NEW BEDFORD SCHOOL COMMITTEE AND NEW BEDFORD EDUCATORS ASSOCIATION, MUP-4210 (11/6/81).

(10 Definitions)
16.1 impasse
(50 Duty to Bargain)
53.23 Proposition 2½
54.5111 lay-off
(60 Prohibited Practice by Employer)
62.41 abolition of position
67.8 unilateral change by employer
67.82 implementing changes after impasse
(80 Commission Decisions and Remedial Orders)
82.11 back pay
82.13 reinstatement
(100 Impasse)
108.6 bargaining to impasse
108.61 mid-contract mediation and fact-finding

Commissioners Participating:

Phillips Axten, Chairman
Gary D. Altman, Commissioner

Appearances:

Arthur J. Caron, Jr., Esq. - Representing the New Bedford School Committee

William H. Shaevel, Esq. - Representing the New Bedford Educator's Association

DECISION

Statement of the Case

The New BEdford Educators' Association (Association) filed prohibited practice charges with the Massachusetts Labor Relations Commission (Commission) on February 25, 1981 alleging that the New Bedford School Committee (School Committee) had violated Sections 10(a)(5) and (1) of General Laws Chapter 150E (the Law) by refusing to bargain in good faith to the point of resolution or impasse over the impact of a contemplated reduction in force on terms and conditions of employment of individuals represented by the Association before unilaterally implementing such reduction in force.

Pursuant to its authority under Section 11 of the Law, the Commission investigated the Association's charge and issued its own Complaint of Prohibited Practice. On May 19, 1981 a formal hearing took place before Hearing Officer Diane Drapeau. Both parties subsequently submitted briefs, which we have considered together with the rest of the record. As discussed below, we hold that the School Committee's conduct violated Sections 10(a)(5) and (1) of the Law.

New Bedford School Committee and New Bedford Educators Association, 8 MLC 1472

Jurisdictional Findings

The New Bedford School 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 representative for the purpose of collective bargaining of certain employees of the School Committee, including teachers.

Findings of Fact

The effective dates of the collective bargaining agreement between the School Committee and the Association are September 1, 1980 through August 31, 1982. The agreement contains no provision governing the rights and obligations of the parties in the event of a reduction in force.

On or about January 9, 1981, Michael Ras, President of the Association, received a letter from Arthur J. Caron, Jr., Director of Labor Relations and Personnel of the City of New Bedford. In substance, this letter informed Mr. Ras that due to the enactment of Chapter 580 of the Acts of 1980 (Proposition 2½), the School Committee had decided to implement a reduction in force in order to curtail expenditures in fiscal year 1981. Included in this letter was a proposed listing of the employees whose positions would be affected by the reduction in force. The letter concluded with the statement: "The New Bedford School Committee through my office is available for negotiations on the impact of its decision to make these reductions in force. I have contacted Edward Hayes, your Massachusetts Teacher Association representative, so as to arrange a meeting to discuss these issues."

The first such discussion between the Association and the School Committee took place on January 12, 1981. At this meeting a document headed Summary of Curtailment of Expenditures from 1981 Budget was passed out by the School Committee. This document set forth a list of 53 positions including 18 teachers to be eliminated from the City budget resulting in a saving of $484,500.00 from the fiscal 1981 budget. The School Committee also informed the Association that, due to the immediate need for curtailment of expenses, time was of the essence in the impact negotiations. No substantive negotiations took place at this meeting, and impact bargaining was scheduled to continue on January 21, 1981.

On January 21 the following occurred:

1. A proposal was made by the Association that the School Committee agree to a contract provision providing for a two-year period of recall for teachers laid off because of Proposition 2½.

2. A discussion took place regarding the possibility of placing teachers slated for lay-off into positions now held by long-term substitutes (defined under Article II(F)(1) of the collective bargaining agreement as "substitutes who have been employed for more than ninety days in a single teaching assignment").

3. A discussion took place regarding the effect of laying off specialists (teachers of music, art, physical education, and the like) upon teacher preparation

time. Article 11(G)(1) of the collective bargaining agreement provides that:

> "Elementary teachers shall not be required to remain in the classroom while specialists are providing instruction."

This provision was intended to allow teachers to use the time in which specialists were visiting their classrooms as preparation time. The Association was concerned that the layoff of these specialists would result in a decrease in such preparation time.

4. A discussion took place regarding the possibility that a reserve fund existed in the City of New Bedford which might be used to avoid some of the proposed layoffs.

None of the four issues set forth above were resolved at the January 21 meeting. On January 23, 1981, the School Committee provided the Association with certain information regarding teachers on leave. The Association had asked for the information by the January 21 meeting.

On January 26, 1981, at the next School Committee meeting, Association President Ras asked the School Committee to re-examine its budget to determine whether layoffs could be avoided. Despite Ras' request, however, the School Committee voted to eliminate 53 positions, of which 18 were bargaining unit positions currently filled by teachers.

The next scheduled impact negotiation meeting took place on January 28, 1981. At this meeting the following proposals were discussed.:

1. The School Committee responded to the Association's request for a two-year recall provision by agreeing to the principle of a two-year recall by seniority but refused to commit such a provision to writing.

2. The School Committee made a proposal under which the 18 teachers slated for layoff would be placed in long-term substitute positions under the condition that the Association would agree to modify the terms of Article XVI(C) of the collective bargaining agreement, regarding personal leave. The modification proposed by the School Committee called for the elimination of the current contractual language allowing personal leave at the discretion of the employee and the replacement of that language with a provision requiring approval by the Superintendent of Schools.[1]

The Association responded initially that it would not agree to such a provision, but that it would encourage its membership to be very careful in the use of personal days.[2] The School Committee then indicated that if the Association did not

[1]The reasoning behind this proposal was that teachers' salaries are higher than those of long-term substitutes, but that this difference in cost could be at least partially compensated for if decreased personal leave could avoid the necessity of hiring substitute teachers.

[2]The provision allowing for two days personal leave at the discretion of the teacher was first implemented in 1975. Apparnetly, it was one of the few gains

(footnote continued on following page)

agree to such a modification, the School Committee would go ahead and implement the layoffs.

On February 2, 1981 the Union held a general meeting of its membership in order to take up the School Committee's proposal to retain the 18 teachers slated for layoff in exchange for the amendment of the contractual procedures regarding personal leave. The result of this meeting was a postponement of voting on this issue until the School Committee had submitted a written proposal.

On February 5,1981 representatives of the Association and the School Committee met for a third time to engage in impact bargaining. At this meeting the Association indicated that the sentiment during the February 2 membership meeting was against acceptance of the School Committee's proposal regarding personal leave. The Association suggested that a provision be added to the proposal stating that if future layoffs became necessary, individuals who had paid neither Union dues nor the required agency service fee would be terminated first. The School Committee's attorney responded that he would have problems with adding such a provision to the agreement. The School Committee submitted a written proposal regarding personal leave time, to which two paragraphs (paragraphs 5 and 6) were added at the suggestion of the Association. No further issues were taken up at this meeting. Later in the day on February 5, 1981, the agenda for the February 12 School Committee meeting was made available. This agenda included the termination of 18 bargaining unit members.

On February 10, 1981 the membership of the Association voted to reject the School Committee's proposal regarding personal leave.[3] Several members indicated to Ras that if the 18 teachers scheduled for termination couldbe retained they would voluntarily give up personal days, but that they did not want the contract changed.

MTA consultant Hayes contends that he did not regard the situation following the February 10, 1981 membership meeting as being one of impasse. Based upon his five years' experience bargainig with the School Committee, he believed that the School Committee would formulate a counter proposal. The Association regarded the following issues as being unresolved and open for discussion as of February 10, 1981:

---

[2](footnote continued from previous page)
achieved in that year, during which major labor disputes had occurred in New Bedford and the teachers had accepted a zero percent pay raise.

[3]There was conflicting testimony at the hearing regarding the manner in which the School Committee was notified of the Association membership's rejection of its proposal. Massachusetts Teachers Association consultant Edward Hayes contends that on the evening of February 10 he telephoned Superintendent of Schools Rodrigues, while Rodrigues recalls no such conversation. Resolution of this credibility issue is not necessary to our determination of the issues in this case, since the Association does not allege that it made a demand that the School Committee continue bargaining regarding the impact of proposed teacher layoffs during this telephone conversation. Additionally, the School Committee admits that it had notice of the membership's vote the following day.

1. teacher preparation time;

2. teachers who had failed to pay the agency service fee;

3. the placing of teachers in long-term substitute positions;

4. elimination of extracurricular activities such as the school swimming pool;

5. voluntary forfeiture of personal time; and

6. a written recall provision.

On February 12, 1981 the School Committee voted to terminate 12 teachers and voted not to terminate 6 others. During the course of the February 12 School Committee meeting, Ras indicated that in her opinion the parties had not reached impasse during the impact bargaining. The termination of 12 teachers occurred at some time immediately following the February 12 School Committee meeting.

Opinion

At issue in the present case is whether the School Committee fulfilled its bargaining obligation. Specifically, the Commission must consider whether the School Committee made itself available for negotiations over the impact of the proposed reduction in force, whether it participated in such negotiations in good faith, and finally whether it implemented the reduction in force before a good faith impasse was reached. If the Commission determines that the parties were not at impasse when the employer implemented the reduction in force, the Commission must then decide whether extraordinary circumstances beyond the employers control allowed such implementation prior to reaching impasse.

1. Good Faith Bargaining

The Association first asserts that the School Committee bargained in bad faith throughout the negotiations. Specifically, it argues that the School Committee's bargaining was characterized by an offer made in the form of an ultimatum, a failure to respond to the Association's proposals, and a failure to respond to the Association's requests for information.

Our review of the record does not demonstrate that the School Committee bargained in bad faith. Although the elimination of discretionary personal leave was the only affirmative proposal made by the School Committee, the Committee did exhibit flexibility regarding several of the Association's proposals. The School Committee agreed to the principle of a two-year recall, although it did not agree to a written recall provision. The School Committee made two amendments to its Memorandum of Agreement including a guarantee of employment for the teachers who had received termination notices through the 1980-81 school year. Although this proposal was conditioned upon acceptance of the School Committee's personal leave proposal, we can hardly say that the School Committee's position at the bargaining table evinces bad faith within the scope of Section 10(a)(5) of the Law. Finally, while the School Committee did not provide the requested information regarding teachers on leave by January 21, 1981 as requested, it did provide this information two days

later. In sum, we are unpersuaded that the School Committee lacked a genuine desire to find a basis of agreement.

2. Impasse

As a general principle, an employer must refrain from implementing a proposed reduction in force until, upon demand, it has negotiated to resolution or impasse over the resulting changes in conditions of employment which involve mandatory subjects of bargaining. Newton School Committee, 5 MLC 1016 (1978). A narrow exception to this requirement exists where circumstances beyond the control of the employer require immediate action, so that bargaining after the imposition of a change may satisfy the employer's bargaining obligation. City of Boston and Administrative Guild, 4 MLC 1912 (1978).

The School Committee asserts that by February 12, 1981, when the layoffs were implemented, the parties were at impasse in the negotiations over the proposed reduction in force. Alternatively, the School Committee contends that circumstances arising out of the passage of Proposition 2½ justified its imposition of a deadline upon the negotiations, and allowed the School Committee to implement the layoffs prior to the point of impasse.

The Association, however, argues that there was significant room for movement in the negotiations as of February 12, 1981 and that no circumstances existed justifying implementation of the layoffs prior to the point of impasse. The Association further argues that no impasse may be said to exist prior to the time at which the parties have invoked the provisions of Section 9 of the Law by petitioning the Board of Conciliation and Arbitration for a determination that the parties have reached an impasse.

The National Labor Relations Board has characterized impasse as the condition reached "after the parties have bargained in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless." Durd Fittings Co., 121 NLRB 377, 383 (1958). The Court in NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963) stated a widely accepted definition of impasse in the private sector as follows: "a state of facts in which the parties, despite the best of faith, are simply deadlocked." Among the factors to be weighed in determining whether an impasse exists in the private sector are the bargaining history, the good faith of the parties in the negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations. Taft Broadcasting Company, 163 NLRB 475 (1967), enf'd. 395 F.2d 622 (D.C. Cir. 1968).

Applying these criteria to the facts of these negotiations, we conclude that no impasse had been reached on February 12, 1981 when the School Committee effectuated the reduction in force. Although the impact negotiations began on January 12, 1981 no substantive proposals were suggested or discussed prior to January 21. All negotiations over the impact of the proposed layoffs therefore occurred during the three week period between January 21 adn February 12.

During that time, the parties met on four occasions. Three of those meetings were bargaining sessions, and one was a School Committee meeting. The facts indicate that although several proposals and concerns were raised,

the major part of the actual discussion centered around the Memorandum of Agreement which both parties hoped would resolve the problem so that the layoffs would not be necessary.

As of February 12, the parties had not discussed the issue of loss of preparation time which would result from the termination of specialists. The Association's proposal that personal leave be voluntarily forfeited without amending the contract had not been discussed at any length. As the Association president testified, the membership might well have accepted the previously rejected proposal if a written recall provision had been added.[4] In the totality of the evidence before us, we do not believe that the parties had exhausted the prospects of concluding an agreement and that any further bargaining on the matters in question would have been fruitless. Since we find that the parties were not deadlocked in their negotiations under traditional standards of impasse, we need not reach the issue of whether the parties must invoke the provisions of Section 9 of the Law before an impasse under Chapter 150E can legally occur.[5]

3. Legality of Action Short of Impasse.

We turn now to the School Committee's argument that because of fiscal restraints it was justified in implementing layoffs prior to reaching impasse in its negotiations with the Association. In Boston School Committee and Administrative Guild, 4 MLC 1912 (1978), the Commission first articulated the standard to be applied in situations in which an employer declares that it must implement changes at a certain time regardless of whether the parties are at the point of resolution or impasse. The employer must establish as an affirmative defense that due to circumstances beyond its control it had to implement a change by a particular time. The employer must also show that the union was put on notice that the change would be implemented at a certain time and that the imposition of a deadline in the negotations was reasonable and necessary. We conclude that the School Committee has not presented sufficient evidence to satisfy this standard.

It is true that the School Committee indicated at the initial bargaining session on January 12, 1981 that it considered time to be of the essence in the negotiations. Nonetheless, the actions taken by the School Committee during the course of negotiations between January 12 and February 12 indicate the contrary. Specifically, the first substantive negotiation session was not until January 21, 1981. There was no evidence presented that in the other two negotiation sessions, on January 28, and February 2, the School Committee ever indicated that a deadline was approaching or suggested that the pace of bargaining accelerate in order to

---

[4]We need not decide whether the Association could legally compel the School Committee to bargain over the subject of first laying off non-union, non-agency fee paying members of the unit. There is no indication in the record that this matter played a significant part in the parties inability to reach agreement.

[5]We note, however, that the language of Section 9 refers to negotiations "over the terms of a collective bargaining agreement" (emphasis supplied) rather than to a situation such as this one involving mid-contract negotiations.

accommodate bargaining in the limited available time. It was not until the February 5,1981 session that the Association first became aware that the School Committee was actually going to act on the reduction in force at the February 12 meeting; a one week time period. Thus, we conclude that until February 5, 1981 the School Committee through its actions gave the impression that no action was imminent. Under the circumstances we do not think there was sufficient notice of the deadline within the standard enunciated in the Administrative Guild exception. Boston School Committee and Administrative Guild, Id.

We also conclude that the School Committee has not established that the February 12 deadline for implementation was reasonable and necessary under all of the prevailing circumstances. The School Committee's reason for pressing for a speedy conclusion of impact bargaining was that, dut to the reduction in the excise tax mandated by Chapter 580 of the Acts of 1980 (Proposition 2½), a curtailment of previously appropriated expenditures for fiscal year 1981 was necessary so that the School Committee could avoid entering fiscal year 1982 with a deficit. The School Committee's concern that negotiations proceed expeditiously is understandable. If the budget projections indicated that 18 teachers had to be terminated by February 12 to avoid a deficit, and protracted negotiations delayed any terminations until some later time, additional positions beyond the original 18 would have to be eliminated to compensate for the delay. Evidence is lacking in the record, however, to show either that 18 was the required number or that February 12 was the required date to eliminate the projected deficit. Furthermore, for reasons not explained in the record, the School Committee decided not to terminate the 18 positions originally called for; instead, only 12 were laid off. This indicates substantial flexibility in setting the date for implementation. Finally, we note that prior to February 12, the parties were making progress in the negotiations. Thus, nothing in the record indicates that implementation of the reduction in force at some point after February 12 would have been unduly burdensome or would have prevented the School Committee from realizing the required fiscal year 1981 savings. Under these circumstances we believe that it would have been reasonable for the School Committee to have postponed implementation of the reduction in force for another several days, if not a few weeks, in order to maximize the opportunity for bargaining to run its course. Accordingly, we do not think the deadline was reasonable and necessary. Boston School Committee and Administrative Guild, supra at 1916.

Finally, we note that Proposition 2½ was passed by voters in early November, 1980, and that the School Committee was on notice from that date onward that losses in excise tax revenues would result. Nothing, in the record indicates why, despite this knowledge, the School Committee made no attempt until January 9, 1981 to inform the Association that a reduction in force during fiscal year 1981 might be necessary. We will not allow an employer to avoid its obligation to bargain to the point of resolution or impasse when it has established neither a commitment to fully maximize the time available for negotiations, nor the necessity of choosing a particular date for cutting off the negotiation process.

The School Committee's final contention is that since the Association membership rejected the School Committee's proposal, it was incumbent upon the Association to propose a counteroffer prior to the February 12, 1981 School Committee meeting, and that by failing to do so it waived its bargaining rights. While the School

Committee may be justified in its assertion that the Association was the party responsible for making the next move in the negotiations, only one day intervened between the membership meeting at which the School Committee's proposal was rejected and the School Committee meeting at which the layoffs were implemented. We will not infer a waiver the Association's rights under these circumstances.

The Remedy

For the foregoing reasons, we conclude that the School Committee unilaterally implemented a reduction in the force without bargaining with the Association to the point of resolution or impasse over the impact of such reduction on mandatory subjects of bargaining in violation of Sections 10(a)(5) and (1) of the Law. Under Commission decisions the appropriate remedy is an order that the School Committee restore the status quo ante and maintain the status quo until such time as it has fulfilled its bargaining obligations. This may be accomplished by ordering the School Committee to rehire the terminated teachers, and retain them until the parties have bargained in good faith either to resolution or impasse. In order to ensure that the bargaining cannot be protracted by the Association through dilatory bargaining practices, we additionally provide that the School Committee may reinstitute the reduction in force should the Association fail to respond promptly to the School Committee's offer to bargain, or should the Association fail to bargain in good faith.[6] See Royal Plating & Polishing Co., Inc., 160 NLRB 990, 63 LRRM 1045 (1966).

An additional remedy is required to compensate the employees for their losses caused by the employer's unlawful conduct. In this case, the identity of particular employees and even the number of such employees who were to be terminated were uncertain. Among the subjects under negotiation at the time of the School Committee's unilateral implementation of the reduction in force were the possibility that teachers could be placed in long-term substitutes positions and the possibility that a written recall provision could be instituted in exchange for a written provision forfeiting employee discretion in choosing personal days. Resolution of these issues could have resulted in the indefinite retention of some or all of the terminated employees. Under these circumstances, the employees should be compensated with back-pay dating from the day of termination. Newton School Committee, 5 MLC 1016 (1976). Compare City of Quincy, 8 MLC 1217 (1981) (laid-off employees not entitled to back pay where selection for lay-off was predetermined by contract and civil service law.) Thus, we order that all bargaining unit members laid off pursuant to the School Committee's February 12 vote receive back pay interim earnings from the date of termination to the date of the employer's unconditional offer of reinstatement, with interest at 10% per year, compounded quarterly.

Order

WHEREFORE, pursuant to the authority vested in the Commission by Section 11 of the Law, it is hereby ORDERED that the New Bedford School Committee:

---

[6] While these provisions are largely a restatement of the parties' respective obligations under normal circumstances, we think it wise to state them specifically when the bargaining is pursuant to our order.

1. Cease and desist from:

   a. failing and refusing to bargain collectively in good faith with the New Bedford Educators' Association over the impact of the School Committee's reduction in force decision.

   b. implementing a reduction in force, in accordance with the School Committee's vote of February 12, 1981, prior to the occurrence of the earliest of the following conditions:

      (1) an agreement with the Association on the impact of the reduction in force on bargaining unit members;

      (2) a bona fide impasse in the bargaining;

      (3) the failure of the Association to commence bargaining within five days of notice of the School Committee's willingness to bargain and unconditional offers of reinstatement to the terminated employees; or

      (4) the subsequent failure of the Association to bargain in good faith.

   c. In any like or similar manner interfering with, restraining, or coercing any employees in the exercise of their rights guaranteed under General Laws Chapter 150E.

2. Take the following affirmative action which we find will effectuate the policies of the Law:

   a. Post in conspicuous places where employees represented by the Association usually congregrate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

   b. Offer those teachers who were terminated from employment with the School Committee on February 12, 1981 full reinstatement to their former positions, or, if any of those positions no longer exist, to substantially similar positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of their unlawful termination, together with interest on any sums owing at ten percent (10%) and compounded quarterly from the date of termination.

   c. Upon request of the Association, bargaining collectively in good faith over the impact upon wages, hours, and conditions of employment of any decision to reduce the work force in the bargaining unit represented by the Association.

   d. Notify the Commission in writing within ten (10) days of the service of this Decision and Order of the steps taken in compliance therewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
GARY D. ALTMAN, Commissioner

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

Chapter 150E of the General Laws gives public employees the following rights:

To engage in self-organization.
To form, join or assist any union.
To bargain collectively through representatives of their own choosing.
To act together for the purpose of collective bargaining or other mutual aid or protection.
To refrain from any and all of these activities.

WE WILL NOT do anything that interferes with, restrains or coerces employees in their exercise of these rights.

More specifically,

WE WILL offer those employees terminated from employment on February 12, 1981 immediate and full reinstatement of their former positions or, if any of these positions no longer exist, to substantially similar positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of earnings suffered as a result of their unlawful termination, by payment to them of such sums equal to those which they normally would have earned absent their unlawful termiations, from the date of their terminations on February 12, 1981 to the date of the employer's offer of reinstatement with back pay computed on a quarterly basis and at the rate of ten percent (10%) interest per annum.

WE WILL upon request by the New Bedford Educators Association bargain collectively in good faith over the impact upon wages, hours, and conditions of employment of any decision to reduce the workforce in the bargaining unit represented by the aforesaid union.

NEW BEDFORD SCHOOL COMMITTEE

Paul Rodrigues, Superintendent of Schools

BOARD OF REGENTS (FITCHBURG STATE COLLEGE) AND AFSCME, COUNCIL 93, SUP-2590 (11/10/81). Dismissal of Allegations in Unfair Labor Practice Charge.

(50 Duty to Bargain)
54.587 carrying weapons

DISMISSAL OF ALLEGATIONS IN UNFAIR LABOR PRACTICE CHARGE

The Commission has voted to dismiss such aspects of the charge as allege that the Employer violated Sections 10(a)(5) and (1) by refusing to bargain about the decision to eliminate firearms. The decision to eliminate firearms is not a mandatory subject of bargaining although the impact of such decision on safety is a mandatory subject.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner