
ELIOT POLICE ASSOCIATION,)
)
 Complainant,)
)
 v.)
)
 TOWN OF ELIOT,)
)
 Respondent.)

DECISION AND ORDER

The Eliot Police Association ("Union" or "Association") filed this prohibited practice complaint on February 22, 2016, against the Town of Eliot, alleging that the Town violated 26 MRSA §964(1)(E) of the Municipal Public Employee Labor Relations Law ("Act"). Specifically, the Complaint alleges that the Town failed to bargain in good faith by raising new issues at the bargaining table after the third negotiating session in violation of the parties' bargaining ground rules.

The Board held an evidentiary hearing on November 22, 2016. Daniel R. Felkel, Esq., represented the Eliot Police Association and Ann M. Freeman, Esq., represented the Town of Eliot. Both parties were able to examine and cross-examine witnesses, offer documentary evidence at the hearing, and submit written argument. Chair Jeffry J. Knuckles presided at the hearing, with Employer Representative Richard L. Hornbeck and Employee Representative Amie M. Parker. The parties' post-hearing briefs were both filed by December 23, 2016, and the Board deliberated this matter on January 17, 2017.

JURISDICTION

The Eliot Police Association is a bargaining agent within the meaning of 26 MRSA §962(2), and the Town of Eliot 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).

FINDINGS OF FACTS

1. The Eliot Police Association and the Town of Eliot are parties to a collective bargaining agreement for the Police Department which expired on July 1, 2015.
2. The parties had their first negotiation session for a successor agreement on February 13, 2015. At this meeting, the Union's lead negotiator, Mr. Daniel Felkel, offered a set of proposed negotiating ground rules for the parties to adopt.
3. Mr. Dana Lee, the Town Manager, was the lead negotiator for the Town. The other members of the Town's negotiating team were the Chief of Police and two members of the Board, Mr. Roland Fernald and Mr. Grant Hirst.
4. In addition to Mr. Felkel, the Association's negotiating team included Officer Brian Delaney and Officer Michael Grogan.
5. The ground rules were signed on February 13, 2015, by Mr. Felkel for the Association and by Mr. Lee for the Town. The ground rules covered such topics as timing and frequency of negotiating sessions, confidentiality, bargaining authority, and a requirement that both sides ratify any agreement reached by the bargaining teams. In addition, paragraph 6 of the ground rules stated:

No new proposals may be added to the package after the third negotiation session, unless

agreed to by the parties.

6. The parties met several times during March, April and May of 2015. By the beginning of June, the parties had reached a tentative agreement on the terms of their successor collective bargaining agreement. Pursuant to the parties' ground rules, ratification by both sides was necessary for the agreement to become effective.
7. The Association ratified the tentative agreement soon after June 1, 2015.
8. Mr. Fernald and Mr. Hirst were members of the Town's negotiating team through June when the parties reached their tentative agreement.

Sometime in June of 2015, the Town's annual election was held, with two open seats on the Select Board. Mr. Hirst lost his bid to be re-elected and his seat was won by Mr. Pomerleau. Mr. Beckert was re-elected to the other open seat.

9. Mr. Pomerleau ran on a platform focussed on ensuring that everyone's taxpayer dollars were wisely spent.
10. Once elected, Mr. Pomerleau took Mr. Hirst's place on the Town's negotiating committee.
11. On July 9, 2015, the Board of Selectmen met in executive session to have the details of the tentative agreement explained to them. Mr. Pomerleau, as a new Board member, and Board Member Davis were concerned that they had not been briefed sufficiently on the substance of negotiations. Present at the July 9, 2015, meeting of the Select Board was Town Manager Dana Lee, and Board Members Robert Pomerleau, Rebecca Davis, Roland Fernald, Steve Beckert and Jack Murphy.
12. As a result of this meeting in executive session on July 9,

2015, the Board voted "that MAP Bargaining Unit be asked back to the negotiating table to further review some of the contract provisions."

13. The Town Manager summarized the concerns and questions raised during the July 9, 2015, meeting in a document titled "Concerns about Ratification of CBA." The document consisted of 15 concerns, listed by the proposed agreement's article and section number. The introductory line stated, "There were some questions and some objections to the draft contract, and I would ask the union to meet to go over them to avoid a potentially adverse vote by the Board of Selectmen." Many of the questions related to proposed changes to wages, benefits or contractual language, but some related to articles in the proposed agreement that were unchanged from the prior agreement.
14. The Town Manager provided the document to the Association's attorney, who inserted his responses and explanations in underlined text. The Association's attorney included in his written response an objection to the Town "seeking to introduce completely new topics that were never discussed before at negotiations," in violation of the ground rules.
15. The parties met on July 29, 2016, to discuss these concerns. The discussions were mostly each party explaining its positions and rationales to the other, and there was little that could be considered negotiation. The Association repeated its assertion that the Employer's proposals were in violation of ground rule #6. The Association requested that the Town's negotiating team take the tentative agreement back to the full Select Board for a ratification vote.
16. The Board of Selectmen unanimously rejected the proposed agreement on August 13, 2015, and voted to ask the Association

to return to the bargaining table.

17. After the Board rejected the proposed agreement, Mr. Fernald asked to be relieved of his duties on the negotiating team. He was replaced by Ms. Davis.
18. Sometime in September, 2015, the Town Manager met with the Town's negotiating team and suggested that they reduce the concerns listed in the document provided to the Union in July to those issues that were particularly important to them. As a result, the two most important issues were identified as "Art 9, § 1: Wages and COLA increases," and "Article 20, 29, 30 & Related: Rate of Time Off Earned."
19. The parties met a couple of times to try to negotiate over the articles that were of the greatest concern to the employer, but made no progress. The Association continued to assert that the Town was raising new issues that were not allowed by paragraph 6 of the negotiating ground rules.
20. The parties met for mediation in late 2015. The Association continued to object to the introduction of new issues based on its contention that the ground rules were still in effect. The parties did discuss the possibility of reducing the term of the contract from three years to two in order to make the compensation changes more acceptable, but they were unable to resolve their differences.
21. On July 6, 2016, the parties filed a "Mutual Request to Waive Fact Finding" with the Board's Executive Director. This is essentially a request to proceed directly to interest arbitration, the final step of the impasse-resolution procedure established by the Act. A panel of the Board of Arbitration and Conciliation has been being selected for this purpose and

a hearing is scheduled for February 27, 2017.¹

DISCUSSION

In broad terms, the issue before the Board is the circumstances under which a violation of a ground rule can be considered a violation of the Act. Specifically, the question presented is whether a negotiating ground rule that restricts the parties' ability to bring new issues to the negotiating table after the third negotiation session can remain effective after the parties' tentative agreement is rejected in good faith. The Complaint charges that the Town's insistence on bringing new issues to the table violated the parties' ground rule and constituted a failure to bargain in good faith in violation of §964(1)(E).

Determining whether a party has bargained in good faith requires consideration of many factors, of which adherence to ground rules is just one. This Board's established standard 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 ground-rules, 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

¹ The Board has taken official notice of the status of this request in accordance with Title 5, §9058.

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).

In many of this Board's cases involving a violation of a ground rule, the violation was merely one factor of many supporting the Board's conclusion that a party's overall conduct constituted bad faith bargaining. For example, in Sanford Fire Fighters Assoc. v. Sanford Fire Commission, the employer's categorical refusal to adopt ground rules was one of many other factors, including its take-it-or-leave-it proposal, indicating bad faith bargaining. No. 79-62, at 7-8 (Dec. 5, 1979). In Teamsters v. Town of Bar Harbor, the employer's refusal to comply with a ground rule requiring the reduction of tentative agreements to writing was evidence of bad faith, as was its unilateral rejection of several tentative agreements. No. 82-35 at 9-10 (Nov. 2, 1982). In Caribou School Department, which the Complainant cites as supporting its position that a ground rule violation alone can constitute bad faith bargaining, the Board and the Law Court cited several factors beyond the ground rule violation in concluding that the Employer did not bargain in good faith. In that case, the history of negotiating one-year agreements and the employer's agreement to continue that practice led to the Board's conclusion that the employer's last-minute attempt to change the duration of the agreement was a failure to bargain in good faith. Caribou School Department v. Caribou Teachers Association and MLRB, 402 A.2d 1279, 1283 (1979).

The Board has issued two decisions in which the complainant

alleged that violation of a ground rule alone constituted bad faith bargaining.² In both of those cases, the Board looked at the purpose of the ground rule and the circumstances of the breach as part of its analysis. A review of these two cases is instructive.

In Orono, the Town filed a complaint against the union charging that the union's disclosure of negotiating positions to the press violated the parties' confidentiality ground rule and constituted bad faith bargaining. Town of Orono v. IAFF Local 3106, Orono Fire Fighters, No. 11-11 (Aug. 11, 2011). The ground rule at issue required confidentiality of negotiations and prohibited any sort of press releases regarding bargaining. Id. at 3. The union president emailed the newspaper suggesting an article on the negotiations and specifying the positions of the parties on the three issues scheduled for fact finding. The Board noted that the email was initiated and sent 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. Id. at 12. The Board concluded that the union president's actions violated the Act because they were a flagrant violation of the ground rule intended to substantially alter the nature of the bargaining process the parties had agreed upon. Id.

In its analysis, the Orono Board considered a ground rule concerning public disclosures of bargaining positions or tactics to be substantively different than other types of ground rules. The Board noted that parties' are free to negotiate a ground rule requiring strict confidentiality or one allowing full disclosure of the negotiating process. The key is to stay within the agreed-

² In a third case, a counterclaim alleged the union violated the Act by ignoring a ground rule that required 48 hours' notice to bring a consultant into negotiations. The Board held such a breach of a ground rule did not constitute bad faith bargaining. Fox Island Teachers Assoc. v. MSAD No. 8, No. 81-28 at 9-10 (April 22, 1981).

upon framework:

. . . 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. . . . When both sides are proceeding from the start of 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.

Orono, No. 11-11 at 10, 11-12.

In Massabesic, the two ground rule violations were not so egregious. The union alleged that the school superintendent violated the ground rule on the confidentiality of negotiations when he presented information on the budget to the school board, as required by Maine's statutes governing the school budget process. Massabesic Education Assoc. v. RSU 57 Board of Directors, No. 11-17 (Nov. 10, 2011). An essential part of explaining the budget was the underlying assumption of flat funding for employee salaries. Id. at 10. The Board held that there was insufficient evidence to prove that the superintendent disclosed information obtained during negotiations in his presentation to the school board, thus the Board was unable to conclude a breach had occurred. Id.

A second alleged violation of the confidentiality ground rule in Massabesic involved a grievance-related email sent by the superintendent to several people, including one person not on either negotiating team. In that email, the superintendent disclosed the union's negotiation position on the particular issue involved in the pending grievance. The Board held that this was a clear violation of the ground rule, but the disclosure was limited

and it was not sufficient to constitute a violation of the law by itself. Massabesic, No. 11-17 at 11.

In the present case, the Complainant charges that the Town's violation of ground rule #6, which prohibited offering new proposals after the third negotiation session, was in itself a violation of §964(1)(E). The proper analysis must start with the purpose of the ground rule at issue, and its role in furthering the collective bargaining process. We will address merits of this charge at two distinct points in time: before the Town rejected the tentative agreement and after rejection.

Ground rules are a set of rules adopted by parties to govern the mechanics of negotiations. The purpose of ground rules is to smooth the process of negotiating, with the goal of increasing the chances of the parties reaching an agreement. Typically, ground rules cover the manner of scheduling negotiating sessions, the composition of bargaining teams, the timing of presentation of bargaining proposals, confidentiality issues, disclosures to the press, who has authority to speak for the bargaining team and sign tentative agreements, and the reservation of the right to ratify the full agreement.

A ground rule limiting the time during which new proposals may be introduced, such as ground rule #6 in the current case, provides assurance to the parties that as they proceed through negotiations, their calculation of the balance they may achieve between gains and concessions will not be disrupted by the late addition of new issues. The Law Court made this point in Caribou when it stated that "a delay in introducing a contract issue while the other party proceeds under the impression that the issue is settled is evidence of dilatory tactics and bad faith." Caribou School Department v. Caribou Teachers Assoc., 402 A.2d 1279, 1283

(Me. 1979). Thus, it can be said that such a ground rule fosters collective bargaining by giving the parties the ability to focus exclusively on those issues that are on the table. This facilitates productive bargaining and minimizes disruptions.

In the present case, the record indicates that following the bargaining session at which the parties reached a tentative agreement, the Town's newly-constituted Select Board discussed the provisions and identified various concerns and questions they wanted to address with the Union. These concerns were put in writing, the Union responded in writing, and the parties met to discuss these issues. Each party explained its respective position on each of the issues and the Union indicated that ground rule #6 prohibited the Town from bringing new issues in at that stage. There is, however, no evidence that the Town insisted that these items be negotiated. At this point, the discussion ended when the Union asked the Town's negotiating team to take it to the full Select Board for the ratification vote, which it did. We do not consider this conduct to have violated the ground rule--the Town was raising concerns, not demanding that new issues be negotiated.

Before proceeding, we note that the Complaint in this case alleges only that the Town failed to bargain in good faith by violating ground rule #6 of the parties' negotiating ground rules. We emphasize that, in most circumstances, rejection of a tentative agreement and the party's conduct thereafter must be examined carefully for evidence of bad faith. The question presented to the Board here, however, is limited to the violation of one specific ground rule.

A proper analysis of the conduct of the parties after the Town rejected the tentative agreement must take into account the

effect of the continued operation of ground rule #6. As noted above, the purpose of ground rule #6 was to facilitate collective bargaining. While such a ground rule has a salutary effect during the negotiating process, once one of the parties has rejected a tentative agreement in good faith, the impact of restricting the issues that can be negotiated only serves to impede the bargaining process. Here, the Select Board's good-faith rejection of the tentative agreement is a fundamental statement signaling a need for the parties to be open and able to consider alternatives. The continued imposition of ground rule #6 will impede, not foster, productive bargaining. We conclude that in order to enable fruitful bargaining after rejection of a tentative agreement, all issues that were on the table as well as those that formed the basis of the good-faith rejection of the tentative agreement must be permitted. We hold, therefore, the Town of Eliot did not fail to bargain in good faith in violation of 964(1)(E) after its good-faith rejection of the tentative agreement by attempting to bargain over issues that had not been raised during the first three negotiating sessions.

We encourage the parties to return to the bargaining table and attempt to reach an agreement in light of the Board's conclusions. We note that the parties filed a "Mutual Request to Waive Fact Finding" prior to the evidentiary hearing in this matter and that an interest arbitration hearing is scheduled for February 27, 2017. We do not think it would be productive to hold the parties to their agreement to waive fact finding. To that end, we will instruct the Executive Director of the Board to allow either or both parties to withdraw their request to proceed directly to interest arbitration if either believes mediation or fact finding would be beneficial. Such a request to withdraw should be made to the Board's Executive Director by February 17,

2017. If both parties still want to proceed to interest arbitration, that will be permitted.

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), the complaint is dismissed.

Dated at Augusta, Maine, this

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 MRSA §968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Jeffry J. Knuckles
Chair

Richard L. Hornbeck
Employer Representative

Amie M. Parker
Employee Representative