In the Matter of NORTH MIDDLESEX REGIONAL SCHOOL DISTRICT TEACHERS ASSOCIATION

and

NORTH MIDDLESEX REGIONAL SCHOOL DISTRICT COMMITTEE

Case No. MUPL-4153

76.5 unilateral change by union
91.1 dismissal
91.52 failure to file answer

October 23, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Ira Fader, Esq.	*Representing the North Middlesex Regional School District Teachers Association*
Gregory Angelini, Esq.	*Representing the North Middlesex Regional School District Committee*

DECISION[1]

Statement of the Case

On March 10, 1997, the North Middlesex Regional School District Committee (the Committee) filed a charge with the Labor Relations Commission (the Commission) alleging that the North Middlesex Regional School District Teachers Association (the Association) had violated M. G. L. c.150E (the Law). Following an investigation, on March 11, 1998, the Commission issued a Complaint of Prohibited Practice, alleging that the Association had violated Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law by: 1) unilaterally changing the practice of resolving grievances in executive or closed sessions; and 2) repudiating the parties' collective bargaining agreement. On April 13, 1998, the Committee filed a Motion for Summary Judgment, on the ground that the Association had failed to file an answer within the time specified in 456 CMR 15.06. On April 29, 1998, the Association filed: 1) a Motion for Enlargement of Time for Filing Answer; 2) an Answer; and 3) an Opposition to the Committee's Motion for Summary Judgment. The Commission denied the Committee's Motion for Summary Judgment.[2]

On May 21, 1998, Commissioner Mark Preble, Esq. conducted a hearing at which both parties had an opportunity to be heard, to examine and cross-examine witnesses and to introduce documentary evidence. Both parties subsequently filed post-hearing briefs. The Hearing Officer issued Recommended Findings of Fact on February 6, 2001. The Association and the Committee filed challenges to the Recommended Findings of Fact on March 12, 2001 and March 19, 2001, respectively.

Findings of Fact[3]

A. Background

The Committee is a public employer within the meaning of Section 1 of the Law. The Association is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for all teachers and certain non-teaching personnel employed by the Committee. The Committee and the Association are parties to a collective bargaining agreement covering the period September 1, 1996 through June 30, 1999. Article 3 of that agreement, entitled "Grievance Procedure," provides for a four-step process that culminates in binding arbitration. Article 3 also states, at paragraph B(1):

> The purpose of this procedure is to secure at the lowest possible administrative levels equitable solutions to the problems which may from time to time arise affecting the welfare or working conditions of members. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.

Paragraph B(1) has been in the parties' successive collective bargaining agreements since at least 1975, and there have been no negotiations about the provision for at least eight (8) years prior to the events that gave rise to this case.[4] There have also been no arbitration cases concerning the application or interpretation of the provision.[5]

Pursuant to Article 3 of the parties' agreement, the grievance process begins at step one with a private meeting between the grievant, an Association representative, and the school principal. If the matter is not resolved, the principal informs the superintendent and the matter proceeds to step two. Step two of the process is a meeting between the superintendent and the Association president.

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

2. The Hearing Officer reported to the parties at the outset of the hearing that the Commission had decided to deny the Committee's Motion for Summary Judgment. Although we do not condone the Association's delay in filing its Answer, we decline to decide matters on purely technical grounds where, as here, the Committee suffered no prejudice and had full opportunity to present its case. *See Commonwealth of Massachusetts*, 21 MLC 1515, 1517 (1994).

3. The Commission's jurisdiction in this matter is uncontested.

4. The Association requests in its challenges that this finding be modified to reflect that there have been no negotiations about the provision for 25 years, rather than 8 years, based on the testimony of the Association President, Nancy Jo Daly. However, although Daly testified that the provision, in its current form, was in the agreement dating back to 1975, she also testified that she has only been involved in the last three rounds of negotiations between the parties, and, upon a review of her notes from the last three bargaining rounds, she found no indication that the issue had been raised in negotiations. Therefore, we decline to modify the Hearing Officer's finding.

5. The Committee requests in its challenges that facts concerning a professional consultation provision, which allowed the Association to meet directly with the School Committee outside of the grievance process, and which was deleted from the contract by agreement in negotiations prior to the 1996-97 school year, be included in the findings. The Association President had testified about regretting the Association's agreement to delete this provision, and how the lack of access to the School Committee had partly motivated the publication of the no confidence vote at issue here. However, because the Association's motivation in taking the action it did is not material to the issues in the case, we decline to supplement the findings with these facts.

Superintendent James McCormack (McCormack) states at the outset of the meeting that the meeting is an executive session and nothing that is said in the meeting should leave the room. If the matter remains unresolved at step two, the matter proceeds to step three. Step three of the process is a hearing before the Committee.[6] Grievance hearings at the Committee level are conducted in executive session.[7]

Although neither the Committee nor the Association regularly released the substance of the grievance meetings to the press prior to the events that led to this dispute, there was at least one occasion on which both Committee and Association representatives were quoted in the press concerning a pending grievance. During the 1993-1994 school year, the parties were engaged in a dispute over health insurance contributions. On September 10, 1993, the Association filed a grievance over the matter that was ultimately denied by the Committee on May 24, 1994. The Association also filed an unfair labor practice charge over the health insurance issue with the Labor Relations Commission in 1993, in Case No. MUP-9664.[8] However, in a newspaper article that appeared in the *Fitchburg Sentinel* in January 1994, it was reported that Association President Nancy Jo Daly (Daly), who was then the professional rights and responsibility chairman, said that "80 to 100 former and current school workers were overcharged for health insurance from 1989 until December 1993." The article also reported that McCormack said that the Association was "jumping to conclusions." Then-Association President Robert LeBlanc was also heavily quoted. Neither party protested the other party's discussion of the health insurance matter with the press at that time.

In addition to discussing the health insurance matter with the press in January 1994, in general, McCormack would speak to the press very broadly about various issues, if he were contacted. McCormack may have spoken to reporters about a school calendar grievance.[9]

B. The Dispute

In approximately 1994, some members of the bargaining unit began to voice concerns about High School Principal Thomas Casey (Casey). The Association attempted to address those concerns through various channels, including the Faculty Senate and by speaking directly to McCormack, but it was not satisfied by the way that the concerns were being addressed. By 1996, the members of the bargaining unit had become very frustrated.

During the 1996-97 school year, the Association filed a class-action grievance over an alleged change in the high school schedule. After the grievance was denied at the first two steps of the grievance process, Daly requested that the matter proceed to step three. The matter was scheduled to be heard at a Committee meeting on November 18, 1996.[10]

In the meantime, on November 5, 1996, High School Varsity Basketball Coach Steve Dubzinski (Dubzinski) and an Association representative met with Casey to discuss a step one grievance filed regarding Casey's decision to not recommend Dubzinski's appointment for the 1996-97 school year. Casey denied the grievance and, in a memorandum to McCormack dated November 6, 1996, Daly requested that the matter proceed to step two of the grievance process.[11] The parties ultimately settled the matter, sometime after November 1996.[12]

On November 14, 1996, the Association's Executive Board adopted a resolution of "no confidence" in Casey. The resolution stated:

> Whereas, the Principal of the North Middlesex Regional High School, Thomas Casey, has displayed blatant disregard for the provisions of the Collective Bargaining Agreement between the North Middlesex Regional School District Teachers Association and the North Middlesex Regional School District Committee, and
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> Whereas, Mr. Casey has participated in the dismissal of a member of the coaching staff without just cause, and
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> Whereas, Mr. Casey has, in August of 1996, arbitrarily altered the teaching schedule at the High School in direct contradiction to the recommendation of the High School Restructuring Committee, and
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> Whereas, Mr. Casey's actions and demeanor in the last three years have adversely affected the morale of the professional staff at the High School, i.e. his inaccessibility to staff, and the fact that he dismisses teacher concerns on a daily basis resulting in a lack of respect from and the alienation of the High School staff, and
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> Whereas, Mr. Casey has failed to earn the respect of the student body, a situation which is of grave concern to the professional staff,
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> Be it therefore known that the Executive Board of the North Middlesex Regional School District Teachers Association, acting on a

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6. The Committee meets on the second and last Monday of each month.

7. Unlike open sessions, executive sessions are not attended by members of the public or the media.

8. We have included a reference to the Commission charge, at the request of the School Committee in its challenge. Although witness testimony was inconsistent about whether or not there was a charge, we take administrative notice of the charge filed with the Commission.

9. We have supplemented the findings, based upon both the Committee's and the Association's challenges, to include McCormack's testimony that he speaks broadly to the press when contacted, and based upon the Association's challenge, that McCormack may have spoken to the press concerning the school calendar grievance, and that neither party protested the other party's comments to the press concerning the health insurance issue, all of which are supported by the record. We have not included a finding that media attention concerning the health insurance issue was triggered by the termination of a clerical employee for revealing confidential information, however, because the record is unclear on this point and it does not appear to be material to the issues before us here. We have also not included the Committee's requested finding that the health insurance controversy lasted for two years because only that grievance was pending at the time of the article and how long it had been pending up to that point appears relevant to a decision in this case.

10. The Committee denied the grievance following a hearing conducted in an executive session on November 18, 1996. The matter then proceeded to arbitration, where the grievance was denied.

11. The memo also referenced a matter concerning the dismissal of another high school coach.

12. We have included, based on the Committee's challenge, that the matter was settled at a time after the events in dispute in November 1996. We have not included the requested finding by the Committee that the Committee might have gone another way on the settlement under other circumstances, which is irrelevant to the issues in this case.

> vote of the High School teachers, does declare a vote of "no confidence" in the High School Principal, Thomas Casey.[13]

On Friday, November 15, 1996 the Association mailed a memorandum dated November 16, 1996 to Committee Chairperson Dennis Moore (Moore) that included a copy of the resolution.[14] The memorandum was simultaneously sent to the other members of the Committee and indicated that copies were being sent to McCormack, Casey and several area newspapers.[15] On Sunday, November 17, 1996, Daly sent a copy of the memorandum and resolution to several area newspapers via facsimile transmission. Prior to taking the vote and distributing the memorandum and resolution, the Association reviewed the collective bargaining agreement—including article 3, paragraph B(1)—and believed there was nothing in the agreement that prohibited the Association from taking the no confidence vote and making the results public.

In a newspaper article that appeared in the *Lowell Sun* on November 19, 1996, Daly was quoted as saying that "an overwhelming majority—more than two thirds" of the Association membership voted not to endorse Casey. Daly was also quoted as stating that "unfortunately it was at a point where people are feeling so demoralized with the way things are going." The article referred to the grievance that was pending over Dubzinski's dismissal, but did not refer to the class-action grievance that was pending over the change in the high school schedule.

Prior to the article in the *Lowell Sun* on November 19, 1996, there had been media coverage of the coach's dismissal. In her conversation with the *Lowell Sun* reporter, Daly did not divulge to the reporter that there were pending grievances against the principal, and she refused to discuss the particulars with the reporter when he raised the issue of the coach dismissal matter with her.[16]

Opinion

The Complaint in this case alleges that the Association violated Sections 10(b)(2) and (1) of the Law, when it forwarded a "no confidence" vote in the high school principal to area newspapers, and thereby unilaterally changed the practice of holding all meetings and written communications about grievances in executive or closed sessions. The Complaint further alleges that, by its conduct, the Association repudiated the language of the collective bargaining agreement providing that "both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure", in violation of Sections 10(b)(2) and (1) of the Law.

The Committee argues first that the Association's conduct was a *per se* violation of G. L. c.150E, because it was the equivalent of insisting that grievance hearings be conducted in open session and created a "chilling effect" on possible settlement of the grievances. The Committee relies on the Commission's decision in *Falmouth School Committee*, 12 MLC 1383 (1985), in which the Commission extended to grievance hearings the *per se* rule that an employer violates the Law by insisting upon open collective bargaining sessions. The Committee further relies on the Commission's decision in *Wakefield School Committee*, 18 MLC 1114 (1991), in which the Commission gave an advisory opinion concerning a party's proposal to disclose the substance of negotiations.

In *Falmouth*, the Commission held that a party violates the law by insisting that grievance sessions be held in public, based on the rationale previously articulated with respect to collective bargaining negotiations:

> Successful negotiations are based on compromise. They require that each side be free to test out a variety of proposals on the other; withdrawing some, giving up others in order to gain a better advantage in a different area. The presence of third parties necessarily inhibits such compromises and reduces the flexibility management and unions have to reach agreement. Positions taken in public tend to harden and battle lines are drawn in spite of the mutual desire of the parties to meet in an acceptable middle ground.

Falmouth School Committee, *supra* at 1386, *citing Town of Marion*, 2 MLC 1256, 1258 n.3 (1975), *aff'd sub nom.*, *Board of Selectmen of Marion* v. *Labor Relations Commission*, 7 Mass. App. Ct. 360 (1979). The Commission noted a similar concern in *Wakefield School Committee*, where the disclosure of collective bargaining minutes could be the equivalent of holding sessions in public:

> [D]isclosure of the substance of negotiations, after the parties have agreed not to disclose, could not only violate the duty to bargain in good faith by breaching the ground rule, but also could interfere with the frank and open conduct of negotiations by creating a chilling effect on the negotiators.

Wakefield School Committee, *supra* at 1115.

Nothing in *Falmouth* or *Wakefield*, however, prohibits the discussion of grievance issues outside the grievance proceedings. In fact, the Commission has specifically noted in the past that, although a party may not insist on holding collective bargaining negotiations in open session, a party may negotiate a ground rule permitting the parties to communicate their bargaining positions to the media and the public. *Holbrook School Committee*, 5 MLC 1491, 1494 (1978). More importantly, the Commission has repeatedly held that activities designed to involve or persuade non-parties for the purpose of favorably resolving a dispute or a grievance are concerted and protected, provided the activities are not unlawful, violent, in breach of contract, disruptive or indefensibly disloyal to the employer. *City of Lawrence*, 15 MLC 1162, 1165 (1988) and cases cited therein. The Committee concedes that the decision to conduct the no-confidence vote and to publicize the details of the

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13. We have supplemented the facts to include the entire resolution, in response to the School Committee's challenge, which sought inclusion of the first paragraph, and the Association's challenge, which sought reproduction of the entire resolution.

14. Although the memorandum was dated November 16, 1996, Daly mailed the memorandum on Friday, thinking that it would be received on Saturday.

15. We have not included a finding requested by the Committee that the newspapers carried the story before the communication was received by members of the Committee, because it is not relevant to an decision in this case.

16. We have supplemented the facts, based upon the Association's challenge, to include Daly's testimony concerning her conversation with the reporter, and the extent of prior media coverage, because the extent of what the Association divulged to the press is a central issue in the case.

vote were protected, concerted activities. It is only the Association's publicizing of the subject matter of pending grievances that the Committee claims constitutes the violation. However, the Law is clear that, even if the Association had included information about the substance of the grievances in its statement, that conduct would not come within the narrow prohibition against insisting on open grievance proceedings under Commission case law.

In this case, the Association neither insisted on open sessions for the grievance hearings, nor revealed the substance of what took place at the grievance hearings. The Association included in its statement only conduct that it had also complained about in its grievances, but did not disclose to the public that the Association had filed grievances about the conduct, any of the responses to the grievances that the Association had received nor any information about the proceedings that had taken place. The Association's statement to the press is therefore not analogous to the conduct in either *Falmouth* or *Wakefield*, and not a *per se* violation of the Law.

The Committee also argues that the Association's conduct violated the Union's duty to bargain in good faith, because it constituted an unlawful unilateral change in the parties' practice to refrain from publicizing any pending grievance proceedings to third parties, including the media. In general, a union's obligation to bargain in good faith under Section 10(b)(2) mirrors an employer's good faith bargaining obligation under Section 10(a)(5) of the Law. *Town of Hudson*, 25 MLC 143, 147 (1999), *citing Massachusetts State Lottery Commission*, 22 MLC 1519, 1522 (1996). A public employer violates Section 10(a)(5) and (1) of the Law when it unilaterally changes wages, hours or other terms and conditions of employment without first bargaining to resolution or impasse with the union. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). To establish an unlawful unilateral change, the charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice or an opportunity to bargain. *Town of Hudson*.

A unilateral change analysis appears inapposite to the facts of this case. In the past, the Commission has generally considered a union's violation of Section 10(b)(2) of the Law in the context of a union's conduct during negotiations, and found a violation where the union had failed to fulfill the Law's requirement to bargain in good faith. *See*, *e.g*., *Holbrook Education Association*, 14 MLC 1737 (1988) (Union violated Section 10(b)(2) of the Law by engaging in an unlawful work stoppage intended to affect the conduct of the parties' negotiations); *Local 1462, AFCSME, Council 93, AFL-CIO*, 9 MLC 1315 (H. O. 1982) (Union violated Section 10(b)(2) of the Law by seeking an increase in insurance premium benefits through placing an article on a Town meeting warrant, and thereby bypassing the Town on a mandatory subject of bargaining.) *See*, *also*, *Massachusetts State Lottery Commission*, 22 MLC 1519 (1996) (Union violated Section 10(b)(2) of the Law by undermining the parties' grievance-arbitration process, by criticizing bargaining unit members for testifying voluntarily at an arbitration hearing in favor of the employer's position.)

In this case, to the extent there existed a practice of keeping grievance matters confidential, we decline to view the Association's decision to depart from that practice as a unilateral change in terms and conditions of employment in violation of the Law. Absent an underlying agreement between the parties concerning confidentiality, we do not interpret the Law to foreclose the Association from engaging in protected, concerted activity, simply because the Association has not done so in the past. Even if we were to review the Association's conduct under a unilateral change analysis, we would find that the Association did not depart from a past practice. The evidence establishes that, in the past, both Association and Committee representatives had spoken to the press about the health insurance issue, while a related grievance was pending and that the Superintendent spoke generally to the press about matters which might be the subject of grievances. Therefore, the record does not establish a past practice of keeping matters pertaining to grievances confidential.

Finally, the Committee argues that the Association's publishing of the no confidence vote, which referred to subject matter that the Association had also grieved, repudiated the language in Article 3, Paragraph B(1) of the collective bargaining agreement that "[b]oth parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure." A party that fails to implement an unambiguous provision of a collective bargaining agreement repudiates the agreement's terms in violation of the obligation to bargain in good faith. *City of Melrose*, 22 MLC 1209, 1217 (1995). To establish repudiation, the Committee has to show that the Association deliberately refused to abide by the agreement. *Massachusetts State Lottery Commission*, 22 MLC 1519, 1522 (1996). If the parties hold differing good faith interpretations of the provision at issue, the Commission will find no violation. *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1991).

The Committee's repudiation argument requires several unsupported leaps in fact and logic. First, the contract language itself does not prohibit the publicizing the subject matter of the grievance; it is merely the proceedings that must be kept as confidential as may be appropriate. The no-confidence vote does not reference the grievance proceedings. Second, the contract does not contain a blanket prohibition against revealing information about grievance proceedings; the parties have agreed only that the proceedings will be kept as confidential as may be appropriate. The words "as may be appropriate" clearly leave to the parties some discretion to determine the propriety of revealing information.

In addition, the parties' practice to hold all grievance hearings in closed or executive session does not support the Committee's argument that the contract precludes a unilateral decision by either party as to when grievances may be publicized. The Committee mistakenly equates the holding of hearings in executive session with the discussion of the subject matter of the grievance with third parties. There is no evidence of bargaining history concerning this provision, which has been in the parties' contract for more than 25 years, to support the Committee's argument, which is contrary to the plain language of the provision. We therefore conclude that the Committee has failed to establish that the Union's provision of the

no-confidence vote to the press constituted a deliberate refusal to abide by the contract in violation of the Law.

Conclusion

For the foregoing reasons, we conclude that the Association did not violate Sections 10(b)(2) and, derivately, 10(b)(1) of the Law when it forwarded a no confidence vote in the high school principal to area newspapers. Therefore, we dismiss the complaint.

SO ORDERED.

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