MELROSE SCHOOL COMMITTEE AND MELROSE TEACHERS ASSOC., MUP-2323 (12/7/76).

(50 Duty To Bargain)
54.66 initial wages for newly created positions
(60 Prohibited Practices By Employer)
67.15 defenses - union waiver of bargaining rights
67.9 refusal to bargain with new employees

Commissioners Participating: James S. Cooper, Chairman; Madeline H. Miceli, Commissioner; Garry J. Wooters, Commissioner.

Appearances:

William Sherry, Jr., Esq. - Counsel for the Melrose School Committee
Brian Riley, Esq. - Counsel for the Melrose Teachers Association

DECISION

Statement of the Case

On August 15, 1976, the Melrose Teachers Association (the Association) filed a Complaint of Prohibited Practice with the Labor Relations Commission (the Commission) alleging that the Melrose School Committee (the School Committee) had violated General Laws Chapter 150E (the Law) Section 10(a)(5) by refusing to negotiate in good faith with respect to the wages for certain newly created positions in the bargaining unit. After an investigation, the Commission issued its Complaint of Prohibited Practice alleging that the School Committee's actions violated Sections 10(a)(1) and (5) of the Law. Prior to a hearing, the parties agreed to submit the matter on a stipulation of facts which we have adopted below.

Findings of Fact

1. The City of Melrose is a municipal corporation situated in Middlesex County in the Commonwealth of Massachusetts and is a "Public Employer" within the meaning of Section 1 of the Law.

2. The Melrose School Committee is the representative of the Public Employer for the purposes of collective bargaining with employees of the School Committee.

3. The Melrose Teachers Association is an "Employee Organization" within the meaning of Section 1 of the Law.

4. The Melrose Teachers Association is the exclusive representative for purposes of collective bargaining of a unit of employees described as follows:

> All classroom teachers, librarians, guidance counselors, school psychologists, adjustment counselors and special subject teachers.

The collective bargaining agreement (in effect between the parties at the date this Complaint arose) became effective September 1, 1974 and was to terminate on August 31, 1976. It contained the following provision:

Melrose School Committee and Melrose Teachers Assoc., 3 MLC 1299

ARTICLE II - RECOGNITION

> Section 4. This contract is a complete contract between parties covering all subjects of bargaining for the term hereof.
>
> Except as specified in the Duration Article; the Committee shall not be under an obligation to negotiate with the Association any modifications or additions to this contract which are to become effective during the term hereof.
>
> In the event that agreements are mutually reached on a voluntary basis between the Committee and the Association, they will be signed by the Committee and the Association and will become an addendum to this contract.

. . . . . .

The Duration Clause contained the following provision:

> It is recognized that the operation of the new Melrose High School is anticipated for the fall of 1975. Should the Melrose Education Association desire to submit any proposals for implementation in the second year of this contract, they may do so by giving a notice of reopener of this issue to the School Committee by May 1, 1975, and negotiations with respect to said proposals will commence promptly after that date.

In late 1974 or early 1975, the School Committee voted to create two extra-curricular positions for "Unit Teacher Advisors" at the new Melrose High School beginning September 1, 1975. A description of the positions posted on or about March 14, 1975, indicated that members of the high school teaching staff were eligible for appointment as Unit Teachers Advisors at a $1,000 per year stipend. Prior to this time, the School Committee gave no specific notice to the Association nor did it consult with the Association about either the creation of the positions or the initial stipends set for them.

On May 21, 1975, a collective bargaining session was held between the School Committee and the Association, which had given timely notice of its intention to reopen negotiations pursuant to the collective bargaining agreement. At this session, the Association requested that the School Committee bargain about the stipends for the new Unit Teacher Advisor positions. The School Committee took the position that the stipends were not negotiable matters at the time. An exchange of correspondence subsequent to this session reiterated the positions of both parties.

On June 30, 1975, two teachers at Melrose High School were elected as Unit Teacher Advisors for the 1975-1976 school year at a salary of $1,000.

On August 15, 1975, the Association filed the instant Complaint.

During negotiations between the School Committee and the Association for a collective bargaining agreement for the 1976-1977 and 1977-1978 school years,

the parties negotiated in good faith with respect to the stipends for the Unit Teachers Advisors for those school years.

Since 1970 and prior to the filing of this Complaint, the School Committee had created approximately twenty extracurricular positions without giving specific notice to the Association and without consultation with the Association regarding the establishment of and the initial salary for these positions. No grievance or Complaint of Prohibited Practice was filed by the Association regarding those actions of the School Committee.

OPINION

This Complaint raises two issues: 1) whether initial salaries for newly created bargaining unit positions[1] are matters over which an employer and employee organization must bargain and if so, 2) whether in this case the employee organization waived its bargaining rights.

In Northeast Metropolitan Regional Vocational School Dist. and Northeast Teachers Assn., 1 MLC 1005 (1974), the Commission found that where positions in a newly created afternoon education program were proper accretions to an existing bargaining unit, a duty arose on the part of the Public Employer to bargain about wages, hours and other terms and conditions of employment for these positions. This decision was in harmony with a National Labor Relations Board interpretation of Section 8(a)(5) of the National Labor Relations Act.[2] LeRoy Machine Co., Inc., 147 NLRB 1431, 56 LRRM 1369 (1964) held that an employer violated Section 8(a)(5) when it refused to bargain with a union on rates of pay for new jobs, even though the rates were later negotiated in subsequent collective bargaining agreements.

The employer suggests that School Committee of Hanover v. Curry, Mass. Adv. Sh. (1976) 396, 343 N.E. 2d 144 (1976) and School Committee of Braintree v. Raymond, Mass. Adv. Sh. (1976) 399, 343 N.E. 2d 145 (1976) now preclude us from adhering to our prior position. Hanover held that the decision to abolish a bargaining unit position for reasons of educational policy was within the exclusive managerial prerogative of the School Committee. We are asked to find that the establishment of an initial salary level for a new position is similarly committed to School Committee discretion and removed from the requirements of the Law.[3] However, we note that Hanover was careful to distinguish "educational policy" from "terms and conditions of employment". Those matters "predominently in the realm of educational policy" are not within the scope of bargaining.

---

[1]Neither party disputes the fact that the extracurricular positions ar issue are properly included in the bargaining unit represented by the Association.

[2]29 U.S.C. 158(a)(5) (1974) "(It shall be an unfair labor practice for an employer)... to refuse to bargain collectively with the representatives of his employees..."

[3]The issue of whether the decision to create a new position is controlled by Hanover and Braintree is not before us. The Association has not challenged the right of the School Committee to create new positions. It has only insisted that there is a duty to bargain about initial salary levels.

School Committee of Hanover v. Curry, supra. We cannot conclude that initial salary levels are matters of educational policy and not terms and conditions of employment. Such an interpretation would conflict with the statutory language of Section 2 of the Law.

> Employees shall have the right to self-organization and the right to form, join or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment. (emphasis added)

We therefore follow our decision in Northeast Metropolitan Regional Vocational School Dist. and Northeast Teachers Association, supra, and find that initial wages for newly created positions which are properly included in an existing bargaining unit are "wages" within the meaning of the Law and matters upon which an employee organization has a right to bargain.

This decision does not, however, end this case. The School Committee contends that even if a right to bargain about initial salary levels exists, that the Melrose Teachers Association has waived its right in this instance. The School Committee points to the provisions of the collective bargaining agreement in effect at the time of the creation of the positions and the past practice of unilateral creation of extracurricular positions and initial salary determination.

We have adopted the standard of the National Labor Relations Board in requiring that a waiver of a union's statutory right to bargain be "clear and unmistakable." NLRB v. Perkins Machine Co., 326 F.2d 488, 55 LRRM 2204 (1st Cir. 1964); Town of Natick, 2 MLC 1086 (1975); City of Everett, 2 MLC 1471 (1976). Mere silence on the part of an employee organization is not waiver. Bierl Supply Co., 179 NLRB 741, 72 LRRM 1498, 1499 (1970); Town of Natick, 2 MLC 1086, 1092 (1975). The matter allegedly waived must have been fully explored and consciously yielded before a waiver will be found. The Press Co. and Newspaper Guild, 121 NLRB 976, 42 LRRM 1493 (1958).

In the instant case, a consideration of all the facts points to a waiver by the Association of its right to bargain about the stipends at issue during the term of the existing collective bargaining agreement. First, the collective bargaining agreement specifically states that the School Committee is not obligated to negotiate modifications or additions to the contract to become effective during its term. Under the standards we have adopted, this provision alone would not amount to waiver of the Association's right to bargain about wages for newly created positions. However, because of the opening of a new high school, the parties agreed to a reopener clause in the collective bargaining agreement which by its terms is limited to matters of hours or working conditions. The subject of wages was omitted from the reopener provision. The Association has not contended that this omission was the result of anything but conscious deliberation. Especially when we view these provisions together with the past practice[4] of

[4]The collective bargaining agreement between the parties effective September 1974 covered approximately 80 extracurricular positions. The 20 positions created by the School Committee since 1970 represent one-quarter of all existing positions. This large percentage of positions surely did not go unnoticed by the Association and must reasonably have made it aware that the opening of a new high school may have occasioned additional actions of this nature.

unilateral creation of new extracurricular positions and initial stipends by the School Committee we cannot but conclude that the Association knew that new extracurricular positions could be established at the high school and stipends set for them; that it was fully aware that it had not negotiated a contract provision covering this matter; and that it consciously agreed to limit the reopener clause to preclude wage negotiations during the contract term.

While the Commission will not lightly infer a waiver of a statutory right, it will also not allow parties to lightly escape their duties and responsibilities to abide by the agreements they negotiate.[5]

ORDER

Wherefore, on the basis of the foregoing, it is hereby ordered that this Complaint ought to be and is DISMISSED.

James S. Cooper, Chairman

Madeline H. Miceli, Commissioner

Garry J. Wooters, Commissioner

[5]We note that the School Committee and the Association have successfully negotiated an agreement which includes wages for the Unit Teacher Advisor positions that are the subject of this Complaint. We are confident that they will note our conclusions as to the bargainability of the underlying subject matter and that they will in good faith resolve any future disagreements of this nature.