TOWN OF SAUGUS AND LOCAL 1003, IAFF, AFL-CIO, CLC, MUP-591 (5/5/76).

(60 Prohibited Practices by Employer)
67 Refusal to bargain
67.4 good faith test (totality of employer's conduct)
67.8 unilateral change by employer
68.3 refusal to participate in fact-finding

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

Appearances:

Bradbury Gilbert, Esq. - Counsel to the Employer
E. David Wanger, Esq. - Counsel to the Association

DECISION AND ORDER

Statement of the Case

On August 1, 1973, a Complaint of Prohibited Practice was filed with the Labor Relations Commission (Commission) by Local 1003, International Association of Firefighters, AFL-CIO, CLC (Association) alleging that a practice described in General Laws, Chapter 149, Section 178L had been committed by the Town of Saugus. After preliminary investigation, the Commission issued, on October 12, 1973 a Complaint of Prohibited Practice alleging that the Town of Saugus and its Town Manager ahd violated General Laws Chapter 149, Section 178L(4) by failing to bargain in good faith with the Association.[1] On November 14, 1973 a formal hearing was held before Commissioner Henry C. Alarie at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce testimony. Extensive memoranda were filed by both parties and the arguments contained therein have been carefully considered.

The Issues

Two distinct issues are presented in the current proceeding. First, the Association charges that the employer has failed to bargain in good faith by engaging in a pattern of conduct intended not to facilitate agreement but to frustrate agreement. Second, the Association charges that the employer refused to bargain by institutint a change in the health plan offered to employees without agreement of or consultation with the Association.

Findings of Fact

Upon the entire record herein, including the demeanor of witnesses, the Commission finds:

1. That the Town of Saugus is a municipal corporation located in the County of Essex, within the Commonwealth of Massachusetts;

[1] At the time the Complaint was filed Francis C. Moorehouse was Town Manager. Norman D. Hanson has since succeeded Moorehouse to that office.

2. That the Town of Saugus is a Municipal Employer within the meaning of Section 178L of Chapter 149 of the General Laws;

3. That the Selectmen of the Town of Saugus and the Town Manager are Chief Executives of the Municipal Employer within the meaning of Section 178G of Chapter 149 of the General Laws.

4. The Association is an Employee Organization within the meaning of Section 178G of Chapter 149 of the General Laws.

5. That the Association is the exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment for firefighters employed by the Town of Saugus.

The course of negotiations falls into three general time periods: (1) prior to the commencement of fact finding, October 1972 to early March 1973; (2) from the commencement of fact-finding to the filing of the complaint now under consideration, early March, 1973 to August 1, 1973; and (3) from the filing of the complaint to the time of the hearing, August 1, 1973 to November 14, 1973.

The first period. By letter of October 20, 1972 the Association forwarded to the Town a fifty-nine item bargaining agenda. Thereafter, at the bargaining sessions the Town commented generally on the Association's proposals and agreed to many proposals which constituted a reduction to writing of past practices. With respect to new benefits, the Town indicated its willingness to negotiate further on some items and flatly rejected other items, including the Association's proposed 17.6% wage increase for one year. At a fourth session on December 12, 1972, the Town offered a "settlement" proposal to be on the table only until December 31 of that year: a two-year contract with terms identical to the previous contract with two exceptions, namely (1) a wage increase of approximately 4.1% as of July 1, 1973 and a further 3.5% wage increase as of July 1, 1974; and (2) a change in insurance coverage to Major Medical, Blue Cross/Blue Shield. The Association membership rejected this offer and by letter of December 13, 1973 submitted a modified proposal. In two bargaining sessions subsequent to the submission of the Association's modified proposal, the Town agreed to most of the items which represented a reduction to writing of past practices. In addition, the Town made a counter-proposal of a three year contract including wage increases of 4.2% effective September 1, 1973, 3% effective July 1, 1974, and 3% effective July 1, 1975, and showed some movement relating to five other significant items on the Association's bargaining proposals. On January 2, 1973 the Association petitioned the Board of Conciliation and Arbitration for declaration of an impasse and initiation of factfinding. The Board of Conciliation and Arbitration duly declared an impasse and with the agreement of the parties names Professor David Bloodsworth as fact-finder on February 22, 1973.

The second period. Mr. Bloodsworth made an unsuccessful attempt at mediation on March 17, 1973 and scheduled the first fact-finding hearing for March 24. Prior to the initial hearing, the Town withdrew its previous agreements and retrenched to its initial settlement proposal. The Town refused to participate in the fact-finding proceeding other than to write a letter to Fact-

finder Bloodsworth requesting that any settlement which he proposed be kept within the rise in the cost-of-living. The Town hindered the fact-finding proceedings by its unwillingness to permit the Association negotiators time off from work to appear at the hearings. On June 9, 1973 Mr. Bloodsworth submitted his findings concerning the dispute. On June 20, 1973 the Association indicated its willingness to accept the recommendations of the fact-finder. On June 22, 1973 the Town refused to accept the recommendations. At the request of the Association on June 25, 1973 the Town met with the Association on July 5, 1973. The Town reaffirmed its refusal to accept the Fact-finder's report and adhered to its pre-fact-finding position. The meeting ended with the Association spokesman indicating his availability for further negotiations should the Town change its position. During July, 1973 the Town unilaterally instituted a change to Major Medical coverage for all town employees, including firemen, over the Association's objections.

The third period. On August 1, 1973, the Association filed the instant prohibited practice charge. On October 23, 1973 the Town met with the Association and offered renewal of the existing contract for two years with a wage increase of 4.2% effective July 1, 1973 and a further 4.2% effective July 1, 1974. The Association rejected the Town's offer.

Opinion

General Laws Chapter 149, Section 178L, the statutory source of the obligation of the municipal employer to bargain collectively in good faith with the exclusive representative of its employees, states:

> For the purposes of collective bargaining, the representative of the municipal employer and the representative of the employees shall meet at reasonable times...and shall confer in good faith with respect to wages, hours, and other conditions of employment; or the negotiation of an agreement...but neither party shall be compelled to agree to a proposal or to make a concession.... 2

Section 8(d) of the National Labor Relations Act as amended, 29 U.S.C. 151, 158 (a) (5), defines the duty to bargain collectively in relevant part as follows:

---

[2] General Laws Chapter 149, Section 178L was repealed effective July 1, 1974 and replaced by General Laws Chapter 150E, Section 6. The new statute provides:

> The employer and the exclusive representative shall meet at reasonable times....and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance and any other terms and conditions of employment....

For the purpose of the case sub judice we find that the employer's obligation to bargain under the old law continues under the new law. See Ronald J. Murphy, 1 MLC 1271 at n. 1 (1975).

Town of Saugus and Local 1003, IAFF, AFL-CIO, CLC, MUP-591

> ...the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement...but such obligation does not compel either party to agree to a proposal or require the making of a concession...."

It is clear that the state law is patterned after the federal statute; we therefore look to the interpretations of the federal law by the National Labor Relations Board (NLRB) and the courts for guidance. Jordan Marsh Co. v. Labor Relations Commission, 312 Mass. 597, 601 (1942).

The agsence of good faith intent to bargain "must be discerned from the record." General Electric Co., 150 NLRB 192, 57 LRRM 1491 (1964), eff'd 418 F.2d 736, 72 LRRM 2530 (2nd Cir. 1969), cert. denied 397 U.S. 965, (1970). All of the relevant facts of a case are considered in determining whether an employer or a union is bargaining in good or bad faith; i.e. the totality of conduct is the standard by which the "quality" of negotiations is tested. City of Chicopee, 2 MLC 1071 (1975), NLRB v. Stevenson Brick & Block Co., 393 F.2d. 234, (4th Cir. 1968), Continental Insurance Co. v. NLRB, 495 F.2d 44 (2nd Cir. 1974).

The Association contends that the Town used in the course of negotiations the illegal bargaining technique called Boulwarism. This bargaining tactic received its definitive explanation and ultimate legal rejection in the General Electric Co. cases, supra.

Boulwarism consists of a one-offer bargaining policy, coupled with an elaborate system of communications designed (1) to induce employees to bring pressure on the union to accept management's offer and (2) to discredit the motives and integrity of union leaders. The constant flow of information is a cornerstone of Boulwarism. A primary goal of the program is a close harmonious employer-employee relationship and active employee support of management and its objectives; to this end, the employees are literally flooded with various forms of management propaganda during negotiations. See Robert Durkin, "The Duty to Bargain: Law in Search of Policy" 64 Columbia Law Review, at pp. 289-290 1964.

The Appeals Court in General Electric stated that "an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is unable to alter a position once taken." 418 F.2d at 762.

As the findings of fact set forth above, the Town's bargaining strategy consisted neither of a one-offer ultimatum nor of a constant flow of management propaganda during negotiations. Although the Town clearly took a hard line during negotiations, the record is devoid of evidence suggestive of Boulwarism. Accordingly we reject the Association's contention.

Petitioner also alleges that Respondents have been engaged in a pattern of bargaining called "surface bargaining" which is indicative of bad faith.

NLRB v. Herman Sausage Co. 275 F.2d 229 (5th Cir. 1960) enforcing 122 NLRB 168 (1958) rehearing denied 277 F.2d 793 (5th Cir. 1960); C.F. Irvington Motors Inc. 147 NLRB 565 (1944) enforcing 343 F.2d 750 (3rd Cir. 1065). When an employer rejects a union's proposal, tenders his own and does not attempt to reconcile the differences, he is engaged in surface bargaining. A.H. Belo Corp., 170 NLRB 1558 (1968) 69 LRRM 1239. The duty to bargain in good faith implies an open mind and a sincere desire to reach an agreement as well as a sincere desire to reach a common ground, NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943). Although Section 8 (b) (5) (like Section 178 L) does not require the making of a concession, an overall willingness to compromise is deemed essential. For example, the court stated in NLRB v. Reed and Prince Mfg. Co., 205 F.2d 131, 134-135 (1st Cir. 1953) cert. denied 345 U.S. 887 (1953) enforcing 96 NLRB 850 (1951) that:

> While the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position, the employer is obligated to make some reasonable effort in some direction to compose his differences with the union, if Section 8 (a) (5) is to be read as imposing any substantial obligation at all.

Professor Archibald Cox in his article, "The Duty to Bargain"[3] states, "The Law has crossed the threshold into the conference room and now looks over the negotiator's shoulder." Cox comprehensively defines the employer's legal duty to bargain as "the duty to engage in discussion, listening to the union's proposals, and giving the grounds for any disagreement [extending] to each and every topic the union may wish to discuss, provided that it falls within the phrase 'rates of pay, wages, hours of employment and other terms and conditions of employment'" See State of N.Y. and Council 82, AFSCME, 5 PERB paragraph 4523 at 4603, (1972).

In addressing the Association's allegation of surface bargaining, it is helpful to examine the Town's conduct in each of the three periods of negotiations outlined above.

The first period. The Association presented its proposal in the form of an extensive bargaining agenda. Subsequently the Town proffered its "settlement" proposal. This proposal was not the product of compromise and embodied none of the items on the Association's agenda; it simply included a wage increase and a change in insurance coverage. The Commission is not called upon, and declines, to decide whether the maintenance of this bargaining posture would have been a violation of the law.

During the next month, each side presented counterproposals. In two bargaining sessions Respondent agreed to most of the Association's proposals which represented written codification of previous practices. Agreement to proposals embodying existing practices is a consideration in evaluating bargaining conduct. Continental Bus System, Inc., 128 NLRB 384, 46 LRRM 1308 (1960) affirmed 294 F.2d 264, 48 LRRM 2579 (D.C. Cir. 1961). See also Weinacker Bros. 153 NLRB 459 (1965).

Town of Saugus and Local 1003, IAFF, AFL-CIO, CLC, MUP-591

In response to new items on Petitioner's amended bargaining agenda the employer did make a few significant concessions. Respondent agreed to compensation for work out of grade, unlimited accumulation of unused sick leave with a buy-back provision, and credit for town service as well as fire service when computing longevity. The Town also raised its original wage offer.

The Association petitioned the Board of Conciliation and Arbitration for an impasse declaration during these negotiations, on January 2, 1973, but the record shows that the Town's second substantial offer was presented several days after that. According to the standards determinative of surface bargaining, it cannot be found that the Town, during this first period, was engaged in bad faith bargaining. See King Philip Regional School Commission, 2 MLC____(1976). Thus the impasse formally declared by the Board of Conciliation and Arbitration was the product of an impasse reached after good faith bargaining.

The second period. Some time before fact-finding formally convened, the Town withdrew its improved January offer and retreated to its initial "settlement" proposal. The Town refused to participate in the fact-finding proceedings except for a letter to the Fact-finder requesting that no settlement of the wage issue be recommended which exceeded the increase in the cost of living. There is evidence that the Town actually hindered the proceedings. The Town rejected the recommendation of the fact-finder (which by itself is an acceptable action) and maintained its initial position. Only after that did the Association file the instant prohibited practice charge.

Public employees are not allowed the right to strike.[4] The law in effect at the time these events occurred offered in its stead a fact-finding process[5] designed to facilitate agreement between the parties. Section 10 (a) (6) of Chapter 150E declares it a prohibited practice to refuse to participate in good faith in mediation, fact-finding and arbitration procedures, but such a course of conduct was not illegal per se under the old law, and we do not decide this case on that basis. However, the Town's failure to participate fully in fact-finding is an indication that the Town lacked a sincere desire to reach an agreement. In addition, the Town's retreat to its initial bargaining position, a substantial retrenchment, immediately prior to fact-finding, is another indication of bad-faith bargaining. Taken together, the

[4] General Laws Chapter 149, Section 178M, now repealed, contained the prohibition against striking for municipal employees. The strike prohibition is retained in the new public employee collective bargaining law, General Laws Chapter 150E, Section 9A.

[5] Section 4 of Chapter 1078 of the Acts of 1973, which became effective after these events occurred, provides policemen and firefighters, in addition to the fact-finding process, final and binding interest arbitration.

evidence is persuasive that the Town committee a prohibited practice by refusing to bargain in good faith.

The third period. Both parties submitted evidence and argued in briefs concerning the conduct of the Town during the period after the filing of the prohibited practice charge by the Association. We will therefore examine the Town's bargaining posture.

The only bargaining session during this period occurred on October 23, 1973, at which time the Town slightly changed its position from the "settlement" proposal of December 1972: a two-year contract with a 4.2% increase effective July 1, 1973 (approximately the same increase as was offered before), and with a further 4.2% increase effective July 1, 1974 (an increase of 7/10 of 1%) over the increase offered previously. All language of the contract was to remain the same. Insurance had already been changed over to major medical, at the same contributory rate as the previous contract. This very slight movement was accompanied by continued unwillingness to discuss modification of contract language or changes in existing benefits. Perfunctory concessions immediately prior to the opening of prohibited practice hearings before this Commission will not prevent a finding of a refusal to bargain in violation of General Laws Chapter 149, Section 178L.

The unilateral change. The Association requests the Commission to find a further violation of the law in the Town's unilateral change to major medical insurance coverage. The Association argues that, while it is a defense that the parties were at impasse when the unilateral change was instituted, where the impasse resulted from illegal bargaining the defense should not lie. Marine and Shipbuilding Workers v. NLRB 320 F.2d 615 (5th Cir. 1963) cert. denied, 375 U.S. 984 (1974). In the instant case, however, we have found that the impasse was initially the result of good faith bargaining. On the record before us we cannot speculate as to whether, if the Town had negotiated in good faith during the second period, whether the parties would still have been at impasse on July 1, 1973. We therefore find that the unilateral change did not constitute a violation of the law.

The Remedy

The Association seeks as a remedy (a) that the Town be ordered to pay full costs of the fact-finding, and (b) be ordered to submit the fact-finder's report to the town meeting and advocate its acceptance. The first alternative is not appropriate in light of our finding that the initial impasse resulted from good faith bargaining. The second alternative is an extraordinary remedy which this Commission will not order lightly. Extraordinary remedies require extraordinary circumstances not apparent in the record.

The Commission is informed that the parties have by this time settled the contract in dispute. We are not inclined to order the reopening of sore wounds and therefore we order in this case only the minimum remedy appropriate.

Town of Saugus and Local 1003, IAFF, AFL-CIO, CLC, MUP-591

DECISION AND ORDER

Based upon all the evidence in the record and conclusion drawn therefrom, the Commission finds:

That the Town of Saugus acting through its Town Manager refused to bargain collectively with the exclusive representative of its firefighters in violation of the Law.

WHEREFORE, it is hereby ordered that:

1. The Town of Saugus shall cease and desist from refusing to bargain in good faith with the International Association of Firefighters, Local 1003, AFL-CIO, CLC:

2. The Town of Saugus shall post in conspicuous places, and leave posted for a period of thirty (30) days, the Notice to Employees accompanying this Decision:

3. The Town of Saugus shall notify the Commission within fifteen (15) days of receipt of this Decision and Order of the steps it has taken in order to comply with it.

James S. Cooper, Chairman

Madeline H. Miceli, Commissioner

Henry C. Alarie, Commissioner

NOTICE TO EMPLOYEES
OF THE TOWN OF SAUGUS FIRE DEPARTMENT
POSTED BY ORDER OF THE LABOR RELATIONS COMMISSION

The Labor Relations Commission, by decision dated April 30, 1976, found that the Town of Saugus committed a prohibited practice in violation of Section 10 (a) (5) of General Laws Chapter 150E. The Town of Saugus will henceforth bargain collectively in good faith including participation in all mediation, fact-finding and arbitration as required by law with the exclusive representative of the firelfghters, Local 1003, International Association of Firefighters, AFL-CIO, CLC.

Board of Selectmen

Town Manager
Town of Saugus

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission's office.