

In the Matter of CITY OF BOSTON SCHOOL COMMITTEE  
and  
BOSTON PUBLIC SCHOOL BUILDINGS CUSTODIANS'  
ASSOCIATION  
Case No. MUP-9794

51.11	<i>authority of employer representative</i>
54.23	<i>overtime</i>
54.5	<i>other conditions of employment</i>
54.581	<i>minimum manning</i>
54.589	<i>bargaining unit work</i>
54.6	<i>wages</i>
54.62	<i>other fringe benefits</i>
67.3	<i>furnishing information</i>
67.6	<i>other refusal to bargain</i>
91.1	<i>dismissal</i>

May 20, 1999

Robert C. Dumont, Chairman  
Helen A. Moreschi, Commissioner

John J. Kenney, Esq.      *Representing Boston Public  
David C. Jenkins, Esq.      School Buildings Custodians'  
   Association*

Haidee A. Morris, Esq.      *Representing the City of Boston  
   School Committee*

### DECISION<sup>1</sup>

#### STATEMENT OF THE CASE

On March 28, 1994, the Boston Public School Buildings Custodians' Association (Association) filed a charge with the Labor Relations Commission (Commission) alleging that the City of Boston School Committee (School Committee) had engaged in prohibited practices in violation of Sections 10(a)(5) and (1) of G.L. c. 150E (the Law). Following an investigation of the Association's charge, the Commission issued a Complaint of Prohibited Practice on September 21, 1994, alleging that the School Committee had failed to bargain in good faith, in violation of Sections 10(a)(5) and (1) of the Law, by: 1) not providing the Association with relevant information reasonably necessary for it to perform its duties as the exclusive collective bargaining representative; 2) failing to designate a negotiator with sufficient authority to bargain the terms of an agreement; and, 3) refusing to make an economic offer. The Commission dismissed all other allegations contained in the Association's charge.

Pursuant to notice, Hearing Officer Ann T. Moriarty conducted an evidentiary hearing on behalf of the Commission on February 7, 1995, February 14, 1995, February 22, 1995, March 16, 1995 and April 18, 1995, at which time the parties had a full opportunity to examine and cross examine witnesses and to introduce documentary evidence.<sup>2</sup> Both parties filed post-hearing briefs on July 14, 1995.

In accordance with Commission Rule 13.02(2), 456 CMR 13.02(2), the hearing officer issued recommended findings of fact on July 16, 1996. The School Committee filed challenges to the recommended findings of fact on August 19, 1996. The Commission has reviewed the record evidence, adopts the hearing officer's findings of fact, except where noted, and makes additional factual findings as warranted.

#### FINDINGS OF FACT<sup>3</sup>

The Association is the exclusive collective bargaining representative for a bargaining unit of custodians employed by the School Committee. The School Committee and the Association are parties to a collective bargaining agreement covering the period September 1, 1989 through August 31, 1992. Between December 21, 1993 and April 7, 1994, the parties met and negotiated over the terms of a successor agreement on twelve separate occasions, but failed to reach an agreement. Negotiations were held on December 21, 1993, December 30, 1993, January 14, 1994, January 25, 1994, February 11, 1994, February 16, 1994, February 24, 1994, February 28, 1994, March 10, 1994, March 16, 1994, March 24, 1994 and April 7, 1994. During these twelve sessions, the Association's chief spokespersons were Joseph Kemski, Association President, and John J. Kenny, counsel for the Association. The School Committee's chief spokespersons were Robert Roy, Director of Facilities Management, and Haidee Morris, counsel for the School Committee. Generally, at the end of every negotiating session, the School Committee asked the Association what issues it wanted placed on the agenda for the next session.<sup>4</sup>

*1. Collective Bargaining Negotiations: December 21, 1993 - April 7, 1994.*

During the first negotiating session held on December 21, 1993, the parties discussed ground rules, including the mutual requirement that any agreement reached at the bargaining table was subject to ratification by the School Committee and Association bargaining unit members. Although no proposals were exchanged, the School Committee talked about an approach to collective bargaining that identified each party's interests, and the use of package offers as an alternative to negotiating through the exchange of proposals on a piecemeal basis. The School Committee identified school building access, the cleanliness of school buildings, and school-based management as its interests, or the substantive areas it desired

1. Pursuant to 456 CMR 13.02(1), the Commission has redesignated this case as one in which the Commission shall issue a decision in the first instance.

2. On March 15, 1995, the School Committee filed a Motion to Dismiss On the Basis of Mootness and in the Alternative, Interlocutory Appeal of the ALJ's Ruling That Economic Offers Made After April 7, 1994 Are Inadmissible. The Association filed a response to the School Committee's motion on March 31, 1995. It is unnecessary to rule on this motion in light of our decision.

3. The Commission's jurisdiction is uncontested.

4. The record evidence supports this finding, and we modify the facts as requested by the School Committee.

addressed during negotiations.<sup>5</sup> The School Committee also expressed concern about the financial costs of complying with a superior court contempt finding and order that addressed: 1) recrediting sick leave for employees on workers' compensation; 2) the involuntary transfer of employees to cover short-term vacancies unless the overtime list is exhausted; and, 3) coverage for certain Association officers while on Association business.<sup>6</sup> At each of the next eleven negotiating sessions, the School Committee identified these primary areas for negotiations, and stated that these interests needed to be met within the school department's level funded budget.

During the January 14, 1994 negotiating session, the School Committee provided the Association with a written outline of its interests. The School Committee's outline identified both the substantive changes it desired to accomplish through negotiations and the contractual provisions that required modification.<sup>7</sup> For example, to meet its concerns regarding school access and school-based management, the School Committee proposed that the language of the parties' prior agreement at Article VIII, Section 9, be changed to designate the school principal or headmaster as the individual in charge of a building at all times, instead of a senior custodian.<sup>8</sup> To accomplish its goal of maintaining clean buildings while remaining within its budget, the School Committee proposed numerous changes in the existing contractual overtime requirements, and the creation of a substitute custodian pool for filling temporary vacancies. And, to further all of its interests, the School Committee sought to include language that permitted each school to determine whether to contract out some, or all of their custodial services. The outline included other desired changes, like the reduction in the number of transfer bids, and the incorporation of existing policies on discharge, discipline, and sick leave in the contract.

In contrast, during this same January 14, 1994 negotiating session, the Association provided the School Committee with a formal written proposal for a successor contract. The Association's proposal included an expedited arbitration procedure, language changes and increases in sick leave, personal leave, vacation allotment and other approved absences with or without pay, increases in longevity pay, overtime, vacancies and bidding

procedure language changes, employer-provided equipment and work clothes, salary regrades or increases, and other economic and non-economic proposals.

During the next negotiating session held on January 25, 1994, the School Committee presented a formal written proposal that, in substantial part, codified its January 14, 1994 written outline of interests. The formal written proposal included, among other items, a new school-based management section that provided the School Committee with the right to contract out all, or any portion of custodial work after 30 days notice to the Association, modifications to overtime applicability, decrease in minimum call back pay, use and accrual of sick leave while on workers' compensation, vacancies and bidding [sic] procedures, including language on filling temporary vacancies through the use of a substitute custodian pool, and other economic and non-economic issues. The School Committee's written proposal did not contain a wage increase offer.

In response to the Association's requests for a wage increase proposal during negotiating sessions held prior to February 28, 1994, Attorney Morris indicated that any wage increase proposal was contingent on the removal of certain items from the existing contract and that she was without authority to make a wage increase proposal absent assurances that certain language changes favorable to the School Committee's primary substantive issues would be met. During negotiating sessions held prior to February 28, 1994, the parties talked about building regrades,<sup>9</sup> workers' compensation, longevity pay, contracting out, sick leave, building transfers, and an expedited arbitration procedure.

During the eighth negotiating session held on February 28, 1994, the School Committee addressed the Association's January 14, 1994 written proposal item by item giving a brief oral response.<sup>10</sup> During this presentation, Attorney Morris indicated to the Association that the School Committee would offer a wage increase of 9% over a three-year period, in exchange for agreement on approximately twenty-one contractual changes detailed in the Committee's January 25, 1994 written proposal.<sup>11</sup> The Association responded with words to the effect that they would not "gut" their contract for 9%, or that a 9% wage offer would not buy the School Committee all of its interests. During an exchange, the Association

5. The hearing officer's finding that the School Committee's interests needed to be met within the department's level funded budget is stated elsewhere in the findings. Therefore, we decline to modify the facts as requested by the School Committee.

6. By a June 18, 1993 Memorandum of Decision and Order on Cross Motions for Summary Judgment, Saris, J. determined that the School Committee was in civil contempt of a February 2, 1990 superior court decision and order that confirmed an August 23, 1989 arbitration award. The School Committee estimated the costs of complying with the superior court order at \$800,000 for the restoration of sick leave credits and \$1.5 million for custodial overtime. The School Committee's proposed contractual language changes regarding workers' compensation and overtime were prospective in nature. The School Committee's request for supplemental findings is supported by the record, and we modify the facts.

7. The outline did not constitute a formal School Committee offer.

8. The School Committee desired access to all school buildings to conduct meetings outside the normal working hours of the custodian(s) assigned to a particular school, and without the presence of a custodian compensated on an overtime basis. The School Committee's major concern centered on access to the forty schools staffed by one custodian.

9. Bargaining unit members' wages are tied directly to the grade, A through D, assigned to the school where they work. A custodian assigned to a Grade D building is compensated at the highest level. The parties discussed building regrades during the February 24, 1994 negotiating session.

10. During four negotiating sessions held between January 14, 1994 and February 24, 1994, the School Committee did not respond directly to each item contained in the Association's January 14, 1995 written proposal, as requested by the Association.

11. Association negotiating team members Donald Mullen and Paul Jelley testified that the School Committee's February 28, 1994 9% wage increase proposal was communicated to the Association as both a tentative offer and contingent on the Association's agreement with the School Committee on major contractual changes. The hearing officer credited the Association negotiating team members' testimony on this point, and we adopt her finding.

questioned the School Committee negotiator's authority to make the wage increase offer. In response to this challenge, the School Committee indicated that it had the authority to make a wage increase offer in exchange for an agreement on proposals that met the School Committee's interests.<sup>12</sup>

During negotiations held between February 28, 1994 and March 16, 1994, inclusive, the parties continued discussions about regrading the school department's 117 schools. The parties also discussed the bi-annual vacancy bidding procedure for filling vacancies, and the so-called bouncing list used to move a custodian to a one-person building should that custodian be absent.<sup>13</sup> The Association presented its written counter proposal to all three of these related issues during the March 16, 1994 negotiating session.

On April 7, 1994, the School Committee opened the negotiating session by placing a package offer on the bargaining table. Consistent with its interests, the School Committee proposed changes in the overtime procedures, and designated the principal or headmaster and staff of the Department of Facilities Management as the person(s) who determine the need for custodial services on an overtime basis. The offer also included, among other things, a 5% across the board salary increase, and an upgrade of some schools from B to C and C to D. Further, the offer modified the grievance procedure, added training provisions, a residency requirement, employer-provided toolboxes, and addressed access to school buildings for school site council and parent site meetings.

The Association rejected the School Committee's offer and indicated that it was not what it was looking for, and that no amount of money would buy the School Committee's interests. Following this exchange, the School Committee stated that, in their view, the parties were at impasse. The Association disagreed, and expressed a willingness to continue to talk. The session concluded without any further negotiations.

## *II. Information Requests*

By letters dated February 4, 1994 and March 8, 1994, the Association requested information from the School Committee about school access, school department policies, budgetary items, custodial overtime, and contracting out of custodial services.<sup>14</sup> The School Committee received both requests, and assigned Janet Elie, a staff attorney with the School Committee and a member of the bargaining team, to review the requests, to locate responsive information in the School Committee's possession, and to forward the information to the Association. The School Committee provided the Association with information during negotiating sessions and in a March 16, 1994 letter.<sup>15</sup>

12. School Committee negotiating team members, Robert Roy, Janet Elie, and Paul McNeil, testified that, at least as of February 28, 1994, the negotiating team had the authority to include a wage increase as part of an offer that also incorporated contractual changes that addressed the School Committee's economic and non-economic interests. Both Roy and Elie attended School Committee Executive Sessions at which the School Committee discussed the custodian associations' negotiations. The hearing officer credited the School Committee negotiating team members' testimony on this point, and we adopt her finding.

13. There are approximately 40 schools staffed by one custodian.

14. Both the Association and the School Committee used these subject headings in their written correspondence.

## *A. February 4, 1994 Information Request*

### *1. School Access*

Asserting that during negotiations the School Committee indicated that: 1) various principals and headmasters expressed concerns about their inability to access their assigned schools; and 2) the School Committee desired to increase school building access for certain principals and headmasters<sup>16</sup> without incurring the costs associated with the presence of a custodian, the Association requested the following information:

1. The names of the Headmasters/Principals who have expressed said concerns;
2. Names of their schools;
3. The present hours of custodial staffing at that school;
4. Specific hours and days for which access to school buildings is needed for the Principal/Headmaster.

To respond to this request, Barbara Fields, Senior Officer for the School Committee's Office of Equity and a member of the School Committee's bargaining team, asked the Executive Director of the Citywide Parent Council to conduct a survey to determine the number of attendees at school parent council meetings held in school buildings. During a March 10, 1994 negotiating session, the School Committee, through Ms. Fields, provided the Association with the results of the survey. After receiving this information, the parties talked about holding one school parent council meeting per month outside the normal working schedule of a custodian assigned to a one-person building. The parties also discussed the number of school rooms used during the meetings, and whether children would attend the meetings. After Ms. Fields presented this information, the Association did not indicate that it required further information. During other negotiating sessions, the parties discussed access to the forty school buildings staffed by one custodian, and the different needs of specialty schools within the system, like the community schools.

In a March 16, 1994 written response to the Association's information request about school access, the School Committee stated that it had responded during numerous collective bargaining sessions and was in the process of compiling additional information regarding this issue. The School Committee did not provide the Association with any further written information regarding school access between March 16, 1994 and March 28, 1994, the date the Association filed this charge with the Commission.<sup>17</sup>

15. The hearing officer credited Janet Elie's testimony that she provided the Association with all the information that she located and/or received from other school department personnel, and we adopt her finding.

16. The School Committee's negotiating team included at least two principals. The School Committee's position on access to all schools is adequately stated elsewhere in the findings. Therefore, we decline to modify the facts here as requested by the School Committee.

17. The record does not indicate whether the parties discussed school access between March 16, 1994 and March 28, 1994.

## 2. School Department Policies

During negotiations conducted prior to February 4, 1994, the School Committee expressed an interest in incorporating existing school department policies in the collective bargaining agreement. The Association requested a copy of the discharge and discipline policy and the sick leave policy. In response to this request, the School Committee provided the Association with copies of both policies during the February 16, 1994 negotiating session.<sup>18</sup>

## 3. Budgetary Items<sup>19</sup>

The Association requested:

- 1) the total annual budget of the school department for the fiscal year 1993-1994;
- 2) the custodial budget allotment for the fiscal year 1993-1994; and,
- 3) the proposed fiscal year 1994-1995 budget "which the Superintendent was to have submitted to the Committee on February 2, 1994 in accordance with her statutory obligations."

In response to the Association's request for the school department's total budget and custodial budget allotment for fiscal year 1993-1994, the School Committee provided the Association with a school department budgetary hierarchy report during the February 16, 1994 negotiating session.<sup>20</sup> The hierarchy report reflects the total annual budget of the school department including the total custodial budget and a separate expense code/line item for custodial overtime. Further, by letter dated March 16, 1994, the School Committee provided the Association with a copy of the school department's "Preliminary Budget Overview for Fiscal Year 1995" dated March 10, 1994.

## 4. Custodial Overtime

On several occasions during negotiating sessions held prior to February 4, 1994, the School Committee informed the Association that the costs associated with custodial overtime had to remain within the budgeted amount. And, within this same time frame, the School Committee expressed concern about the financial costs associated with overtime and recrediting sick leave as required by the judicial contempt finding. The Association requested information and documents concerning:

1. The custodial overtime budget for fiscal year 1993/1994;
2. The proposed custodial overtime budget for fiscal year 1994/1995;
3. Information and documents substantiating the Committee's anticipated price tag of 1.5 million dollars as the cost of complying with the Superior Court's Contempt Order regarding the utilization of overtime; and
4. Information and documentation concerning the Committee's anticipated price tag of \$800,000.00, anticipated cost of complying

with a one to one restoration formula for sick leave credit as presently provided for in the contract.

By letter dated March 16, 1994, the School Committee responded, in part, by referring the Association to the February 16, 1994 hierarchy report that itemized the custodial overtime budget for 1993/1994, and informed the Association that information regarding the proposed custodial overtime budget for fiscal year 1994/1995, was not yet available.

Further, in this same letter, the School Committee provided the following information regarding the costs associated with complying with the overtime aspect of the judicial contempt finding:

3. The School Committee originally estimated the cost of compliance with the Superior Court's order was approximately \$1,500,000. This figure is dependent on the custodial absenteeism rate. The \$1.5 million figure was calculated based on a 6-10% absenteeism rate.

Please note these figures do not include coverage for the absences of Paul Jelley, and other provisions of the court order, and do not include the still-unsettled question as to the appropriate amount for workers' compensation.

To compile the information on the costs associated with recrediting sick leave for employees on workers' compensation, Attorney Elie contacted Patricia Morey Walker, the school department's workers' compensation coordinator from November 1991 to October 1994. Using percentages provided by School Committee negotiating team members, Ms. Morey Walker performed the requisite calculations based on her research of the number of custodians on workers' compensation and other factors over the applicable years. Ms. Morey Walker also drafted the School Committee's response on this issue that was included in its March 16, 1994 letter. The text reads:

4. According to the School Committee's most recent estimates, if the Association is requesting a change from the School Committee's longstanding practice by seeking restoration of an additional 40% salary replacement for custodians on workers' compensation, the cost to the School Committee would be \$460,828 for Fiscal Year 1994. The cost to the School Committee for restoration of 40% additional salary to custodians absent on workers' compensation during the period Fiscal Year 1988 to Fiscal Year 1993 is approximately \$2,764,968. In order to calculate this figure, medical benefits to workers' compensation recipients were not included in this calculation. If the custodians are seeking restoration of sick leave to total 160% sick leave, the cost to the School Committee is estimated at an additional \$691,242 for Fiscal year 1994. Restoration of sick leave at this rate for the period Fiscal Year 1988-Fiscal Year 1993 would cost an additional \$4,147,452.

In addition, Ms. Morey Walker attended the March 16, 1994 negotiating session and discussed her calculations at the bargaining

18. In its brief, the Association states that, to the extent Count I of the Commission's Complaint of Prohibited Practice alleges a violation by the School Committee's failure to provide these policies, the claim is not pursued.

19. School Committee counsel Elie forwarded the Association's request for fiscal information to Arthur Shea, head of the school department's budget office. Within the budget office, Mr. Shea assigned Francine Bouchard to retrieve the information and to forward it back to the labor relations office for transmittal to the Association.

20. The hierarchy report is a reliable, concise budgetary document suitable for persons unfamiliar with the school department budgetary process. It is given to city hall in response to its fiscal information requests. As of February 16, 1994, the school department budget office was still compiling data to complete a preliminary budget for fiscal year 1994-1995, and the information was insufficient to trigger a hierarchy report for this fiscal year.

table. During this discussion, the Association disputed her figures. Members of School Committee's bargaining team also expressed some disagreement with Ms. Morey Walker's calculations. During the session, the School Committee amended its figures to reflect a higher cost to the School Committee.<sup>21</sup> At some point during the discussion about her base calculations, Ms. Morey Walker indicated to an Association bargaining team member that she would get back to him on the figures.<sup>22</sup> Ms. Morey Walker left before the negotiating session ended.

*B. March 8, 1994 Information Request*

*1. Contracting Out Custodial Services*

By letter dated March 8, 1994, the Association requested that the School Committee identify and produce relevant documents in support of its stated proposal and rationale that contracting out custodial services is a more cost efficient means of providing custodial services than the employment of the present bargaining unit.<sup>23</sup> To respond to this request, Attorney Elie contacted Paul McNeil, Assistant Director of Facilities Management and a member of the School Committee's negotiating team. Neither McNeil nor his direct supervisor, Robert Roy, was aware of any information or study authorized, conducted, or funded by the School Committee concerning contracting out custodial services. However, because they were aware of a study on this issue conducted by the independent Boston Municipal Research Bureau in the early 1990's, they indicated to Attorney Elie that the school department had no studies in its possession regarding contracting out, but when the information became available it would be forwarded to her for transmittal to the Association. In its March 18, 1994 written response to the Association, the School Committee stated that it was in the process of compiling information.<sup>24</sup>

During a February 11, 1994 negotiating session, Arthur Shea, the school department's chief financial officer, indicated to Association team member Donald Mullen that he possessed information on the cost effectiveness of contract cleaners. In

response to Mullen's request to review the information, Shea informed him that it was not in his possession, but that he would bring it to the next negotiating session.<sup>25</sup> Shea did not attend any other negotiating session, nor did he provide Mullen with any information.<sup>26</sup>

*2. Budget Items*

Referencing negotiations and a prior verbal request, the Association requested that the School Committee provide it with the school-based management budget, including the amount of monies designated for custodial overtime, for the fiscal years 1993/1994 and 1994/1995. In its March 16, 1994 response, the School Committee provided the Association with a copy of an expenditure control sheet accounting summary for the school-based management account showing the total budgeted amount and the budget for custodial overtime for fiscal year 1993/1994 ending June 30, 1994. In an applicable narrative, the School Committee stated:

*2. Overtime Budget for School Based Management:* Funds totalling \$71,745 were included in the Fiscal Year 1994 budget for custodial overtime at certain schools with one custodian, in the event that such school(s) choose to hold school based management training outside of normal custodial hours. The funding calculation was based on 6 meetings at 4 hours overtime per meeting. Please be advised that these are one-time-only funds, which expire in June 1994.

After the Association received the School Committee's March 16, 1994 response that ended with the statement that the School Committee would provide additional information as it was available,<sup>27</sup> it did not make any further inquiry of the School Committee about its information requests prior to filing this charge with the Commission on March 28, 1994. Further, except as otherwise indicated in these findings of fact, the Association did not question the accuracy or adequacy of the information provided by the School Committee, nor did the Association indicate to a School Committee representative that the information supplied was non-responsive, before it filed this charge.<sup>28</sup>

21. The record supports this additional finding, and we modify the facts as requested by the School Committee.

22. Donald Mullen testified that, during this negotiating session, Ms. Morey Walker told him that she would get back to him on the base figures. As the Association's financial retirement secretary and a member of the bargaining team, Donald Mullen assisted custodians in their workers' compensation claims and worked with Ms. Morey Walker in this area. Ms. Morey Walker was not a member of the School Committee's bargaining team and attended only one session. Ms. Morey Walker testified that she did not recall anything about providing further information after the March 16, 1994 session. The hearing officer credited Donald Mullen's testimony on this point, and we adopt her determination.

23. The School Committee's January 25, 1994 bargaining proposal contained language that allowed the School Committee to retain the right to contract out all or any portion of custodial work, after 30 days notice to the Association. The School Committee's request for additional findings on this subject are not material to the outcome of our decision.

24. Paul McNeil did attempt to locate a copy of the study, but he was informed that it was never published. Janet Elie testified that, to her knowledge, the School Committee did not have any documents concerning contracting out of custodial services in its possession before April 7, 1994, and that she was not aware of any documents responsive to this request throughout her employment with the School Committee that ended in August 1994. The hearing officer credited Janet Elie's testimony on this point, and we adopt her finding.

25. Although Shea recalled his exchange with Donald Mullen about contracting out custodial services, he denied telling Mullen that he had information about the cost effectiveness of contract cleaners, and that he would provide the information. The hearing officer credited Donald Mullen's testimony on the content of his exchange with Shea. Mullen's testimony on this point was internally consistent on two different occasions during the course of this five-day hearing, and Mullen produced his bargaining notes that corroborated his recollection of the exchange. We adopt the hearing officer's credibility determination on this point.

26. We affirm the hearing officer's findings that Shea did not possess information about the cost effectiveness of contract cleaners.

27. On May 9, 1994, the School Committee provided the Association with: 1) a May 2, 1994 hierarchy report showing budget figures for fiscal years 1993/1994 and 1994/1995; 2) excerpts from the City of Boston's fiscal year 1995 budget as of April 27, 1994; 3) the School Committee's preliminary budget document for fiscal year 1995, as submitted by the Superintendent and voted on by the School Committee on March 16, 1994; and, 4) the School Committee's vote concerning the preliminary budget document for fiscal year 1995, dated March 16, 1994.

28. Janet Elie testified without rebuttal that, after the Association's receipt of the School Committee's March 16, 1994 response, the Association did not request supplemental information, nor did it indicate that the School Committee's response was inadequate or that there was a problem. School Committee witnesses Paul McNeil and Robert Roy also testified that the Association did not inform them that it needed further information, nor did the Association indicate to either McNeil or Roy that the information the School Committee provided was inadequate. The

## OPINION

*Count I: Refusal to Provide Information*

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1149 (1981). The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration. *Boston School Committee*, 24 MLC 8, 11 (1998), citing *Boston School Committee*, 10 MLC 1501, 1513 (1984). Absent legitimate considerations, a union has a right to information which may explain a public employer's proposals, and assist a union in formulating reasoned counter proposals. *City of Boston*, 24 MLC 39, 42 (1997); *Massachusetts State Lottery Commission*, 22 MLC 1468, 1472-1473 (1996).

The Commission's standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1141. Reasoning that a union has a legitimate and continuing interest in monitoring and maintaining bargaining unit work, the Commission has determined that a union is entitled to review the terms of contractual work assignments to non-bargaining unit members. *Commonwealth of Massachusetts*, 18 MLC 1220, 1228 (1991). A public employer may not unreasonably delay furnishing the requested information. A delay is unreasonable if it diminishes the union's ability to fulfill its role as the exclusive representative. *Boston School Committee*, 24 MLC at 11, see, *Massachusetts State Lottery Commission*, 22 MLC 1468, 1472 (1996); *City of Boston*, 8 MLC 1419, 1437-1438 (1981).

On February 4, 1994, the Association requested that the School Committee provide it with information about school building access, school department policies,<sup>29</sup> custodial overtime, and other budget information. During negotiations conducted between December 21, 1993 and January 25, 1994, the School Committee advanced school building access, the cleanliness of school buildings, school based management, and compliance with a court order that addressed restoration of sick leave credits and custodial overtime as areas it desired addressed during negotiations. Further, the School Committee stated that the changes in these areas needed to be reached within the school department's level funded budget. Therefore, we find that the requested information is relevant and

reasonably necessary to the Association to bargain intelligently with the School Committee, and to formulate reasoned proposals and counter proposals.

On March 8, 1994 the Association requested that the School Committee identify and produce relevant documents to support its proposal and rationale that contracting out custodial services is a more cost efficient means of providing custodial services. Although the School Committee asserts that it did not formally propose the privatization of custodial services, its January 25, 1994 proposal included a section that provided the School Committee with the right to contract out all, or any portion of custodial work after notice to the Association. Further, the school department's chief financial officer and an Association officer discussed the issue during a February 11, 1994 negotiating session. Therefore, we find that this requested information is similarly relevant and reasonably necessary to the Association to perform its duties as the exclusive collective bargaining representative of school department custodians.

After receipt of each request, the School Committee assigned a staff attorney, who was also a member of the bargaining team, to review the requests, to locate responsive information, and to forward the information to the Association. The School Committee provided the Association with information during the negotiations and in a March 16, 1994 letter. In response to the request for school access data, the School Committee provided survey results about the number of attendees at school parent council meetings during the March 10, 1994 negotiating session. After receiving this information, the School Committee and the Association discussed various issues surrounding these meetings. At subsequent negotiating sessions, the parties discussed access to the buildings staffed by one custodian and the different needs of specialty schools. In its March 16, 1994 letter, the School Committee stated that it was compiling additional information on the issue. The School Committee did not provide further information before the Association filed this charge on March 28, 1994.

Similarly, during the February 16, 1994 negotiating session the School Committee provided the Association with a budget report that reflected the total annual budget for the school department for the 1994 fiscal year including the total custodial budget and a separate line item for custodial overtime. As of February 16, 1994, the school department budget office was still compiling data to complete a preliminary budget for the 1995 fiscal year. On March 16, 1994, the School Committee provided the Association with the school department's preliminary budget overview for fiscal year 1995 dated March 10, 1994. And, on March 16, 1994, the School Committee notified the Association of the methodology it had used to calculate its costs of complying with a court order on overtime

28. continued...

hearing officer credited the School Committee's negotiating team members on this point, and we adopt her finding. Although three Association officers and negotiating team members testified that the information did not satisfy their needs, or that it was unresponsive, an examination of their testimony does not indicate that they informed any School Committee agent that there was a problem with the Committee's responses to their information requests prior to filing the charge of prohibited practice with the Commission.

29. The Association does not seek to pursue its allegation that the School Committee failed to provide the requested school department policies. The record supports a finding the School Committee provided the requested information.



and sick leave credit restoration for employees on workers' compensation. Further, the school department's workers' compensation coordinator attended the March 16, 1994 negotiating session and explained her figures and calculations to the Association.

In response to the Association's March 8, 1994 request for school based management budget information, on March 16, 1994, the School Committee provided an account summary for the school based management account, and other information explaining the amount of monies available for overtime in this account during fiscal year 1994. The School Committee also informed the Association of the method the School Committee used to calculate the overtime budget. The School Committee did inform the Association that it would provide additional information as it was available, and did so on or about May 9, 1994. Finally, in response to the Association's March 8, 1994 request for documents relating to contracting out custodial services, the School Committee attempted to locate a study conducted by an independent research bureau in this area, and informed the Association on March 16, 1998 that it was compiling the information. However, the School Committee representatives' inquiry did not locate this study, and the record reflects that the School Committee did not have any information on the cost effectiveness of contract cleaners or contracting out custodial work in its possession to provide the Association.

Based on this record, we find that, the School Committee responded with reasonable promptness to the Association's two requests for information. The School Committee took the steps necessary to retrieve the information and responded during negotiations both orally and in writing. Although the Association desired further information particularly regarding fiscal information for fiscal year 1995 that was not immediately forthcoming because the School Committee itself had not finalized this data, the information was provided as it became available. Further, after the School Committee complied with the Association's requests, the Association's representatives did not press the School Committee for further information, or challenge the adequacy of the information that was provided. Therefore, we conclude that the School Committee satisfied its statutory obligation to bargain in good faith by providing the Association with information in its possession in response to the Association's two requests. Accordingly, the allegations in the first count of the Commission's complaint of prohibited practice are dismissed.

*Count II - Failure to designate a negotiator with sufficient authority*

*Count III - Failure to make an economic offer during negotiations*

Section 6 of the Law requires a public employer and a union to meet at reasonable times to negotiate in good faith over wages, hours, standards of productivity and performance, and any other terms and conditions of employment, ... but such obligation shall not compel either party to agree to a proposal or make a concession. See, *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). The Commission examines the totality of the parties' conduct, including acts away from the bargaining table, to assess whether a public employer or a union has bargained in good

faith. *Higher Education Coordinating Council*, 25 MLC 69 (1998), citing *King Philip Regional School Committee*, 2 MLC 1393, 1397 (1976). The duty to bargain requires the parties to enter into negotiations with an open mind and a sincere desire to reach an agreement and to make efforts to compromise differences. *Commonwealth of Massachusetts*, 8 MLC 1499, 1510 (1981); *Brockton School Committee*, 23 MLC 43 (1996); citing *Holbrook Education Association*, 14 MLC 1737, 1740 (1988)

Although a party's designated bargaining representative need not have the authority to conclude a binding agreement, the representative must possess sufficient authority to make commitments on substantive provisions of a proposed agreement. *Watertown School Committee*, 9 MLC 1301, 1304 (1982); *Middlesex County Commissioners*, 3 MLC 1594, 1597 (1977), cited with approval in *Higher Education Coordinating Council*, 23 MLC 250, 252 (1997). The Commission examines the representative's "character and powers" in deciding whether a party has satisfied the statutory duty to bargain in good faith. *Id.* If the representative's authority is limited to transmitting and discussing proposals, and then reporting back and making recommendations to a principal, without the ability to engage effectively in the give and take of negotiations, a party has failed to bargain in good faith within the meaning of Section 6 of the Law. *Id.*

A party's refusal to negotiate over major economic items until all non-economic issues are resolved impermissibly limits potential compromises and unlawfully frustrates the bargaining process. *Town of Rockland*, 7 MLC 1653, 1656 (1980). If a public employer is opposed to a wage increase, or is reasonably unsure of funding, it may propose a zero percent wage increase, condition its offer on receipt of specific monies, or propose a wage reopener. *Brockton School Committee*, 19 MLC 1120 1123 (1992). A union may then bargain intelligently with the employer, including offering proposals that seek changes in existing economic and non-economic benefits in exchange for a wage increase. *Id.* As the Commission stated in *Town of Rockland*, 7 MLC 1653 (1980), "parties negotiating for...an agreement are only capable of bargaining intelligently and arriving at mutually agreeable compromises if they are free to explore one another's positions over the entire range of mandatorily bargainable subjects which particularly concern them." *Town of Rockland*, 7 MLC at 1656, quoted with approval in *Boston School Committee*, 15 MLC 1541, 1547-1548 (1989).

Here, the Association argues that the School Committee's negotiating team lacked sufficient authority to engage in meaningful bargaining because the team couched its position in terms of "interests," not proposals, and the chief negotiator made statements during bargaining that evidenced her lack of authority. Further, the Association maintains that there was no substantial progress during negotiations, and the School Committee refused to place a valid economic offer on the bargaining table until the Association had agreed to twenty-one major contractual issues. The evidence, however, does not support the Association's position.

During the first negotiating session the parties included in their ground rules the mutual requirement that any agreement reached during negotiations was subject to ratification by the School

Committee and the bargaining unit members. No proposals were exchanged, but the School Committee identified substantive areas it wanted addressed during negotiations, and suggested using package offers as an alternative to the exchange of proposals on a piecemeal basis. Consistent with this stated approach, on January 14, 1994, the School Committee provided the Association with a written outline of its interests or initiatives identifying requisite contractual language changes, and codified this in a written proposal during the next negotiating session on January 25, 1994. The Association advanced its proposal during the January 14, 1994 session.

During negotiations on February 11, 1994, February 16, 1994 and February 24 1994, the parties talked about economic and non-economic issues like school building regrades, that directly impact custodians' wages, sick leave, longevity pay, building transfers, and an expedited arbitration procedure. Prior to February 28, 1994, the School Committee negotiator told the Association that any wage increase proposal was contingent on the removal of certain items from the contract, and that she was without authority to make a wage increase proposal absent assurances that the agreement would contain certain language changes. On February 28, 1994, the School Committee made a tentative wage increase offer contingent on the Association's concurrence with twenty-one contractual changes. The Association rejected the tentative offer. During negotiations on February 28, 1994, March 10, 1994 and March 16, 1994, the parties continued discussing school building regrades, and other economic and non-economic issues. On April 7, 1994, the School Committee placed a complete package offer on the table that included a wage increase.

Based on the totality of the School Committee's conduct, we are not persuaded that the School Committee failed to designate a negotiator with sufficient authority to bargain, and failed to make an economic offer during the negotiations conducted on twelve dates between December 21, 1993 and April 7, 1994. The record discloses that the School Committee's negotiator advanced the issues the School Committee desired addressed, and tied a tentative wage increase proposal to contractual changes. This conduct, standing alone, does not support a finding that the employer's negotiator lacked sufficient authority to engage in meaningful bargaining with the Association. Although the School Committee remained steadfast in its objective to achieve certain contractual changes, there is insufficient evidence to infer that its proposals effectively precluded good faith negotiations, or that the negotiator was without sufficient authority, within certain stated interest based parameters, to effectively negotiate a compromise agreement.

The School Committee did not offer a wage increase proposal until the eighth negotiating session on February 28, 1994, and this wage proposal was both tentative, and tied to agreement on twenty-one contractual changes. The record discloses that the employer's chief negotiator had the authority to place this wage offer on the table. Although the collective bargaining process would have been better served had the employer included a wage increase offer earlier in negotiations, we decline to find that, either linking the tentative wage offer to twenty one contractual changes, or the timing of its wage offer, rises to the level of impermissible conduct. Cf. *Higher Education Coordinating Council*, 23 MLC 253 (1997) [An

employer's failure to submit economic proposals effectively stalled negotiations for a year in violation of the duty to bargain in good faith.]; *Boston School Committee*, 15 MLC 1541 (1989). [An employer's refusal to submit a wage proposal until it finalized its budget about four months after negotiations began, and its failure to give its representative sufficient authority to make a wage proposal violated the Law.] Further, unlike *Town of Rockland*, 7 MLC 1653 (1980), where the employer refused to negotiate over the bulk of economic issues until all non-economic issues were resolved, here, the School Committee did negotiate with the Association, both prior to and after February 28, 1994, over non-economic and economic items, notably school building regrades. And, on April 7, 1994, the School Committee placed a new package offer on the table that included a wage offer and other economic and non-economic items that the parties had discussed in the prior eleven negotiating sessions.

The totality of the School Committee's conduct both at and away from the bargaining table militates against a finding that its chief negotiator did not have sufficient authority to engage in meaningful bargaining or that the School Committee failed to make an economic offer in violation of the Law.

#### CONCLUSION

For the reasons stated, we conclude that the School Committee did not fail to bargain in good faith during successor collective bargaining negotiations with the Association conducted between December 1993 and April 7, 1994, as alleged in the complaint of prohibited practice. Therefore, the complaint is dismissed.

SO ORDERED.

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