such obligation neither party may be compelled to agree to a proposal or be required to make a concession and except that public employers of

teachers shall meet and consult but not negotiate with respect to educational policies; for the purpose of this paragraph, educational policies may not include wages, hours, working conditions or contract grievance arbitration;

D. To execute in writing any agreements arrived at, the term of any such agreement to be subject to negotiation but may not exceed 3 years; and

E. To participate in good faith in the mediation, fact-finding and arbitration procedures required by this section.²

The gist of the Union's complaint is that the County violated the Act by refusing to put "any language" in the agreement concerning subcontracting. The Union argues that the County refused to bargain by not offering any counterproposals on the subcontracting issue and refusing to put in writing any assurances that Cooks would be transferred to other positions in the jail if the food services were contracted out. The statutory obligation to bargain, however, expressly states that "neither party may be compelled to agree to a proposal or be required to make a concession." 26 M.R.S.A. §965(1)(C). A holding that the County must make a counterproposal on one particular item, or must agree to include language on a mandatory subject that the Union feels strongly about, is equivalent to compelling it to agree to a proposal or make a concession.

It is important for both parties to understand that whether a party has failed to bargain in good faith involves the assessment of many factors simultaneously. The analysis used by this Board is well-established:

A bad faith bargaining charge requires that we examine the totality of the charged party's conduct

² Section 965(1) ends with a paragraph describing the 120-day notice requirement when the Union's proposals will require appropriations, a provision that is not at issue here.

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.

Here, the "totality of the circumstances" analysis is not a very extensive task because the parties had only three negotiation sessions. Nonetheless, the evidence is that during the three meetings, the County made some proposals and counter-proposals, explained its positions on various issues, and was prepared to present further proposals when the Union ended the third meeting. The County's conduct demonstrated a sincere desire to reach an agreement. The fact that the County did not offer a counterproposal on one particular item is not a violation of the Act. To conclude otherwise would be inconsistent with both the totality of the circumstances analysis and the express language in §965(1)(E) that "neither party may be compelled to agree to a proposal." The Union's complaint must therefore be dismissed.³

³We also reject the Union's assertion that if the Board of Corrections had the authority to subcontract food services, the County violated the Act by not have the BOC at the table with them. There is

We now turn to the Employer's counterclaim that the Union violated the Act by leaving the meeting and refusing to continue bargaining unless the County bargained over subcontracting. As noted above, the totality of the circumstances test applies unless the party's conduct "fails to meet the minimum statutory obligations or constitutes an outright refusal to bargain." The evidence is clear that the Union negotiated over several issues but left the third bargaining session stating that they would not continue unless the County bargained over subcontracting, and that they were going to take the next step. There is little additional evidence on this conduct, but most of those present (including the Union) thought this meant the Union would be filing for mediation. There is no evidence in the record that the employer made any effort to resume negotiations after August 19, 2014.⁴ In the absence of evidence that the Union's conduct was more than negotiating bluster, we must dismiss the countercomplaint against the Union alleging a refusal to bargain in good faith.

Likewise, there is no evidence that the Union failed to meet a minimum statutory requirement, such as honoring a 10-day letter requesting bargaining under §965(1)(B) or failing to execute agreements in writing as required by §965(1)(D). Had the County made a formal request to bargain under §965(1)(B), and the Union had refused that request, that would clearly be a failure to meet the minimum statutory requirements and would be a per se

no merit to this argument, as duty to bargain is imposed on the bargaining agent and the public employer, and the Board of Corrections is clearly neither.

⁴The comments of the County's attorney and the Union's representative in closing arguments cannot be considered evidence received by the Board. See MSAD #43 Teachers Assoc. v. MSAD #43 Board of Directors, No. 79-42 at 4, (May 1, 1979) (Section 968(5)(C) prohibits the Board from relying on written briefs containing "facts" not in the record).

violation of the Act.

A request to meet within 10 days is not just for initiating bargaining, but can be used to force a party to the table in other situations, such as when they appear to be at impasse. As this Board observed,

. . . Our Legislature has expressly and unequivocally stated in all [] of our labor relations laws that parties are obligated to meet within ten days after receipt of written notice. This requirement has had a positive effect on labor relations in Maine, as experience has shown that parties frequently make progress in negotiations when meeting pursuant to a ten-day request, even when the parties previously were at impasse.

MSEA v. State, No. 80-09 at 9 (Dec. 5, 1979) (Rejecting State's argument that 10-day request need not be honored when the parties were at impasse).⁵

Whether one of the parties picks up the phone or sends a formal 10-day letter requesting bargaining, it is clear to us that the parties should be back at the bargaining table, with or without the assistance of a mediator. As we are dismissing both the complaint and the countercomplaint, we have no authority to order the parties to go back to the bargaining table, but that is clearly where they should be. We trust that the parties will do so forthwith.

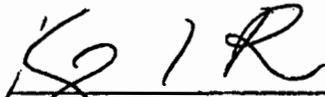
⁵For further discussion of the failure to meet within 10 days, see Washburn Teachers Assoc. v. Barnes and MSAD #45, No. 83-21, at 8 (Aug. 24, 1983) (Finding a violation where the employer did not meet until 21 days after receipt of the 10 day request) and East Millinocket Teachers Assoc. v. East Millinocket School Committee, No. 79-24 at 6 (April 9, 1979) (Rejecting employer's claim that it had no duty to bargain during the term of an agreement and cautioning "Since a misunderstanding of the law [...] will not excuse the duty to meet, a party should therefore not lightly undertake the decision to refuse to meet when requested by a 10 day letter.").

ORDER

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 MRSA §968(5), we hereby DISMISS the Complaint filed by the Teamsters Union Local 340 and DISMISS the Countercomplaint filed by Cumberland County.

Dated this 18th day of February, 2014.

MAINE LABOR RELATIONS BOARD



Katharine I. Rand
Neutral Chair



Robert W. Bower, Jr.
Employer Representative



Amie M. Parker
Employee Representative