IAFF, LOCAL 1009 AND CITY OF WORCESTER, MUPL-2018 (12/15/75).

(50 Duty to Bargain)
53.51 press releases and publicity
54.7 permissive subjects
(70 Union Administration and Prohibited Practices
76. Refusal to bargain in good faith
(100 Impasse)
104. Fact-Finding
109. Police and Firefighter Final Offer Proceedings

DECISION

Statement of the Case

Pursuant to a Complaint of Prohibited Practice filed on March 31, 1975 by the City of Worcester, the State Labor Relations Commission ("the Commission") issued its Complaint of Prohibited Practice on August 8, 1975, alleging that the International Association of Firefighters, Local 1009, AFL-CIO ("the Union"), in violation of G. L. c.150E, Section 10(b) (2) and (1), failed and refused to bargain in good faith by insisting to impasse upon nonmandatory subjects of bargaining and, in violation of G.L. c.150E, Section 10(b)(3) and (1), failed and refused to participate in good faith in the Section 9 fact-finding procedures by altering proposals during factfinding, contrary to agreement of the parties; misrepresenting to the factfinder the firefighters' level of wages and benefits; and contrary to the Rules and Regulations of the Board of Conciliation and Arbitration (hereafter "the Board")[1] releasing to the press - between the close of the fact finding hearing and issuance of the fact finder's report - information concerning the contract dispute. Thereafter, a hearing was conducted before Steven C. Kahn, Hearing Officer, on September 8, 1975 at which parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce testimony. Excellent briefs filed by the parties have been carefully considered. Accordingly, upon the entire record herein, the Commission finds:

Findings of Fact

1. That the International Association of Firefighters, Local 1009, AFL-CIO, the exclusive representative for purposes of collective bargaining of firefighters employed by the City of Worcester, is an "employee organization" within the meaning of G.L. C.150E, Section 1.

2. That the City of Worcester, a municipal corporation located in the County of Worcester, within the Commonwealth of Massachusetts, is a "public employer" within the meaning of G.L. c.150E, Section 1.

In March 1974 the City and Union entered into negotiations for a successor agreement to the contract which, by its terms, was to expire June 30, 1974. In

[1] References to "MBCA", followed by a number (e.g., MBCA 1.10), are to the rules and regulations of the Board.

IAFF, Local 1009 and City of Worcester, MUPL-2018

May 1974, pursuant to the then applicable Ch.149, Section 178K, the parties jointly petitioned the Board to appoint a mediator to assist the negotiations. Thereafter, on July 17, 1974, the Union, pursuant to Ch.150E, Section 9, petitioned the Board to initiate factfinding proceedings, which were conducted before Factfinder Thomas P. Lewis on December 19, 20, 21, 1974 and January 2, 15 and 21, 1975.[2] Briefs were filed by the parties on February 21, and on March 6 a "Motion to Strike", disputing the accuracy of representations in the Union's brief of employee wages and benefits, was submitted by the City and treated by Lewis as a "limited reply brief."[3] With leave of the Fact Finder, the Union on March 17 filed a response to the City's "Motion to Strike." Also on March 17 an article was published in the City of Worcester Evening Gazette, captioned "Fire Fighters Seek 14% Pay Increase", which described the status of negotiations, attributing information to Captain Raymond Whitney, Union president, and D. M. Moschos, counsel for the City. On March 31, as noted above, the City filed with the Commission a Complaint of Prohibited Practice, alleging lack of good faith participation by the Union in the factfinding proceedings. On April 17 Fact Finder Lewis, to whom the parties submitted approximately 40 issues for resolution, filed his report and recommendations, in which he relied upon the guidelines established by the Legislature for Section 4 final-offer binding arbitration. Lewis also observed, in response to a Union suggestion, that "in the nature of things a factfinder must seek to construct a 'package' of recommendations, at least where the issues which separate the parties are many." Of the 40 proposals submitted to the factfinder, the City contends that eight are nonmandatory subjects of bargaining, the submission of which, however, the City failed to protest either during the hearing before the fact finder or in its post-hearing briefs. No collective bargaining agreement has yet been concluded by the parties.

Opinion

In N.L.R.B. v. Borg Warner Corp., 356 U.S. 342 (1958) the Supreme Court ruled that a party's insistence to impasse upon inclusion in a collective bargaining agreement of a nonmandatory subject is a per se violation of its duty to bargain in good faith. Stated otherwise, a party is free to propose a permissive subject for bargaining[4] but may not "insist" upon it as a condition precedent to agreement. While the line between advocacy and insistence is not

[2]The City entered a "special appearance" in the factfinding proceedings, seeking to preserve its right to challenge the validity of the post-impasse procedures established by G.L. c.150E, Section 9 and by Section 4 of Chapter 1078 of the Acts of 1973.

[3]On March 10 the City filed with the Fact Finder a "Motion to Reopen on Ground of Newly Discovered Evidence", accompanied by submission of the evidence which the City hoped to introduce, which the Fact Finder, by letter dated March 18, denied.

[4]By the same token, the "opponent" has no legal obligation to negotiate a nonmandatory subject.

immutably or precisely fixed, private sector precedent establishes that "insistence" means positing the nonmandatory subject matter as a precondition to the negotiation of an agreement. See, e.g., International Longshoremen's Ass'n v. N.L.R.B., 277 F.2d 681, 683 (C.A.D.C., 1960); Philip Carey Mgf. v. N.L.R.B., 331 F.2d 720 (C.A. 6, 1964), cert. denied 379 U.S. 888 (1964). By the same token, encouragement of collective bargaining over permissive subjects, as a mechanism for producing an agreement, requires that voluntary negotiation - without reservation - of a nonmandatory subject not be deemed a waiver of the right subsequently to claim an unlawful "insistence." To conclude otherwise "would penalize a party to negotiations for endeavoring to reach agreement by consenting to bargaining upon issues as to which the Act does not require him to bargain" Kit Mfg. Co., 150 NLRB 662, 671 (1965), enf'd. 365 F.2d 829 (C.A. 9, 1966). As the Fourth Circuit articulated the rationale:

> "A determination that a subject which is nonmandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on nonmandatory matters. Parties might feel compelled to reject nonmandatory proposals out of hand to avoid risking waiver of the right to reject." N.L.R.B. v. Davidson, 318 F.2d 550, 558 (C.A. 4, 1963)

Once an impasse is reached, however, the rationale of the "no-waiver" principle - to encourage bargaining about permissive subjects as a catalyst for agreement on mandatory topics - no longer obtains. Accordingly, no persuasive reason suggests itself for not requiring parties to impasse-resolution proceedings to object to the consideration by a third party of nonmandatory issues in dispute, or be deemed to have waived the objection. Compare Matter of Board of Higher Education of the City of New York, 7 PERB 3042, 3044 (1974); Matter of Yorktown Central School District, 7 PERB 3030, (1974) (The failure to object to the submission to factfinding of nonmandatory bargaining topics constitutes a waiver). On the contrary, a requirement that an employer timely object to consideration by the fact finder of nonmandatory subjects at least serves the salutary purpose of alerting the employee organization that submission of the challenged proposals may trigger the filing of a complaint of prohibited practice, thereby enabling the employee organization to consider withdrawal of the questioned issues in order to avert the risk of a prohibited practice, with the consequence - for the police and fire - of delaying compulsory interest arbitration. (Section 4 of Chapter 1078 of the Acts of 1973) In any event, we submit that the integrity of the dispute-resolution procedures is better preserved by requiring seasonable objections which may encourage the proponent of challenged proposals to narrow the issues and thereby facilitate disposition by the fact finder of perhaps more fundamental disputes separating the parties. Accordingly, in view not only of the undisputed failure of the City of Worcester to object[5] but also of the City's response on

[5]We disclaim, however, reliance upon MBCA 1.11 (1), urged by the Union, which states:

> "Waiver of Objections. Any party to a fact finding hearing who fails to make a timely objection as determined by the fact finder, to infraction of these rules shall be deemed to have waived such objection."

(cont'd.)

the merits to the nonmandatory proposals, we conclude that the Union's submission to the fact finder of allegedly nonmandatory subjects of bargaining did not breach its duty to participate in good faith in the Section 9 factfinding procedures.[6] In so concluding, we recognize the inappropriateness of resolution by the fact finder of the question whether a designated topic is mandatory or permissive,[6a] the determination of which is entrusted to the Commission, subject to limited judicial review. Compare East Chop Tennis Club v. Massachusetts Commission Against Discrimination, ____ Mass. ____, 305 N.E. 2d 507 (1973). The Commission, in turn, anticipates that priority treatment will be accorded complaints filed by a party to fact finding which raise a question of scope of negotiation which the party timely raised before the fact finder. We do not, however, anticipate that disposition of the complaint shall suspend or otherwise delay the fact finding proceedings. Nonetheless, we underscore that the fundamental purpose of the requirement imposed herein is not to secure a prompt resolution of the legal question but merely to afford the proponent of challenged topics an opportunity to reassess its position, as discussed above.

While ruling that the City waived its objection to the Union's challenged conduct, we consider the novel issues presented herein of sufficient public importance to warrant an expression of the Commission's views. The threshhold question is whether the mere submission to the fact finder - over timely objection by the opponent - of nonmandatory topics of negotiation constitutes an unlawful "insistence" thereon. While the New York PERB has answered this question affirmatively,[7] we are of the view that the legality of a challenged submission of permissive topics of negotiation should be evaluated in light of the role that factfinding plays in impasse-resolution and the place it occupies in the statutory framework.

5(cont'd.)
The rule, on its face, applies only to a failure to object to an alleged infraction of Board rules governing the conduct of factfinding proceedings, which do not embrace the question before us.

[6] In view of our disposition of the case, we need not decide, and express no view concerning, the question whether the challenged topics in paragraph five (5) of the complaint are mandatory or permissive subjects of negotiation.

[6a] In this connection we note that MBCA 1.12(A) requires the fact finder to submit "recommendations for the resolution of all issues in dispute between the parties." (infra, p.9) (Emphasis added).

[7] See Matter of Board of Higher Education of the City of New York, supra, in which PERB observed:

"We determine that the test applied by the Supreme Court [in Borg Warner, supra] is the appropriate one to be applied to the duty to negotiate under the Taylor Law. It is, of course, difficult to draw a precise line between appropriate conduct in proposing nonmandatory contract terms and inappropriate insistence upon such a demand. We determine that the insistence on the demand in the instant case went too far when, over the objections of the ...[Employer], it was carried into fact-finding and even beyond fact-finding" (7 PERB 3042 at 3044). Accord: Matter of Yorktown Central School District, supra.

IAFF, Local 1009 and City of Worcester, MUPL-2018

The voluntary impasse-resolution procedures outlined in Section 9 permit either party, following a "reasonable period of negotiation", to petition the Board for a determination of the existence of an impasse. Upon certification of an "impasse", a mediator, either appointed by the Board or agreed upon by the parties, assists in resolving the impasse. If mediation fails, either party may petition the Board to initiate fact finding proceedings. Upon appointment, either by designation of the Board or agreement of the parties, the fact-finder has "full authority and responsibility for the conduct of the fact finding proceedings" (MBCA 1.08). The fact finder also has the power to mediate and to recommend measures for resolving the impasse - a power which, experience indicates, is not infrequently exercised. After the close of the fact-finding hearing, and submission of briefs, if any, the fact finder prepares a report setting forth a statement of the issues presented, a finding of facts and a statement of the recommendations and the rationale therefor (MBCA 1.12(A)). Board rules further require that the report "contain recommendations for the resolution of all issues in dispute between the parties" (MBCA 1.12(A)). Upon issuance, the report serves "as the basis for resolution of the issues at impasse" (MBCA 1.12(E)). If the impasse persists, the Board is requried to make publicly available the fact finder's report, ten days after transmittal thereof, and may, in addition, cause the report to be published "by any of the news media or by any of the publishing services" (MBCA 1.12(E), (F)).

If the impasse is still unresolved, then the dispute is remanded to the parties for further bargaining. Employee organizations representing firefighters or police officers, however, upon expiration of thirty days after publication of the fact finder's report and satisfaction of statutory conditions precedent, are required to utilize "last and best offer" arbitration before a three-member panel for resolution of the dispute.[8] In rendering an award, the panel is requried to "give weight" to ten criteria, the fifth of which is "the decisions and recommendations of the fact-finder." Section 4 of Chapter 1078 of the Acts of 1973 also provides that the

> "...scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign and transfer employees"[9]

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[8]Employee organizations representing public employees other than firefighters or police may utilize "interest" arbitration only if the public employer so agrees.

[9]Compare MBCA 2.02, which states:

> "Section 4 of Chapter 1078 of the Acts of 1973 differentiates between firefighters and police with regard to the scope of arbitration. Firefighters and their employers may arbitrate matters pertaining to wages, hours, standards of productivity and performance, and other terms and conditions of employment; however, 'the scope of arbitration on police matters shall be limited to wages, hours and conditions of employment and shall not include...[designated managerial prerogatives].'"

IAFF, Local 1009 and City of Worcester, MUPL-2018

Analysis of the statutory and regulatory impasse-resolution procedures, outlined above, discloses that factfinding performs a dual function - i.e., "mediation" and "adjudication". Section 9, and Board rules, expressly authorize the factfinder to mediate the dispute, although the frequency of the exercise of the power - and, in particular, the frequency of the successful exercise thereof - has not been empirically demonstrated. By the same token, the fact finder's responsibility, we submit, is, at least in the final analysis, "quasi-judicial" - that is, the adjudication of disputed issues creating an impasse, albeit the disposition is merely advisory and may be rejected by the parties. While factfinding is a hybrid statutory creature, defying glib characterization or classification, the procedure has been aptly described as "fluid, often drifting from 'mediation' to 'arbitration'".[10] The fluidity of the procedure is underscored by provisions of Section 9 - and of the Board's implementing rules - authorizing mediation by the fact finder; directing the parties, in post-fact-finding bargaining, to "consider the report [of the factfinder] as the basis for resolution of the issues at impasse"; requiring public availability of the report; and authorizing publication thereof for the presumptive purpose of discouraging recalcitrance in subsequent negotiations. In short, factfinding is designed to serve as a catalyst for settlement by producing "acceptable" and/or "equitable" resolutions of the issues separating the parties.

The balance - or tension - between the mediatory and judicial functions of fact finding may, however, shift in accordance with its place in the statutory framework. Thus, fire and police disputes unresolved by factfinding or by further negotiation during the statutory thirty days (supra, p. 10) must be resolved by an arbitration panel established under Section 4 and guided in its resolution of the dispute by the criteria enumerated thereunder. One of the criteria to which the panel is required to accord weight is "the decisions and recommendations of the fact-finder" (Section 4(5)). Experience indicates, moreover, that the arbitration panels place substantial - and occasionally controlling - reliance upon the recommendations of the fact-finder and, in fact, frequently eschew independent analysis of the evidence supporting the parties' positions.[10a] In addition, an examination of the docket of the Board of Conciliation and Arbitration discloses that apporximately 2/3 of the fire and police contract disputes that survive factfinding are resolved, not be settlement, but by an award of the panel. Finally, Section 4 of Chapter 1078 of the Acts of 1973 limits the scope of arbitration to mandatory bargaining subjects - a conclusion directly supported by Section 4's express reference to limitation of the police submission to "wages, hours and conditions of employment"[11] and

[10]"Dispute Settlement in the Public Sector: The State-of-the-Art" Report Submitted to the U.S. Dep't of Labor, Division of Public Employee Labor Relations 59-60 (T. Gilroy & A. Sinicropi, eds, 1971) Reprinted in Labor Relations Law in the Public Sector, Smith, Edwards & Clark (eds) (1974) (at p. 811).

[10a]See, for example, Town of Shrewsbury (Police), 1 MLC 2456 (1975).

[11]We submit; that neither Section 4 nor MBCA 2.02 (supra, p. 10, n. 9) was consciously designed to broaden the scope of firefighters' arbitration to include permissive subjects of negotiation.

indirectly supported by similar references in factors four (4) and nine (9), considered by the panel in rendering an award. Since the factfinder's recommendations in police and fire disputes (the majority of which reach compulsory arbitration) have a significant "precedential" value and since, in addition the arbitration panel does determine legal rights and duties,[12] we conclude that a sufficient nexus exists between factfinding and arbitration in police and fire disputes to consider fact finding at least "semi-adjudicative" and therefore similarly to limit the scope of fact finding, absent consent of the parties, to mandatory subjects of bargaining.[12a] In contrast, since experience indicates that only rarely are the voluntary arbitration procedures of Section 9 invoked, and since, in any event, an arbitrator named under Section 9 is not required to comply with Section 4 criteria, we submit that non-police or fire fact finding, which typically serves merely as a prelude to further bargaining, has little or no "precedential" value and therefore significantly less reason to be thus limited in scope.[13] Accordingly, we are of the view that insistence upon submission to the factfinder of nonmandatory subjects of bargaining in police and fire disputes breaches the duty to participate in good faith in the Section 9 fact-finding procedures.

Disposition of the remaining issues requires consideration - for the first time - of the "good faith" requirement of Section 10(b)(3), which provides:

> "It shall be a prohibited practice for an employee organization... to [r]efuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in sections eight and nine."

While the statute provides no definition of "good faith", its general contours have been outlined in litigation of the counterpart requirement, under the National Labor Relations Act, of the duty to bargain collectively. The "good faith" requisite for bargaining in compliance with the statutory mandate "is an intangible factor - a state of mind - provable only by inference or implication from the behavior of the treating parties." Alba Waldensian, Inc. v. N.L.R.B., 404 F.2d 1370, 1371 (C.A. 4, 1968). Accord: N.L.R.B. v. Insurance Agents' Union, 361 U.S. 477, 498 (1960). "Good faith" requires at least "an open and fair mind, and a sincere purpose to find a basis of agreement..." Globe Cotton Mills v. N.L.R.B., 103 F.2d 91, 94 (C.A. 5, 1939). Typically, a lack of "good faith" is predicated, not upon a single element or "infraction", but upon a pattern of behavior or "totality of conduct" which establishes a purposeful design to obstruct agreement. By the same token, we submit that

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[12] Compare G.L. c.30A, Section 1; Jordan March v. Labor Relations Commission, 312 Mass. 597 (1942); City Manager of Medford v. Labor Relations Commission, 353 Mass. 519 (1968); Susan Kemper, Mass. L.R.C. Case No. SUP-28, 1 MLC 1203, 1204-1206 (1974).

[12a] Significantly, Lewis expressly relied upon the guidelines established by the Legislature for Section 4 final - offer arbitration - a reliance which underscores the nexus between factfinding and arbitration.

[13] We do not intend thereby to foreclose an argument that other considerations - e.g., a demonstrable adverse impact upon, or disruption of, the fact-finding process - may warrant a similar limitation of the scope of non-police or fire factfinding to mandatory bargaining subjects.

conformity with the "good faith" requirement of Section 10(b)(3) - and of its counterpart, Section 10(a)(6) - specifically contemplates compliance with MBCA rules and generally contemplates a reasonableness, integrity, honesty of purpose, and desire to seek a resolution of the impasse "consistent with the respective rights of the parties" Majure Transportation Co. v. N.L.R.B., 198 F.2d 735, 739 (C.A. 5, 1952). Mere negligence, inadvertence or incompetence does not establish a violation of 10(b)(3) or 10(a)(6) unless the misconduct is so egregious that it may only be attributable to, or explicable by, a lack of good faith. Finally, we reject the Union's claim that "prejudice" - or third party reliance - is a requisite element of a 10(b)(3) violation since application of the "harmless error" rule, which requires objective demonstration of adverse impact, conflicts with the subjective, core requirement of "good faith."

Tested by these principles, we conclude that the Union did not fail to participate in good faith in the factfinding procedures, as required by G.L. c.150E, Section 10(b)(3) and (1). Thus, as to the Union's alteration of proposals, upon which the City initially relies, the record discloses that during the opening session before the factfinder on December 19, the Union proposed a "change in the night shift differential from a seven percent rate to a 25 cents an hour rate for night tours actually performed." Additionally, the Union proposed a change in the method of computing educational incentive pay - "from a percentage amount for points earned to a flat amount."[14] The City contends that the alteration of the two proposals was in conflict with an agreement of the parties; requried Alphonse G. York, a personnel technician for the City and member of the City's negotiation committee, to devote "several hours" to the recalculation of the cost of Union proposals; and, finally, was designed not only "to harass the City" but also to frustrate factfinding. As a threshhold difficulty, however, the record does not adequately support the existence of an agreement which the alteration of proposals allegedly breached. The City argues that the existence of the concededly oral agreement is adequately reflected in correspondence exchanged in preparation for the factfinding proceedings. Thus, by letter dated November 25, 1974 the Union advised the fact finder that

> "[p]ursuant to our oral discussions, I have forwarded to Mr. Moschos a letter detailing the exact status of Local 1009's bargaining agenda for the purposes of fact finding."

Also on November 25 the Union forwarded to the City its proposed factfinding agenda with the explanation that

> "[p]ursuant to your request as forwarded to me by Fact Finder Lewis, the following constitutes the status of the Local's bargaining agenda for the purposes of fact finding."

Nothing in the foregoing correspondence establishes an agreement that the agenda submitted by the parties be immutable. The City apparently maintains, however, that the reference in the Union letter to the "exact status of Local 1009's bargaining agenda" forecloses, by negative implication, subsequent modification of proposals - an inference that the langauge relied upon does not reasonably support. Indeed, the City's statement in its brief of the alleged oral agreement - which the record nowhere discloses - does not suggest otherwise:

[14]The modified proposals reflected a reduction in the cost of the Union's demands.

IAFF, Local 1009 and City of Worcester, MUPL-2018

> "To enable the parties to prepare comprehensively for the factfinding proceeding, there was an agreement to submit those proposals upon which the parties planned to submit data and argument in advance of the hearings for scrutiny by the opposing party" (Br. 25-26).

Accordingly, we may not conclude that the mere alteration of proposals during factfinding - absent an explicit prohibition by agreement of the parties - evidences a lack of good faith participation in factfinding. Moreover, as noted above, factfinding is designed to be a "fluid" procedure in which - particularly at the outset - modification of proposals reducing the parties' demands should be encouraged, rather than discouraged, in order to create an atmosphere conducive to settlement. In any event, contrary to the City's claim, the alteration of the Union proposals - requiring a recalculation of their cost - did not impose a significant hardship upon the City. Thus, the modification of the Union proposals was submitted at the first day of hearings before the Fact Finder and the City presented its revised cost estimate at the fifth session on January 15, 1975. Additionally, York testified that he devoted only a "few hours" to the recalculation. Finally, the City, relying solely upon the timing of the Union's shift of position, alleges a scheme "to harass the City" or to frustrate fact finding.[15] We do not consider that the timing raises an inference of an ulterior motivation since the revised proposals were submitted at the first session, the hearing was protracted and the City proffered its revised cost estimate one month later at the fifth session. In any event, timing alone will not support an inference that a modification of contract proposals, under the circumstances outlined, is unlawfully motivated.

As to the release of information to the press concerning the contract dispute, the record reveals that on March 17, 1975 - approximately one month before issuance of the Fact Finder's report - an article was published in the City of Worcester Evening Gazette describing the status of the firefighters' contract dispute and containing statements attributed to Captain Raymond Whitney, Union president, and D. M. Moschos, counsel for the City. Whitney disclosed that the firefighters were seeking a 14% raise in the contract negotiations and that the City offered a 1.4% raise during hearings before the fact finder - an offer which Whitney did not consider worthy of discussion. In response to the reporter's inquiry, Whitney also opined that binding arbitration was "inevitable." Moschos, in turn, declined to disclose the City's contract offer, stating only that the City set aside $25,000 to cover the anticipated cost of a settlement. Whitney testified that the reporter contacted him, represented that he had spoken with Moschos and requested Whitney's version of the status of the contract dispute.

Under the foregoing circumstances we conclude that Whitney's release of information to the press did not evidence a lack of good faith participation in fact finding. Thus, Whitney did not initiate the conversation with the reporter but merely offered information in response to questions. Additionally, the quantum of information disclosed, or at least reported, was neither calculated to, nor would have the likely effect of, frustrating factfinding or "locking the parties into their current positions" (City Br., p. 38). Finally, contrary

[15] The City does not explain, nor does the record suggest, how the revised submission frustrated the factfinding.

to the Employer's contention, MBCA 1.11(C)[16] merely accords the fact finder "sole discretion" in the conduct of the hearings and does not purport to regulate the flow of information to the public between the close of the factfinding hearings and issuance of the fact finder's report. Of course, publicity during the ten days between issuance of the fact finder's report and its public availability may well frustrate the statutory design to provide an insulated period, free from public pressure, for further bargaining on the basis of the fact finder's recommendations. Prior to issuance of the fact finder's report, however, and in the absence of a controlling agreement of the parties, the mere release to the media, at its request, of information which neither frustrates factfinding nor significantly contributes to a deadlock of negotiations does not evidence a lack of good faith.[17]

Finally, the City maintains that the Union's brief to the fact finder seriously misrepresented the firefighters' level of wages and benefits - misrepresentations which, the City vigorously contends, could not have been inadvertent and were plainly designed to mislead or deceive the Fact Finder. While accepting the principle that egregious misrepresentations, consistent only with a lack of good faith, may establish a violation of Ch.150E, §10(b)(3) (or of 10(a)(6)), we find that the errors relied upon by the City do not, upon careful scrutiny, inexorably support the conclusion that they were designed to frustrate factfinding. In so finding, we rely not only upon an analysis of the assigned errors but also upon an evaluation of the surrounding circumstances, including the length and complexity of the proceedings, the commission of a similar error by the protesting party, the opportunity for rebuttal and the absence of reliance by the fact finder upon the misrepresentations.[18]

Specifically, the City cites at least six misrepresentations of employee wages or benefits which allegedly support their claim of a purposeful attempt to disrupt fact finding: (1) salary; (2) sick leave accumulation; (3) sick leave "buy back"; (4) personal leave; (5) vacation, and (6) calculation of vacation

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[16] MBCA 1.11(C) provides in its entirety:

"Conduct of the Hearings. The fact Finder shall preside at the hearing and shall rule on the admissibility of evidence and be in complete charge of the proceedings. The fact finder shall have sole discretion as to who shall be admitted or excluded from the hearing room at each session and as to whether or not to permit the hearings to be photographed, broadcast or televised."

[17] The City discerns (Br., 39) a "right to optimum impact of the fact finder's report" which, the City alleges, was infringed by the Union's premature release of information to the press. The City's perceived right, however, is more accurately characterized as the right of the public to have pressure exerted upon the parties, following expiration of the insulated bargaining, to discourage recalcitrance and to encourage reasonable settlements. In any event, we do not perceive that the conduct of the Union materially infringed the City's alleged right.

[18] While "prejudice" or reliance by the fact finder is not a requisite element of a 10(b)(3) violation (supra, p. 15), the lack of prejudice or adverse impact may be relevant in evaluating a respondent's conduct.

leave. As to salary, the City's computation of gross firefighters' salary includes the annual base rate ($10,592.25), the clothing allowance ($225) and holiday pay ($406), totaling $11,223.25. The Union, in turn, represented to the Fact Finder that "the average gross pay of a firefighter, at maximum, is $10,592 annual pay plus an additional $55.00 in fringes (overtime and holiday pay), resulting in an annual figure of $10,647.00" (U. Br. to Fact Finder, p. 58). Subsequent references, however, to the firefighters' "average overall gross compensation" adverted to the $225 clothing allowance, which raised the total to $10,872 (U. Br. pp. 65, 67). Accordingly, the Union accurately noted the base salary of $10,592, as well as the clothing allowance of $225, but did not include the $406 holiday compensation. By the same token, however, the Union did include $55 in fringes omitted by the City in its computation. While assuming, as the Union tacitly concedes (Br., p. 69), that "wages" include holiday pay, we note that neither the contract nor the City's personnel ordinance discloses the monetary value of holiday pay. Accordingly, omission of the holiday pay from the Union's calculation of gross compensation may reflect only a lack of diligence rather than a conscious deception. In any event, the gravity of the Union's misrepresentation is at least partially offset by the City's similar misstatement in an exhibit introduced at the fact finding hearing of the "average take home salary" of firefighters which, while timely rectified, nonetheless indicates the potential for error in complex and detailed fact-finding proceedings.

As to sick leave accumulation and "buy back", the record discloses that City firefighters may accumulate a maximum of 150 days of sick leave, as provided by city ordinance. Appropriate references in the Union's brief are to a maximum permissible accumulation of 145 sick days (Br. 73, 76, 78). However, as the Union points out (Br. 70), the Fact Finder characterized one of the Employer's 11 proposals as "an improvement in sick leave benefits...[which] would recognize contractually the extension of a recently amended sick leave ordinance applicable to other City employees to firefighters." (at p. 5). Thus, the Employer proposed to "increase the maximum sick leave credit accumulation from the present one hundred forth-five (145) days to a maximum of one hundred fifty (150) days" - a proposal which suggests either that firefighters were then entitled only to 145 days, as represented by the Union, or that the City itself misrepresented the maximum accumulation, in which case the Employer could not equitably complain of the Union's misstatement. In any event, while the record does establish a 150, rather than 145, day maximum, the confusion engendered by the City's own proposal, and the Fact-Finder's treatment thereof, casts the Union's misrepresentation in a rather more favorable light.

The record also establishes that the Union, in its brief to the Fact Finder, omitted reference to an alleged sick leave "buy back" benefit under a City ordinance which permits an eligible employee or official of the City who has served twenty years to convert earned sick leave credit in excess of 130 days to administrative leave of a maximum of 20 days. The ordinance does not expressly refer to a "buy back" of sick leave and the record, moreover, does not establish an identity between "conversion" and "buy back" of sick leave. Indeed, in firefighter parlance - and in common parlance - "buy back"

suggests receipt of money upon termination of employment,[19] rather than conversion to administrative leave. Accordingly, we may not conclude that the omission of a reference to a "buy back" benefit "was calculated to disgrace the City's position and to enhance the prospects of a favorable recommendation for a Union sick leave proposal" (City Br., p. 32).

The confusion surrounding a "buy back" provision also characterized the testimony concerning the City's personal leave policy. Thus, York testified that firefighters enjoy personal leave, as provided by City ordinance, but that leave restrictions are occasionally imposed when manpower levels decline significantly - and are lifted when available manpower permits. In its brief to the Fact Finder, however, the Union represented that the City, upon termination of the collective bargaining agreement in July 1974 "unilaterally ceased granting personal leave, opposed the Union's grieving that cessation...and unilaterally opted not to comply with a personnel relations review board determination restoring that benefit to the Union" (Br., p. 90). While the Union's representation of a unilateral cessation of personal leave may have been literally accurate,[20] the implication of an open-ended termination was not. Indeed, the Fact Finder described an "experience during the last year when the employer for a time unilaterally withheld all personal leaves on the ground of manpower shortage" (at p. 56). Nonetheless, the Union did experience difficulty in having the personal leave policy reinstated. Accordingly, in view of the confusion about the status of the Employer's personal leave policy, we do not attribute the Union's omitted reference to the restoration of personal leave to a conscious design to mislead the Fact Finder by "minimiz[ing] the total value of the City's wage and fringe package" (City Br., p. 33).

In contrast, the Union concedes, and the record confirms, that the Union misstated the firefighters' vacation benefits. Thus, firefighters receive 14 days after 6 months, 21 days after 5 years and 28 days after 15 years - and not 2 weeks after 5 years, 3 weeks after 15 years and no 4 week vacations, as represented by the Union (Union Br. to Fact Finder, pp. 77, 79). Finally, the City contends that the Union misrepresented the manner in which vacation leave is calculated. If a vacation commences on a day which is a regularly-scheduled day "off", the day (or days) is tacked on at the end of the vacation leave, but tours off during the scheduled vacation (after the first tour) are not so included. In its brief to the Fact Finder, the Union maintained that the Worcester vacation "entitlement is measured in terms of calendar [rather then "work"] days which would include vacation time off from time-off as well as from scheduled duty time" (Br. p. 78). While characterized by the Union as

[19] Significantly, Article I, Section 6 of Chapter 4 of the Revised Ordinances of 1951, as amended, provides that upon termination of employment "no monetary allowance or adjustment shall be made for said earned sick leave credit or accumulations" - a prohibition which supports the accuracy of the Union's representation that Worcester has no "buy back" provision, as the term is commonly understood.

[20] Thus, personal leave, by directive of the Chief or the Personnel Department, was temporarily revoked during the summer of 1974, when the City unilaterally terminated the contract, and reinstated in the fall of 1974.

"essentially" accurate, the representation does, at least in our view, inaccurately imply the absence of a provision for vacation from "time off" duty. Nonetheless, we note that the Employer's policy is unwirtten and that its implementation has been accompanied by frequent errors in computing employee vacation entitlement. Accordingly, in view of the foregoing and of the confusion about the scope, and application, of the policy, we again conclude that the Union's partially inaccurate representation was not a calculated deception of the Fact Finder.

In sum, the record does disclose misrepresentations by the Union of firefighter benefits, none of which, however - either singly or in combination - constitutes an evident pattern of deception calculated to disturb the integrity of the fact finding process. The foregoing conclusion, we submit, is reinforced by evidence of the length and complexity of the fact finding record, confusion of disputed issues, opportunity for rebuttal, the Fact Finder's affirmative evaluation of the presentations of the parties,[21] and the questionable conduct of the Employer, including misrepresentation of the firefighters' salary; presentation to the Fact Finder, in a post-hearing "Motion to Strike", of a claim of inability to pay notwithstanding a disclaimer of reliance thereon during the fact finding hearing; and, finally, inflation of the cost of the Union's night shift differential proposal by knowingly utilizing a concededly faulty premise.[22]

O R D E R

Wherefore, on the basis of the foregoing, the Commission concludes:

1. That International Association of Firefighters, Local 1009, AFL-CIO has not failed or refused to participate in good faith in the fact finding procedures established by Section 9.

2. That the Complaint ought to be and is hereby dismissed in its entirety.

James S. Cooper, Chairman
Madeline H. Miceli, Commissioner
Henry C. Alarie, Commissioner

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[21]Thus, the Fact Finder observed that "Counsel in this case were extraordinarily thorough in their development and shapening of factual information. Similarly, their briefs are carefully prepared and, given the scope of the inquiry, develop the issues thoroughly" (at p. 6).

[22]The absence of good faith on the part of a complaining party relieves the respondent of its correlative obligation to participate in good faith in the fact finding proceedings. Compare Alba-Waldensian, 167 NLRB 695, 697 (1967); Elgin Standard Brick Mfg. Co., 90 NLRB 1467, 1468 (1950); Times Publishing Co., 72 NLRB 676, 683 (1947). Of course, a complaining party's alleged bad faith is no defense to violations (here, a protested submission to the Fact Finder of nonmandatory topics of negotiation in police or fire disputes) in which bad faith is not an element. Compare Wald Manufacturing Co. v. N.L.R.B., 426 F.2d 1328, 1331-1332 (C.A. 6, 1970).