KING PHILIP REGIONAL SCHOOL COMMITTEE AND KING PHILIP TEACHERS ASSOCIATION, MUP-2125 (2/18/76).

(60 Prohibited Practices by Employer)
63.4 good faith test (totality of employer's conduct)

Commissioners participating: James S. Cooper, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

Kathryn M. Noonan, Esq. - Counsel to the Commission
Guy Volterra, Esq. - Counsel to the School Committee
Sara E. Potter, Esq. - Counsel to the Teachers Association

DECISION

Statement of the Case

On January 16, 1975 the King Philip Teachers Association (the Association) filed a Complaint of Prohibited Practice with the State Labor Relations Commission (the Commission) charging that the King Philip Regional School Committee (the School Committee) violated G.L. Chapter 150E, Section 10 (a) (1) and (5). After preliminary investigation the Commission issued on April 2, 1975 its Complaint of Prohibited Practice, alleging that the School Committee had failed and refused to bargain in good faith with the Association concerning the wages, hours and terms and conditions of employment of employees within the bargaining unit represented by the Association, thereby violating Section 10(a)(1) and (5) of Chapter 150E (the Law). Thereafter on April 9, 1975 the Commission received the answer of the School Committee denying the material allegations of the Complaint and also a Motion to Dismiss the Complaint on three grounds:

1. The School Committee denied the factual allegations of the refusal to bargain charge;

2. The collective bargaining agreement and G.L. Chapter 71 vested the School Committee with auth ity to establish, reclassify and abolish positions; and

3. The parties had filed a petition for determination of impasse before the Board of Conciliation and Arbitration and thus the matter should be resolved by said Board.

On April 14, 1975, the Commission denied the Motion to Dismiss concluding: "The pendency of a petition before the State Board of Conciliation and Arbitration for the determination of an impasse is not grounds for the dismissal of a Complaint of Prohibited Practice alleging a refusal to bargain.

"The scope of the School Committee's rights to manage the school system and the question of the School Committee's bargaining conduct will be determined on the basis of the evidence and argument presented at the formal hearing."

Thereafter on April 22, 1975 a formal hearing was conducted before Kathryn

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M. Noonan, a duly designated hearing officer, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce testimony. Briefs timely filed by the parties have been carefully considered. Accordingly, upon the entire record herein, the Commission makes the following findings:

Findings of Fact

1. The King Philip Regional School Committee is elected by the citizens of Norfolk, Plainville and Wrentham and is a regional school committee established pursuant to G.L. Chapter 71, Section 15 to 16 I.

2. The School Committee is a public employer within the meaning of Section 1 of the Law and is the representative for the purposes of bargaining collectively with the employees of the King Philip Regional School District within the meaning of Sections 6 and 7 of the Law.

3. The King Philip Teachers Association is the exclusive representative for the purposes of collective bargaining of certain employees of the School Committee including all teachers, guidance counselors, librarians, nurses, coaches, department heads, coordinators and activity advisors.

Past Collective Bargaining

The Association and the School Committee executed a collective bargaining agreement effective July 1, 1973 and expiring June 30, 1975. The "scope" clause of this agreement provides that the School Committee recognizes for the purposes of collective bargaining a unit of "all teachers, guidance counselors, librarians, nurses, and such other persons as may be employed under Section XII and as listed in Appendices C and D of this Contract." Section XII of this contract entitled "Additional Positions," provides:

> "A. Additional positions and supplementary compensation therefore, other than that as provided in Appendices A and B of this Contract, may be provided for at the sole discretion of the Committee.
>
> 1. The Committee shall decide at the time said positions are established or at any other time whether or not compensation shall be paid for services rendered in connection with any such positions."

Additional positions include both curricular and extra-curricular assignments. Those curricular and extra-curricular assignments deemed compensable by the School Committee were listed in Appendices C and D of the contract respectively. Included therein was the following description of the method used to determine compensation:

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> "The Committee shall make a reasonable determination of compensation to be paid for curricular [or extra-curricular] assignments, based on the average compensation paid, at the time such services are to be rendered, for similar positions in schools which are then members of the Hockomock League, so-called. In the event the Committee is unable to determine such average compensation because of lack of information, inability to calculate or because of difference in classification of such position, the Committee shall make a reasonable determination of compensation to be paid."

The effect of Section XII and Appendices C & D was to permit the School Committee to make a unilateral determination concerning compensation for all curricular and extra-curricular positions. In addition, if during the term of the contract the School Committee created additional curricular or extra-curricular positions, it could unilaterally decide whether, and at what level, it would compensate the positions. The salary schedule for each existing curricular and extra-curricular position although contained in Appendices C and D was unilaterally set by the School Committee subject to the average compensation paid by other area schools, if ascertainable.

Current Collective Bargaining

During the 1974-75 school year the School Committee and the Association began negotiations for a successor agreement effective July 1, 1975. After several bargaining sessions, they reached a tentative agreement on all items with the exception of the method of determining compensation for curricular and extra-curricular positions. The Association sought the right to bargain for the wages, hours, conditions of employment and standards of productivity and performance of the additional positions referred to in Section XII and Appendices C and D. The School Committee initially sought to retain the sole discretion, as provided in the 1973-75 contract, to set compensation for such positions. Subsequently on January 8, 1975 the School Committee modified its position and proposed that

> "additional positions...that the Committee may determine from time to time to be in the best educational interests of the students may be established, modified, and eliminated at the sole discretion of the Committee."

The Committee further proposed that

> "When such additional positions are established with compensation, said positions shall be considered for inclusion in the appropriate list of Appendix C or D of this Contract during the next following collective bargaining negotiations."

Concerning the method of determining compensation for existing positions the Committee proposed that compensation be

> "based upon an average compensation paid for similar positions in schools which are members of the Hockomock League, so-called. A three-step schedule shall be established wherein Step 2 of said

> schedule is equal (within $12.50) to the average determined for the school year preceeding the school year covered by this Contract. Steps 1 and 3 of said schedule shall differ from Step 2 by increments equivalent (within $25.00) to similar increments found on the King Philip schedule of the preceeding year unless so indicated."

Finally at a March 6, 1975 negotiating session the School Committee offered the following proposal:

> "Compensation for curricular [and extra-curricular] assignments for 1975/1976 shall be identical to the step schedule as determined by the Committee for the school year 1974/1975. Compensation for the succeeding contract years shall be in accordance with Appendix E of this Contract."

Appendix E proposed the establishment of a subcommittee consisting of student, resident, employee, and superintendent representatives whose purpose was to submit compensation recommendations to the School Committee and Association utilizing an evaluation formula delineated in the contract. Appendix E further provided that "the Committee and the Association agree to negotiate the basic compensation to be paid for each such additional position in accordance with said recommendations for the next contract year." Thus the School Committee had proposed that it have sole discretion in determining whether newly-created positions should be compensable; that existing curricular and extra-curricular positions receive the same compensation for 1975-76 as was received during 1974-75; and that the compensation for the contract years 1975-76 and 1976-77 for all positions deemed compensable be the subject of negotiation in accordance with the recommendations of the subcommittee. This proposal was not accepted by the Association.

Thereafter, on April 10, 1975 the School Committee proposed that all additional positions created after the effective date of the contract and thus not enumerated in Appendices C or D, be the subject of negotiations at the close of the school year to adjust the compensation upward according to an agreed formula if the Association believed the position had been undercompensated. This proposal was rejected by the Association.

Opinion

Section 6 of the Law requires the employer and the exclusive representative of the employees to "meet and negotiate in good faith with respect to wages, hours, standards of productivity and performance...but such obligation shall not compel either party to agree to a proposal or make a concession." This duty to bargain in good faith requires that both parties engage in the bargaining process with an open mind making a "sincere effort to reach a common ground." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686, 12 LRRM 508 (9th Cir., 1943). The inability of parties to agree reflects not only the employer's unyielding position on an issue but also the Union's steadfast opposition. NLRB v. American National Ins. Co., 343 U.S. 395, 30 LRRM 2147

(1952). See also Proctor & Gamble Mfg. Co., 160 NLRB 334, 62 LRRM 1617 (1966). Except where the conduct in question is, on its face, a de facto refusal to bargain -- e.g. insistence to impasse on the incorporation of a non-mandatory subject of bargaining within an agreement -- the quality of negotiations is tested by a review of the "totality of conduct" rather than an application of a per se rule. NLRB v. Cascade Employers Association, 296 F.2d 42, 48, 49 LRRM 2049 (9th Cir. 1961). Compare NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958). The record must indicate the presence or absence of an intent to reach agreement. General Electric Co., 150 NLRB 192, 194, 57 LRRM 1491 (1964). In determining whether a violation of Section 10(a)(5) has occurred, the relevant inquiry for the Commission is an examination of conduct exhibited at the bargaining table and the nature of the bargaining rather than the terms or merits of the parties' proposals. NLRB v. American National Ins. Co., supra. If a party's total conduct during bargaining evidences an intent to reach agreement by participation in negotiations in good faith, absent evidence of dilatory tactics or other prohibited intent, insistence to the point of impasse on a contract provision concerning a condition of employment, does not warrant the conclusion that the Law has been voilated. Agreement on many major bargaining subjects may negate an inference that insistence on a single specific term constitutes a refusal to bargain. Proctor & Gamble, supra.

When a party requests an agreement to waive bargaining during the life of a contract concerning a mandatory bargaining issue, the proposal itself suggests a condition of employment. In essence such a proposal raises the issue of the manner in which certain decisions concerning wages, hours or conditions of employment are to be made during the term of the contract and seeks agreement that the employer may take unilateral action in that area. Ador Corp., 150 NLRB 1658, 58 LRRM 1280 (1965). "The extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining." NLRB v. Wooster Division of Borg-Warner Corp., supra at 408-409.

Application of the foregoing principals to the facts requires the conclusion that the School Committee has not refused to bargain in good faith by insisting that its collective bargaining agreement with the Association contain a waiver of the Association's right to bargain over the initial compensation to be received by persons appointed to curricular and extra-curricular positions created during the school year.[1] The record reveals that when

[1]Although discussed at length by the School Committee in its brief, this case does not raise the issue of the statutory obligation of the School Committee to bargain concerning its decision to create or modify a position. The Association "concedes that the decision can and should be left to the Committee." (Association Brief p. 7)

the Association filed the charge with the Commission impasse had not occurred on the question of compensation for the additional positions. Two days prior to the filing of the charge the School Committee had modified its position on the issue and no longer sought to unilaterally establish the compensation level for existing positions. At the March 6 and April 10 negotiation sessions the School Committee presented changes not only of its proposal concerning compensation for the existing positions but also a modification of its proposal concerning compensation for new positions.[2]

Thus the negotiating posture of the parties concerning the issue, at least prior to April 10, cannot fairly be characterized as impasse. To that point the School Committee exhibited a willingness to compromise its position, and had not adopted an irreconcilable attitude after extensive negotiations. Compare Fetzer Television, Inc. v. NLRB, 317 F.2d 420, 53 LRRM 2224 (6th Cir., 1963). However, after April 10 the School Committee was steadfast in its position that negotiations on compensation for newly created positions be delayed to the end of the school year.

Thus the School Committee insisted on a contract term which would allow it to unilaterally set the initial compensation for certain positions created after the contract is executed. The School Committee does not contend that the compensation to be received is not a mandatory subject of bargaining. Neither does it deny the Association's status as the exclusive representative of the employees who would fill these positions. (See Answer of School Committee.) Indeed the scope clause of the past agreement recognizes the inclusion of such employees within the existing teacher unit. The School Committee seeks a waiver of the Association's right to demand bargaining concerning compensation when a new position is created.

The School Committee suggested that discussions concerning the adequacy of compensation occur at the conclusion of the school year, thereby proposing a postponement of bargaining rather than a complete waiver of the Association's rights on the subject. To propose and insist to impasse that questions of compensation be resolved in this manner is to bargain for a condition of employment and thus is a mandatory subject of bargaining.

Although insistence on the "right to retain unilateral control over such basic subjects as wages and hours...is a circumstance which may be considered by the Board in determining whether a party has bargained in good faith," the

[2]At these meetings the School Committee proposed that present levels of compensation for existing "additional positions" be frozen as provided in the 1973-1975 agreement. Clearly, this proposal was not a request that the Association waive its right to bargain concerning these positions. Instead the School Committee sought mutual agreement on the issue of levels of compensation rather than an agreement granting the School Committee the right to unilaterally set levels of compensation as provided in the prior agreement.

position advanced by the School Committee herein provides a mechanism for protecting employees against arbitrary management actions. A.H. Belo Corp. v. NLRB, 411 F.2d 959, 968, 71 LRRM 2437 (5th Cir., 1969). The School Committee's proposal that the adequacy of compensation be negotiated after the school year in a post hoc review provides the Association with an opportunity to protect basic employee interests. This fact, combined with the parties' agreement on other major issues, militates against a finding of bad faith bargaining. In addition the employer's entire course of conduct especially its willingness to modify its initial demands concerning additional positions reveals no independent ground for concluding that the School Committee refused to bargain.

Order

Wherefore, on the basis of the foregoing, the complaint should be, and hereby is DISMISSED.

James S. Cooper, Chairman

Madeline H. Miceli, Commissioner

Henry C. Alarie, Commissioner