MIDDLESEX COUNTY COMMISSIONERS AND AFSCME, COUNCIL 41, MUP-2472 (4/15/77)

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Commissioners participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner.

Appearances:

Peter R. Beatrice, Jr., Esq. - Counsel for the Employer
Wayne Soini, Esq. - Counsel for the Employee Organization

DECISION AND ORDER

Statement of the Case

On March 31, 1976 the American Federation of State, County and Municipal Employees, AFL-CIO, Council 41, (the Union) filed a Charge of Prohibited Practice with the Massachusetts Labor Relations Commission (the Commission) alleging that certain practices prohibited by General Laws Chapter 150E Section 10 (a) had been committed by the Middlesex County Commissioners (the Employer).

The Commission, pursuant to the power vested in it by General Laws Chapter 150E Section 11, investigated the complaint and on May 19, 1976 issued its own Complaint of Prohibited Practice. In substance, the Commission's complaint alleged that the Employer had acted in violation of General Laws Chapter 150E Section 10(a)(1) and 10(a)(5) by failing and refusing to bargain in good faith with respect to economic items. Further, the complaint alleged that the Employer had acted in violation of General Laws Chapter 150E Sections 10(a)(1), 10(a)(5) and 10(a)(6) by failing and refusing to participate in good faith in mediation procedures established in Section 9 of the Law, by altering its previously agreed upon proposals subsequent to the initiation of mediation proceedings.

Pursuant to notice, a formal hearing was held at the offices of the Labor Relations Commission in Boston on August 25, 1976 before Robert B. McCormack, a duly designated agent of the Commission. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties. After having read all of the evidence adduced at the hearing, we hereby make the following findings, rulings, and render the following opinion.

Findings of Fact

1. The Middlesex County Commissioners are a public employer within the meaning of Chapter 150E, Section 1.

2. The American Federation of State, County and Municipal Employees, Council 41, AFL-CIO is an employee organization within the meaning of Chapter 150E, Section 1.

3. The American Federation of State, County and Municipal Employees, Council 41, AFL-CIO is the exclusive representative for the purposes of collective bargaining of employees of the Maintenance Department (including Walden Pond); Middlesex County Hospital and the Training School.

The Union and the Employer were parties to a collective bargaining agreement which was to expire on March 31, 1974. By mutual agreement they extended the terms of said agreement to June 30, 1974.

In the spring of 1974 the parties commenced negotiations on a new collective bargaining agreement. The Union's negotiator was Harvey Berman, while an attorney, negotiated on behalf of the Employer. At the outset of negotiations, Berman asked the attorney whether he had authority to negotiate an agreement; the attorney replied "yes".

At the first negotiation session, Berman gave the attorney a proposed collective bargaining agreement. The parties subsequently negotiated at eight separate bargaining sessions between May 10, 1974 and November 29, 1974. Thereafter there was a lapse in negotiations, and the parties did not meet again until July 1975. This lapse was the result of a County Commissioner having been elected to Congress. It appears that no negotiations were conducted until his vacancy was filled by the appointment of a new County Commissioner. The evidence does not indicate that the Union demanded negotiations during this period.

When the parties again met in July 1975, accord was reached on several, but not all, collective bargaining proposals. We find that the parties agreed on proposals including discipline and discharge, job posting and bidding procedures, hours, vacations, holidays, uniforms and protective clothing, funeral leave, leaves of absence, personnel files, union representation and management rights. Berman and the attorney each initialed proposals which reflected their accord in respect to the above-described issues.[1] Many of the clauses which the two men initialed reflected only a continuance of benefits afforded by the old collective bargaining agreement.

During negotiations, the Union made proposals on certain economic items including shift differential, overtime and recall pay, working out of classification, group insurance, sick leave, and longevity. The Employer refused to bargain concerning said proposals, and submitted no substantial counter offers concerning economic items. It predicated its refusal upon the assumption that the Massachusetts Legislature would not fund that which they might have agreed upon.

The Union then petitioned for mediation, and a mediation session was conducted in January 1976. The Employer had dispensed with the legal services of

[1]The initialed document was not introduced into evidence and we have no knowledge of the specific terms of the accord which was then reached.

their attorney prior to that time. Attorney Peter R. Beatrice, Jr., represented the Employer during mediation and continues to do so today. M. Michael Botelho, assistant to the president of Council 41 of the Union, replaced Berman as chief negotiator. A second mediation session was held in March 1976.

At the mediation session, attorney Beatrice stated that the County Commissioners had not been kept informed of the progress of negotiations, and that they did not have copies of the proposals which were initialed by Berman and their former attorney as having been agreed upon. Attorney Beatrice then submitted a new list of collective bargaining proposals. The Employer's new proposals would change the recognition clause which had previously been agreed upon. Other previously agreed upon provisions concerning recall, discipline and discharge, job posting and bidding procedures, hours, vacations, holidays, uniforms and protective clothing, funeral leave, leaves of absence, and personnel files were either withdrawn or modified from what had been agreed upon the previous July.

Botelho then vigorously indicated he would not relinquish previously agreed upon terms, and would mediate only in respect to matters which had heretofore divided the parties. He then walked out of the mediation session with the admonition that the Employer would be hearing from his attorneys. The mediator declared an impasse.

A witness for the county commissioners admitted that the Employer entered mediation with the intent to start from the beginning on all items to be bargained, for reason that "there had been....almost an entire changeover of personnel in negotiations".[2]

The Employer's witnesses were not employed by the county when the former attorney was its legal representative. Thus they have no personal knowledge of what authority, if any, their former attorney was granted. The Employer admitted that attorney Beatrice, the present negotiator for the County Commissioners, was not "with authority to bind the County Commissioners, but in practice reports back to them to discuss (with them) the different items".

Lastly, it must be noted that the negotiations that took place in 1974 and 1975 were not confined merely to two individuals, Berman and the former attorney. Also present were other persons who may, or may not, have been designated as "representatives" or "administrative assistants" of certain County Commissioners. The evidence is inconclusive as to who represented whom, and in what capacity. Thus, one Cardullo was sometimes present, ostensivly representing Commissioner Denehy. A Mrs. Rubenstein was present most of the time, as was one Thomas Stafford from the county hospital. Robert Ferrara was also present at negotiation sessions, ostensibly representing Commissioner S. Lester Ralph.

[2]The resignation of a county commissioner and the appointment of a new one has already been chronicled. Likewise the change of the employer's legal representative to Attorney Beatrice. Further evidence indicates that Thomas F. Gibson was hired to the post of Head Executive Assistant to the Meddlesex County Commissioners in September 1975, and Thomas B. Concannon, Jr. was hired in late April 1975 as Head Executive Assistant to the newly appointed County Commissioner. The Director of Personnel has held his job since January 19, 1976.

Opinion

We have found that Berman and the Employer's former attorney reached accord on several collective bargaining proposals, which were initialed by each of said negotiators. Having so found, we now address ourselves to the Employer's argument that their former attorney had no authority to bind the County Commissioners, and that attorney Beatrice has no such authority. The Middlesex County Commissioners have admitted being "Employers" within the meaning of General Laws Chapter 150E, Section 1. Section 6 of the Law requires them to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. They have chosen to delegate the task of negotiating to persons in the legal profession, which is clearly a prerogative available to them. They now say they should not be bound by agreements made by their chosen representative. Evidence is limited concerning the scope of authority given their representative. The existing evidence, elicited upon direct examination by the Employer, is that the Employer's representative has the power to negotiate with the Union, but no power to bind the County Commissioners. That his practice is merely to report back to them and to discuss the different items. At the same time they say that they had not been informed of the progress of negotiations in 1974 and 1975.

Although an Employer does not have to be represented in bargaining negotiations by a person having authority to conclude a binding contract, the character and powers of an Employer's representative are factors which are consider in determining whether bargaining has been conducted in good faith. If the onl, person having authority to contract does not attend any of the bargaining conferences, bargaining is not conducted in good faith.[3] The limiting of a representative's authority so that he is unable to make commitments on any vital or substantive provisions of a proposed contract is unlawful.[4] A person in charge of negotiations must have authority to negotiate; otherwise, there is a refusal to bargain collectively.[5] An Employer does not discharge his duty to bargain by appointing a committee with no authority other than to meet with a Union, listen to Union proposals, and report back to management.[6] The authority of a bargaining representative is insufficient to engage in give and take bargaining if that authority is limited to the transmittal of proposals to and from the Employer, discussion concerning such proposals, and the making of recommendations to the Employer.[7] Indeed, the creation of a state of uncertainty with respect to the authority of bargaining representatives to make definite commitments on

[3] Great Southern Trucking Company v. NLRB, 127 F. 2d 180 (4th Cir. 1942).

[4] Sussex Hats, Inc., 85 NLRB 399 (1949).

[5] Carter-Jones Lumber Co., 1968-2 CCH NLRB Paragraph 20, 200; KFXM Broadcasting Co., 183 NLRB 1187 (1970); National Amusements, Inc. 155 NLRB 1200 (1966).

[6] Republican Publishing Co., 73 NLRB 1085 (1947).

[7] Swack Iron and Steel Co., 146 NLRB 1068 (1964). Woodruff, d/b/a/ Atlantic Broadcasting Co. 90 NLRB 808 (1950).

important issues has been held to be evidence of a refusal to bargain.[8] Upon the basis of the foregoing cases, we rule that the Employer's conduct constituted an unfair labor practice.

By their own admission, the Employer entered mediation with the intent to start from the beginning on all items to be negotiated. Were we to sanction such conduct, the Union's efforts during 1974 and 1975 would be rendered fruitless. The facts are analogous to those in Carolina Paper Board Corp. 183 NLRB 544, 550 (1970) wherein the Union and the Employer had agreed to many substantive provisions of a collective bargaining agreement during four negotiation sessions held earlier in the year. When the parties met before a federal mediator, the Employer drastically changed its position so that few of the agreed on articles remained intact. The NLRB concluded that the Employer's conduct evidenced a lack of good faith bargaining, and credited the assertion of the Union's negotiator, that "if we bargained that way we never could reach an agreement on a contract". See also San Antionio Machine and Supply Corp., 147 NLRB 1112, 1116-17. There the Employer defended its course of conduct be reference to the law of the contracts. The Employer's counsel argued that a "tentative" agreement is not a final, binding contract. He implied that the Employer was free to do as he did and repudiate the agreements made during five bargaining sessions at any time before the entire contract had been agreed to and, perhaps, signed. The NLRB, quoting language found in the earlier case of Shannon & Simpson Casket Co., 99 NLRB 430 (1952) enf'd 208 F.2d 545 (9th Cir. 1953) held that:

> "Apparently the respondent seeks to justify certain of above-described conduct by reliance on axioms of contract law. However, the rules by which it is determined whether or not the parties have made a contract are not the rules by which it is determined whether or not the parties have bargained in good faith.... The obligation under the act contemplates that the parties come to the bargaining table with a fair and and open mind and a sincere desire and purpose to conclude an agreement on mutually satisfactory terms. Reliance upon the rules of contract law so as to forestall and avoid agreement does not satisfy that obligation."

In that case the Board pointed out:

> "The demoralizing and frustrating effort of the respondent's requirement at this vital state of negotiations, that they begin anew is readily apparent."

In Tomlinson of High Point, Inc. 74 NLRB 681 (1947) the Board held that an Employer's protestations of willingness to bargain were meaningless where its bad faith was demonstrated by presentation to the Union of contract proposals which omitted, rejected, or substantially changed provisions to which it had previously agreed; its insistence that no agreements had previously been reached, and that all matters should be reopened.

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[8] Borg Compressed Steel Corp., 165 NLRB 394 (1967); Deena Art Ware, Inc., 86 NLRB 732 (1949).

We next turn to the Employer's refusal to bargain concerning economic items. General Laws Chapter 150E, Section 6 requires employers to negotiate in good faith in this respect. Section 7(a) of the Law requires the parties to reduce their collective bargaining agreement to writing, and Section 7(b) of the Law provides that the Employer shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the General Court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. An assumption that the legislative body will ultimately reject a funding request does not excuse an initial refusal to bargain.

We have considered the lapse in negotiations between November 29, 1974 and July 1975. In general, the Commission looks unfavorably upon lapses of such a duration. However, the evidence exhibits no demand by the Union to bargain during this interval. Absent such a demand, we will not rule against the Employer on this point. We find that the Employer did not commit a prohibited practice where there was no demand to bargain. Compare City of Chelsea, 3 MLC 1169 (1976) aff'd. 3 MLC 1384 (1977).

We have little sympathy for the Employer's contention that they had never been given a copy of the collective bargaining proposals which their first attorney initialed. There is sufficient evidence to warrant a finding that other management representatives participated at various times in negotiations. If, in fact, the county commissioners were not informed of the progress of negotiations, they certainly possessed the power to ascertain that information.

Upon consideration of the record as a whole, we are convinced that the Middlesex County Commissioner's conduct, in its totality, indicates a lack of good faith bargaining required by Section 6 of the Law, and constitutes a violation of Section 10(a)(5) thereof. Further, their conduct evinces a refusal to participate in good faith in the mediation procedures set forth in Section 9 of the Law, and constitutes a violation of 10(a)(6) thereof. Lastly, their conduct constitutes an interference, restraint and coercion with respect to the rights of the employees in still further violation of General Laws Chapter 150E, Section 10(a)(1).

We turn, finally to the question of formulating an appropriate remedy in this case. Section 11 of the Law directs the Commission to order a party found to have committed a prohibited practice to cease and desist from such conduct and to "take such further affirmative cation as will comply with the provisions of this section...." This broad grant of power closely parallels the remedial powers granted the National Labor Relations Board under Section 10(c) of the National Labor Relations Act.[9]

[9] 29 U.S.C §160(c) directs the National Labor Relations Board to order a person found to have committed an unfair labor practice, to cease and desist and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."

Middlesex County Commissioners and AFSCME, Council 41, 3 MLC 1594

Ordinarily, refusal to bargain violations are remedied by bargaining orders. Compensatory relief, however, has been held to be an appropriate remedy in refusal to bargain cases where the party's conduct is in flagrant defiance of the Law,[10] or where the party's legal position is frivolous.[11] In cases where a bargaining order would not effectively remedy the violation, but the violation is not flagrant or the legal merits of the party's position are not frivolous, application of compensatory relief should be fashioned upon consideration of the policies which such relief would effectuate.[12] Compensatory relief should not act as punishment to the employer, cause the employer irreparable harm or interfere with meaningful collective bargaining.[13] Nor should it have the effect of compelling an agreement or require speculation as to the specific benefits that would have been extended to the employees had the employer not refused to bargain.[14]

We find that compensatory relief is appropriate in this case. The Employer's conduct substantially impaired the collective bargaining process. The full consequences of such conduct would not be completely remedied by a bargaining order. The existence of the initialed agreement will enable the Commission to objectively decide what benefits were denied the employees as a result of the Employer's prohibited practices. Since that agreement did not include wage or other economic provisions, no irreparable harm to the Employer will result. Compensatory relief will not interfere with the bargaining process nor compel an agreement since the parties will return to bargaining. Therefore, we will order the Employer to take affirmative steps to extend to the employees within the bargaining unit those benefits embodied in the initialed agreement which have been denied as a result of the Employer's violation, until such time as those benefits are altered by an executed agreement reached through good faith bargaining.

ORDER

Based upon the foregoing findings of fact and our inclusions drawn therefrom, it is hereby ORDERED that the Middlesex County Commissioners, their agents, attorneys, successors and assigns shall:

1. Cease and desist from interfering, restraining, and coercing any employees in the exercise of their rights guaranteed under General Laws Chapter 150E.

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[10] International Union of Elec. Workers v. N.L.R.B., 426 F.2d 1243 CADC (1970), cert. den., 400 U.S. 950 (1970).

[11] N.L.R.B. v. Tidee Products, Inc., 426 F.2d 1243 CADC, (1970); Ex-Cell-O Corp. v. N.L.R.B., 449 F.2d 1046 CADC (1971).

[12] Ex-Cell-O Corp., 185 N.L.R.B. 107 (1971), mod. sub. nom. Ex-Cell-O Corp. v. N.L.R.B., 449 F.2d 1046 CADC (1971) enf'd, 449 F.2d 1058 CADC, (1971).

[13] Ex-Cell-O Corp., 185 N.L.R.B. 107, (1970).

[14] Id.

2. Cease and desist from refusing to bargain collectively in good faith with Council 41, American Federation of State, County and Municipal Employees, AFL-CIO as required in Section 6 of the Law.

3. Cease and desist from refusing to participate in good faith in the mediation procedures set forth in Section 9 of the Law.

4. The Middlesex County Commissioners, their agents, attorneys, successors and assigns shall take the following affirmative action which is necessary to effectuate the policies of the Law:

   (a) Upon reuqest, bargain collectively in good faith with the aforesaid Union with respect to wages, hours, standards of productivity and any other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

   (b) Extend to the employees within the bargaining unit represented by the aforesaid Union those provisions contained within the July, 1975 agreement initialed by the negotiators for both parties, until such time as those provisions are altered by a signed agreement.

   (c) Post at its place of business copies of the attached notice marked "Appendix A". Copies of said notice shall be posted by the Employer immediately upon receipt thereof, and shall be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced, or covered by any other material.

   (d) Notify the Massachusetts Labor Relations Commission at its office at Room 1604, 100 Cambridge Street, Boston, Massachusetts, 02202, in writing, within twenty (20) days from the date of receipt of this Decision and Order, what steps the Employer has taken to comply therewith.

James S. Cooper, Chairman

Garry J. Wooters, Commissioner

"APPENDIX A"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
MASSACHUSETTS LABOR RELATIONS COMMISSION

WE WILL NOT interfere, restrain, or coerce any employee in the exercise of any rights guaranteed under General Laws Chapter 150E.

Middlesex County Commissioners and AFSCME, Council 41, 3 MLC 1594

WE WILL NOT refuse to bargain collectively in good faith with Council 41, American Federation of State, County and Municipal Employees, AFL-CIO as required in Section 6 of the Law.

WE WILL NOT refuse to participate in good faith in the mediation procedures set forth in Section 9 of the Law.

WE WILL, upon request, bargain collectively in good faith with Council 41, American Federation of State, County and Municipal Employees, AFL-CIO with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment.

WE WILL, upon request, participate in good faith in the mediation procedures set forth in Section 9 of the Law.

WE WILL extend to the employees represented by Council 41, American Federation of State, County and Municipal Employees, AFL-CIO the provisions of the agreement initialed by the negotiators for the parties in July, 1975, until such time as those provisions are altered by a signed agreement.

Middlesex County Commissioners, BY_____
Commissioner

_____
Commissioner

_____
Commissioner