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| WESTBROOK SCHOOL DEPARTMENT, | ) |          |
|                              | ) |          |
| Complainant,                 | ) |          |
|                              | ) | DECISION |
| v.                           | ) | AND      |
|                              | ) | ORDER    |
| WESTBROOK EDUCATION          | ) |          |
| ASSOCIATION, MEA/NEA,        | ) |          |
|                              | ) |          |
| Respondent.                  | ) |          |
| _____                        | ) |          |

On May 10, 2018, the Westbrook School Department filed a prohibited practice complaint alleging that the Westbrook Education Association failed to "negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration," the mandatory subjects of bargaining, thereby violating §964(2)(C) and (E) of the Municipal Public Employees Labor Relations Act. 26 M.R.S. §961 et seq. (the "Act"). The School Department contends that nine of the issues the Association presented to the fact-finding panel are not mandatory subjects of bargaining, while the Association asserts that the proposals are mandatory subjects of bargaining. It is well established that insistence on non-mandatory subjects beyond the convening of fact finding is a failure to bargain in good faith as required by §965(1)(C) and (1)(E). SAD #22 Non-Teachers Ass'n v. SAD #22 Bd. Of Dir., No. 79-32 at 8 (July 30, 1979). The Complainant has requested an expedited hearing on this matter as a second day of fact finding is scheduled for June 8, 2018. As a remedy, the School Department asks the Board to "order the Association to withdraw all proposals involving

non-negotiable matters of educational policy and all other non-mandatory proposals from its list of issues in controversy before the fact finding panel."

In order to address this complaint in a timely manner, the parties agreed that the facts set forth in paragraphs 17 through 23 of the complaint are admitted and that the recitation of the Association's proposals in paragraph 19, sub-paragraphs (a) through (i) is accurate. As directed by the Executive Director, the parties submitted written argument addressing the negotiability of each proposal separately. The parties were also permitted to submit reply briefs, the last of which was filed on May 21, 2018. Tom Trenholm, Esq., and Connor Schratz, Esq., represented the Westbrook School Department throughout this proceeding, while Gregory Hannaford represented the Westbrook Education Association. The Board met to deliberate this matter on May 24, 2018.

#### JURISDICTION

The Westbrook School Department is a public employer within the meaning of 26 M.R.S. §962(7) and the Westbrook Education Association/MEA/NEA is a bargaining agent within the meaning of 26 M.R.S. §962(2) at all times relevant to this complaint. The jurisdiction of the Board to render a decision and order lies in 26 M.R.S. §968(5).

#### FACTS

The parties agree that the following facts, as set forth and numbered in the complaint, are admitted:

17. On May 1, 2018, the parties submitted their prehearing briefs to the fact finding panel.

18. The Association's brief included proposals that Attorney Trenholm had identified as being non-mandatory subjects of bargaining.

19. The proposals are listed below:

a. Article 6 (B): If the normal teacher work day is extended due to changes in the student day, extension of hours, and/or additional assigned work outside of the teacher's typical duties as required by school administration, then each impacted teacher shall have added to their salary the dollar amount equal to the rate of 1/7 of his/her per diem rate. It is understood that the typical teacher duties include being available to help students outside of the school day as needed would not be subject to this provision. This time is based on the reasonable judgment of teachers.

b. Article 6(D)(1): Teachers will be provided with planning time based on school and class schedule. Every effort will be made to develop a schedule that includes approximately 45 minutes a day or 225 minutes per week of preparation time in an equitable/fair manner. Dailey preparation times will be the norm [sic]. Administrators shall not interrupt this time except for emergencies. Teachers will normally be provided with a minimum of 225 minutes of preparatory time each full school week (this minimum is calculated by multiplying 45 minutes times five days in the regular work week). If an impacted teacher has less than the equivalent of one (1) 45 minute preparation period per day, he/she shall have added to their salary the dollar equal to the rate of 1/7 of his/her per diem rate.

c. Article 8(A): The Administration and supervising officials will make a reasonable effort to equalize the teaching loads and minimize the number of preparations. Middle School and High School teachers who are required to teach more than two (2) preps within a single subject area (i.e. biology, chemistry, physics, natural sciences) shall each receive an additional ten (10) days of per diem for each

additional prep to compensate for the additional preparation and work required for such assignment.

- d. Article 9(A): The Administration and supervising officials will make a reasonable effort to equalize class size and case load, taking into consideration such factors as age of student, mode of instruction, and subject taught, where applicable. Teachers who have more than 15 students Kindergarten or 18 students in first through twelfth grade in any class shall receive one seventh (1/7) his/her per diem rate for class to compensate for the additional workload.
- e. Article 9(B): Specialists who have more than an 18 student caseloads shall receive one seventh (1/7) his/her per diem rate for each additional student assigned to compensate for the additional workload.
- f. Article 13(C): The use of regular teachers as substitute teachers shall be avoided whenever possible. At the K-5 level, if a teacher has to substitute for a specialist, said teacher shall be provided an equal amount of time as soon as possible by the principal to be used as planning time compensated at the rate of 1/7 of their per diem rate. Under all other circumstances, if teachers covered by this Agreement are used as substitutes for at least one full period, said teachers shall be compensated at the rate of 1/7 of their per diem.
- g. Article 15(F): Pursuant to Title 20-A, Chapter 508, evaluations conducted and effectiveness ratings resulting implementation under Chapter 508 shall be performed in good faith and shall be consistent with the Teacher Evaluation and Professional Growth system developed by the initial group of Stakeholders and adopted by the Board.
- h. Article 15(G): Teachers of Record for students who are taught by other personnel directed by the district shall not be held responsible for any educational impact on the students. Furthermore, data or evidence based on student

performance from this class or classes shall not factor into the evaluation of the Teacher of Record.

- i. Article 17(F)(3): Any employee whose religious affiliation requires the observation of holidays other than those scheduled in the school calendar shall be excused with pay by the supervisor.

#### DISCUSSION

Section 965 of the Act establishes the parties' mutual obligation to bargain, which includes the mutual obligation to participate in good faith in the impasse-resolution procedures of mediation, fact finding and interest arbitration. Section 965, subsection (1) defines collective bargaining in five paragraphs. Paragraph (C),<sup>1</sup> at the heart of this case, establishes the mutual obligation:

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;  
(emphasis added)

The School Department contends that most of the Association proposals at issue are non-negotiable because they are matters of educational policy; for one proposal, the School Department argues that the proposal is not a

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<sup>1</sup>Section 965(1)(E) is also implicated, as it requires both parties "To participate in good faith in the mediation, fact-finding and arbitration procedures required by §965." Paragraphs A, B and D require the parties to meet at reasonable times, to meet within 10 days of a written request to bargain, and to execute in writing any agreements.

mandatory subject of bargaining because it would be unconstitutional if implemented.

Before embarking on the task of determining whether the proposals are non-mandatory subjects of bargaining, we note the following:

- The Board's job is to determine whether the conduct at issue constitutes a violation of the Act. Our rulings on each proposal are strictly legal conclusions and do not reflect any judgment on the merits of the proposal. See, e.g., Mt. Abrams Teachers Ass'n v. MSAD No. 58, No. 15-09 at 23 (July 29, 2015).
- Section 965(1)(C) requires the parties "to confer and negotiate in good faith [. . . ] except that by such obligation neither party may be compelled to agree to a proposal or be required to make a concession."
- In 1997, the Law Court held that because 965(1)(C) expressly states that "public employers of teachers shall meet and consult but not negotiate with respect to educational policies", "it prohibits the school district from negotiating with teachers about educational policy" and, accordingly, "educational policy decisions are not subject to the grievance and arbitration procedure". SAD No. 58 v. Mount Abram Teachers Ass'n, 1997 ME 219 ¶5, 704 A.2d 349, 352; accord, RSU No. 5 v. Coastal Education Ass'n, 2015 ME 98, ¶18.
- Inclusion of a non-mandatory or non-negotiable subject of bargaining in a collective bargaining agreement does not make it a mandatory subject of bargaining. See, e.g., SAD #22 Non-Teachers Ass'n, No. 79-22 at 7; Sanford Fed. of Teachers v. Sanford School Committee, No. 84-13 at 6 (March 20, 1984).

With these statutory conditions in mind, we conclude that the Association has violated the Act by refusing to remove from the "issues in controversy" submitted to the fact-finding panel certain proposals that are matters of educational policy and therefore non-negotiable.

Our conclusion with respect to each provision objected to by the School Department is addressed below in the order presented in the complaint:

ITEM #1.

**Article 6 (B):** If the normal teacher work day is extended due to changes in the student day, extension of hours, and/or additional assigned work outside of the teacher's typical duties as required by school administration, then each impacted teacher shall have added to their salary the dollar amount equal to the rate of 1/7 of his/her per diem rate. It is understood that the typical teacher duties include being available to help students outside of the school day as needed would not be subject to this provision. This time is based on the reasonable judgment of teachers. [Complaint Par. 19(a).]

The proposed Article 6(B) includes matters of educational policy and the Association's refusal to remove this proposal from the list of issues in controversy submitted to the fact-finding panel constitutes a refusal to bargain. SAD #22 Non-Teachers Ass'n, No. 79-32 at 8 (to insist on a non-mandatory subject of bargaining is equivalent to refusing to bargain about mandatory subjects.)

The teacher work day is a matter of educational policy.<sup>2</sup>  
City of Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 304 A.2d 387, 414 at 420 (Me. 1973) (Wernick, J., concurring in part

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<sup>2</sup> We note that we can find no support in the law for the Association's position that, to constitute educational policy, a matter must actually have been the subject of prior decision-making by elected officials. To the extent the Association maintains that the law should be different, for policy reasons, it must direct those arguments to the Legislature.

and dissenting in part). The final sentence appears to delegate to the teacher a determination of the length of the teacher work day. In addition, unlike the proposal in Lewiston relied upon by the Association, this provision lacks a defined standard from which to determine when a change has occurred that warrants additional compensation. See Lewiston Teachers Ass'n v. Lewiston School Committee, No. 86-04 (June 30, 1986). In Lewiston, the Board concluded that the proposed compensation for work in excess of seven hours per day was a negotiable matter as it did not require the school to bargain (after the meet-and-consult process<sup>3</sup>) over its right to determine the length of the teachers' work days. Lewiston, No. 86-04 at 19. Here, the proposal would result in the arbitrator, not the school department, making decisions defining the educational policy issue of the "normal teacher work day" and the "teacher's typical duties."

ITEM #2.

**Article 6(D)(1):** Teachers will be provided with planning time based on school and class schedule. Every effort will be made to develop a schedule that includes approximately 45 minutes a day or 225 minutes per week of preparation time in an equitable/fair manner. Dailey preparation times will be the norm [sic]. Administrators shall not interrupt this time except for emergencies. Teachers will normally be provided with a minimum of 225 minutes of preparatory time each full school week (this minimum is calculated by multiplying 45 minutes times five days in the regular work week). If an impacted teacher has less than the equivalent of one (1) 45 minute preparation period per day, he/she

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<sup>3</sup> The purpose of the meet-and-consult requirement "is to ensure that the School Board, representing the interests of the citizens, has the authority to make educational policy, with an opportunity for input from the teachers prior to its implementation." Mt. Abram Teachers Assoc. v. Southern Aroostook Teachers Assoc. v. Southern Aroostook Community School Committee, No. 80-35 and 80-40 at 15 (April 14, 1989).

shall have added to their salary the dollar equal to the rate of 1/7 of his/her per diem rate. [Complaint Par. 19 (b).]

The proposed Article 6(D)(1) includes matters of educational policy and the Association's refusal to remove this proposal from the list of issues in controversy submitted to the fact-finding panel constitutes a refusal to bargain.

Teacher preparation or planning time is a matter of educational policy. See, e.g., Sanford Fed. of Teachers v. Sanford School Comm., No. 84-13 at 5, and Caribou School Dept. v. Caribou Teachers Ass'n, No. 76-15 at 3-4 (Jan. 19, 1977). In all but the last sentence, this proposal requires the School Department to cede its right to determine the number of planning periods. The proposal requires daily prep periods as "the norm" and would require the school to make "every effort" to provide a minimum of 225 minute of preparation time per week for all teachers. The qualifying phrases such as making "every effort" and "will normally be provided" do not alter the non-negotiable status of this proposal because such vague standards will inevitably result in an arbitrator making educational policy decisions. See, e.g., Sanford, No. 84-13 at 5 (Proposal to require daily preparation periods "whenever possible" was educational policy and non-negotiable).

ITEM #3.

**Article 8(A):** The Administration and supervising officials will make a reasonable effort to equalize the teaching loads and minimize the number of preparations. Middle School and High School teachers who are required to teach more than two (2) preps within a single subject area (i.e. biology, chemistry, physics, natural sciences) shall each receive an additional ten (10) days of per diem for each additional prep to compensate for the additional preparation and work required for such assignment. [Complaint Par. 19(c).]

The proposed Article 8(A) includes matters of educational policy and the Association's refusal to remove this proposal from the list of issues in controversy submitted to the fact-finding panel constitutes a refusal to bargain.

The first sentence requiring the School Department to "make a reasonable effort to equalize teaching loads and minimize the number of preparations" constrains the School Department's statutory prerogative to make those choices of educational policy. Caribou, No. 76-15 at 3; Biddeford, 304 A.2d at 420; Sanford, No. 84-13 at 5.

ITEM #4.

**Article 9(A):** The Administration and supervising officials will make a reasonable effort to equalize class size and case load, taking into consideration such factors as age of student, mode of instruction, and subject taught, where applicable. Teachers who have more than 15 students Kindergarten or 18 students in first through twelfth grade in any class shall receive one seventh (1/7) his/her per diem rate for class to compensate for the additional workload. [Complaint Par. 19(d).]

The proposed Article 9(A) includes matters of educational policy and the Association's refusal to remove this proposal from the list of issues in controversy submitted to the fact-finding panel constitutes a refusal to bargain.

The first sentence requiring the School Department to "make a reasonable effort" to equalize class size and case load interferes with its right to determine matters of educational policy. See, Biddeford, 304 A.2d at 420 (Class size and the number of hours the teacher will be required to teach are inseparable from matters of educational policy.)

ITEM #5.

**Article 9(B):** Specialists who have more than an 18 student caseloads shall receive one seventh (1/7) his/her per diem rate for each additional student assigned to compensate for the additional workload. [Complaint Par. 19(e).]

This proposed Article 9(B) does not require the School Board to negotiate over a matter of educational policy; it simply imposes a specified wage supplement in those instances where the student caseloads exceed the specified limit. Whether this proposal purports to address the effects of an existing practice or anticipates the possibility of a future change not presently contemplated, it is essentially a salary proposal, which is a mandatory subject of bargaining in the context of these negotiations for a successor collective bargaining agreement. To be sure, this proposal--if accepted and incorporated into the parties' next collective bargaining agreement--could have the effect of driving the Board's decision-making with respect to specialist caseloads, likely a matter of educational policy. While this financial implication may be a barrier to agreement on the proposal at the bargaining table, it does not affect the proposal's negotiability. The Union's insistence on presenting this proposal to the fact-finding panel does not violate the Act.

ITEM #6.

**Article 13(C):** The use of regular teachers as substitute teachers shall be avoided whenever possible. At the K-5 level, if a teacher has to substitute for a specialist, said teacher shall be provided an equal amount of time as soon as possible by the principal to be used as planning time compensated at the rate of 1/7 of their per diem rate. Under all other circumstances, if teachers covered by this Agreement are used as substitutes for at least one full

period, said teachers shall be compensated at the rate of 1/7 of their per diem. [Complaint Par. 19(f).]

The proposed Article 13(C) includes matters of educational policy and the Association's refusal to remove this proposal from the list of issues in controversy submitted to the fact-finding panel constitutes a refusal to bargain.

A school's decision on whether or when to use regular teachers as substitute teachers is a matter of educational policy, and a proposal that the use of regular teachers as substitutes "shall be avoided whenever possible" is not negotiable. The second sentence of the proposal would require the principal to provide release time from normal teaching duties for K-5 teachers who have been required to substitute for a specialist. The second sentence is non-negotiable, as teacher assignments during the school day while students are present is a matter of educational policy. MSAD No. 43 at 14.

ITEMS #7 & #8.

**Article 15(F):** Pursuant to Title 20-A, Chapter 508, evaluations conducted and effectiveness ratings resulting implementation under Chapter 508 shall be performed in good faith and shall be consistent with the Teacher Evaluation and Professional Growth system developed by the initial group of Stakeholders and adopted by the Board. [Complaint Par. 19 (g).]

**Article 15(G):** Teachers of Record for students who are taught by other personnel directed by the district shall not be held responsible for any educational impact on the students. Furthermore, data or evidence based on student performance from this class or classes shall not factor into the evaluation of the Teacher of Record. [Complaint Par. 19 (h).]

The proposed Articles 15(F) and 15(G) include matters of educational policy and the Association's refusal to remove these

proposals from the list of issues in controversy submitted to the fact-finding panel each constitutes a refusal to bargain. The substance of teacher evaluations is a matter of educational policy. See, e.g., Caribou, No 76-15 at 4, Lewiston, No. 86-04 at 24-26.

**Article 17(F)(3):** Any employee whose religious affiliation requires the observation of holidays other than those scheduled in the school calendar shall be excused with pay by the supervisor. [Complaint Par. 19(i).]

This proposed Article 17(F)(3) does not involve any matter of educational policy. As the Board has no jurisdiction to decide constitutional matters, we conclude that the Union did not violate the Act by insisting on presenting this issue to the fact-finding panel. Sanford Police Assoc. v. Town of Sanford, No. 09-04, Interim Decision at 4 (Jan. 28, 2009).

In summary, we conclude that the Association has violated §964(2)(B) of the Act by failing to bargain collectively with the Westbrook School Department as required by §965.

#### 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)(C), we conclude the Association violated the Act and we hereby ORDER the Union to:

1. Cease and desist from insisting on presenting matters of educational policy to the fact-finding panel;

2. Withdraw any proposals we have found to consist of educational policy.

Dated at Augusta, Maine, this 30th day of May, 2018

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Katharine I. Rand  
Chair

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Robert W. Bower, Jr.  
Employer Representative

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Amie M. Parker  
Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. § 968(5)(F) to seek a 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 80(C) of the Rules of Civil Procedure.