

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 16-22
Issued: November 22, 2017

NEW ENGLAND POLICE BENEVOLENT)
ASSOCIATION, LOCAL 605,)
)
Complainant,)
)
v.)
)
CITY OF CARIBOU,)
)
Respondent.)

DECISION AND ORDER

On May 19, 2016, the New England Police Benevolent Association ("Union" or "NEPBA") filed this prohibited practice complaint against the City of Caribou, alleging that the City violated 26 M.R.S. §964(1)(E) of the Municipal Public Employee Labor Relations Law ("Act"). Specifically, the Complaint alleges that the City failed to bargain in good faith by inserting into the tentative agreement, without notice to the Union, language that precluded the payment of the wage increase retroactive to the effective date of the agreement.

The Board held an evidentiary hearing on September 27, 2017. Peter J. Perroni, Esq., represented the New England Police Benevolent Association, and Ann M. Freeman, Esq., represented the City of Caribou. Both parties were able to examine and cross-examine witnesses, offer documentary evidence, and were given the opportunity to provide written and oral argument. Chair Katharine I. Rand, Esq., presided at the

hearing, with Employer Representative Robert W. Bower, Jr., Esq., and Employee Representative Ms. Amie M. Parker.

JURISDICTION

The New England Police Benevolent Association is a bargaining agent within the meaning of 26 M.R.S. §962(2), and the City of Caribou is the public employer within the meaning of 26 M.R.S. §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S. §968(5).

FINDINGS OF FACTS

1. The New England Police Benevolent Association and the City of Caribou have negotiated collective bargaining agreements since the NEPBA was certified as the bargaining agent in 2011.
2. In September of 2015, the parties had their first negotiation session for a successor agreement to the one set to expire on December 31, 2015. At this meeting, the parties agreed to ground rules, exchanged proposals and were able to come to a tentative agreement on several issues. Retroactivity of pay increases was not an issue because it was assumed that the parties would be able to come to an agreement before the current agreement expired.
3. Mr. Austin Bless, the City Manager, was the lead negotiator on the City's bargaining team, which also included the Chief of Police. Mr. Sean McArdle, the NEPBA representative for northern New England, was the lead negotiator for the Union.

Mr. Chad Cochran, the President of NEPBA Local 605, was also on the bargaining team along with one other police officer. Following the initial negotiating session, Mr. McArdle and the other members of the negotiating team discussed the proposals with the unit members. There were a number of issues identified and considered important by the membership that still needed to be resolved.

4. Mr. Bless and Mr. McArdle attempted to address some of these issues by email or telephone in October, but Mr. McArdle was not satisfied, and told Mr. Bless that he thought mediation was the appropriate step to take.
5. Sometime in November, the Union filed a request for mediation with the Labor Relations Board and the parties scheduled mediation sessions for February 1 & 2, 2016. The issues identified for mediation were wages, vacation and sick leave banks, scheduling and duration of the contract.
6. The parties met for mediation on February 1, 2016, and were able to resolve several issues. At some point during that mediation, the Union raised the issue of retroactivity of pay increases, an issue the members were anxious about because the wage increase they received in the prior one-year agreement was not retroactive. Mr. Bless testified he said the City Council's position had been that there would be no retroactivity, but he would take it back to the Council to see if they were willing to reconsider. Both Union officials testified that Mr. Bless said he did not think it would be a problem to get the Council's approval because the retroactive payment would be for a short period of time.
7. After this first day of mediation, Mr. McArdle typed up a

draft Memorandum of Agreement (MOA) with language reflecting the parties' agreement and emailed it to Mr. Bless for his review. Mr. McArdle indicated that he would be giving a presentation to the membership at 6:00 a.m. the following morning prior to the second day of mediation.

8. The draft MOA was 3 pages long (plus a signature page) and only included changes to the collective bargaining agreement that had expired on December 31, 2015. The preface to the MOA stated:

...in consideration of the mutual promises herein, the Union and the City agree that the following changes will be incorporated into the collective bargaining agreement, subject to the required ratifications:

Each of the nine items listed in this draft MOA included an introductory italicized phrase, such as "Change the fifth paragraph to read as follows" or "Add a new section A1 to read as follows." There was no further indication or explanation of how the changes differed from the existing contract language.¹

9. The second item in the draft MOA was a revision to Article 8, Section B, Hours of Work, Work Week, Wages, which began, "Change the first sentence and wage scale to read as follows":

The base salary for each employee, for forty (40) hours, shall be as follows for the period of January 1, 2016 through December 31, 2018.

The chart following that sentence had four columns, in which the first lines contained the following information:

¹ The expired agreement is not part of the record.

	1-Jan-15	1-Jan-16	1-Jan-17	1-Jan-18
		2 percent	2 percent	3 percent
Starting	\$ 578.67	\$ 590.24	\$ 602.05	\$ 620.11
1 Year	\$ 651.45	\$ 644.48	\$ 677.77	\$ 698.10
2 Years	\$ 673.22	\$ 686.68	\$ 700.42	\$ 721.43

(The rest of the chart extends down to show base salaries at specified numbers of years of service.)

10. Later that evening, Mr. Bless responded to Mr. McArdle's draft MOA, with a cover email explaining his changes and the City's reason for rejecting certain language. His email noted that his additions to the draft MOA were in red and the pieces to be removed were struck through. With respect to Article 8, Section B, Mr. Bless struck out the word "base" in the sentence beginning "The base salary for each employee." Mr. Bless also added a new sentence in red at the beginning to the section which said, "For base pay purposes 40 hours will be paid at straight time and 2 hours will be at time and a half."
11. Mr. McArdle met with the Union membership at 6:00 a.m. on February 2, 2016, to review the MOA and discuss the outstanding issues.
12. The parties continued to bargain starting at 9:00 a.m. on February 2, 2016, and ended at mid-day.² By that time, there were only a small number of open issues and the parties agreed to draft up language to clarify their respective positions.
13. Mr. McArdle was out of state from February 4, 2016, through February 9, 2016, though he was in some contact with the mediator via text and phone. Mr. Bless was off work for

²The mediator was scheduled to mediate for the Fire Department bargaining unit that afternoon and the next day.

parental leave during the last two weeks of February, 2016, starting on or about February 12, but he was able to check and respond to emails to a limited degree.

14. On February 8, 2016, at 6:00 p.m., the City Council met for a "Regular City Council Meeting." The final item on the agenda indicated the Council would meet in executive session, as permitted by 1 M.R.S. §405(6)(D), to discuss the negotiations with Teamsters Local Union No. 340³ and NEPBA Local 605.
15. During the executive session on February 8, 2016, the Council affirmed with the City Manager that they did not want to provide retroactive pay increases. The Council also identified other items they wanted addressed, specifically putting a cap on sick and vacation time accrual. In exchange for accepting the cap on the sick and vacation accruals, the Council was willing to raise the annual increases to base pay to 3.5%, 3.5% and 3% in the three-year contract.
16. After the Council's evening meeting, Mr. Bless made changes to the existing draft MOA to incorporate the Council's decisions. Mr. Bless felt that the proposal might be better received by the Union if it were considered a "Mediator's Proposal," rather than coming directly from the City, as the mediator had shown success extending such "trial balloons" before. With this objective in mind, Mr. Bless wrote an email to the mediator, attaching his suggested Memorandum of Agreement. The MOA he sent at 10:47 p.m. on February 8, 2016, had the following note in the body of the email:

³Teamsters Local 340 represents the fire fighters' bargaining unit.

The Council is willing to go for a 3.5%-3.5%-3% pay increases if the unit accepts capping the vacation and sick bank payouts. I'm attaching the revised proposal here.

17. At 10:50 p.m., Mr. Bless followed up with another email (and attachment) to the mediator saying:

I just realized I forgot the retro clause. The Council does not want to see retro in this case. I've updated the document to reflect that.

18. The next day, Mr. Bless spoke with the mediator on the telephone about the City's proposal. Mr. Bless testified that the mediator said he would "reach out" to Mr. McArdle. Mr. Bless testified that he was under the impression the mediator was going to send the proposal to the Union that day.⁴

19. The MOA attached to Mr. Bless' February 8, 2016, email to the mediator had some of the new portions highlighted, but not all. The sentence indicating that the wage increase was not retroactive was inserted at the end of the introductory paragraph of Section B, but it was not highlighted. The full paragraph now read:

For base pay purposes 40 hours will be paid at straight time and 2 hours will be at time and a half.⁵ The base salary for each employee, for forty (40) hours, shall be as follows for the period of January 1, 2016 through December 31, 2018. Wages for 2016 go into effect the first full pay period after both sides approve this

⁴ There is conflicting evidence on whether the mediator discussed retroactivity with the Union after Mr. Bless emailed the revised MOA to the mediator on February 8, 2016.

⁵ In the exhibit, this sentence was red, not bold.

proposal. [6]

In addition, the now-higher percentage increases in the top row of the wage chart were not highlighted.

20. There is nothing in the record showing that the MOA revision of February 8th was provided to any member of the NEPBA bargaining team during the following few days, and the City Manager did not have any discussion with the Union about it that week.

21. At 4:50 p.m. on Sunday, February 14, 2016, Mr. Chad Cochran, the NEPBA Local 605 President, sent an email to Mr. Bleess stating:

It was my understanding the council had some type of proposal for us? Just wondering if you had a chance to put something together so we could present it to the unit for a vote. The chief gave me some rough idea but was wondering if it had been put into a document.

22. Mr. Bleess responded to this request at 7:55 a.m. the next day, February 15, 2016, by forwarding to Mr. Cochran the MOA Mr. Bleess had provided to the mediator with the statement:

I'm attaching the proposal. I sent it to [the mediator] last Monday night, and he sent it along to Sean on Tuesday. I'm surprised you haven't seen it yet. My apologies on that. If you have questions let me know.

The MOA attached was the same one Mr. Bleess emailed to the mediator on February 8, 2016 (the second, corrected version).

23. On February 29, 2016, Mr. Bleess and Mr. McArdle exchanged

⁶ The "proposal" refers to the MOA, which contained the proposed changes to the parties' previous collective bargaining agreement.

emails resulting in final tentative agreement on the MOA. During the preceding few days, they worked through language on a trial period for the major change to the workweek schedule, as well as changes to allow some degree of carry-over of sick and vacation accruals.

24. Mr. McArdle's final email on February 29, 2016, stated he would take the MOA to the membership for ratification. Both parties ratified and executed (signed) the agreement at the beginning of March, 2016.
25. Shortly after the newly-ratified contract was executed, Mr. Cochran asked Mr. Breess when the retroactive piece of the wage increase would be paid. Mr. Breess said retroactive payments were not in the MOA and referred Mr. Cochran to the specific language in the Article 8, Section B of the contract addressing the retroactivity issue. It was at this point that Mr. Cochran first learned that the City would not be making the wage increase retroactive.
26. Mr. McArdle and Mr. Cochran both testified that when the Union submitted the agreement to its membership for ratification at the beginning of March, 2016, they and the membership thought that the wage increase would be retroactive to the beginning of January. Both witnesses testified that the membership would not have ratified the contract had they known that retroactive pay was not included and both felt the City had misled them.
27. Mr. McArdle testified that because he was the one who originally created the MOA that was being used as the central document of the negotiations following February 1, 2016, he focussed his attention on the portions of the document that were highlighted either with red ink, strike

through marks, or underlining.

28. Both Mr. Cochran and Mr. McArdle testified that they had seen the new sentence in Article 8, section B, but thought it meant something different. They read, "Wages for 2016 go into effect the first full pay period after both sides approve this proposal" as meaning that that first pay period would be the point at which the employees would see the increased wages. They did not interpret it to mean there would be no retroactive payment for hours worked since January 1, 2016.
29. Between the time of first seeing the sentence at issue on February 15, 2016, and the ratification of the MOA in early March, the Union never asked the City Manager or any City official for clarification on the meaning of the sentence.
30. At some point in March, 2016, the Union filed a grievance over the failure to make the wage increase retroactive. The grievance was denied at Step 1 by the Chief of Police and was denied at Step 2 by the City Manager. The City Manager showed Mr. Cochran a copy of the email sent to the mediator on February 8, 2016, that referred to the City Council's decision against making the pay increases retroactive. The grievance was not appealed to the next step.

DISCUSSION

The question before the Board is whether the City of Caribou violated §964(1)(E) of the Act when it inserted (without redlining) a sentence in the tentative agreement that made the negotiated wage increase effective after the execution of the agreement, while the Association thought the wage increase would

be retroactive to the start of 2016. Section 964(1)(E) prohibits "refusing to bargaining collectively" as required by §965, which obligates both parties to "confer and negotiate in good faith." In this case, the question is, in essence, whether the City's insertion of the sentence at issue during the negotiation process without express notice to the Union constituted a refusal to bargain in good faith.

Determining whether a party has bargained in good faith requires consideration of many factors, an analysis which the Board often refers to as the "totality of the circumstances" test. This analysis considers the totality of the charged party's conduct, frequently described with the following:

. . . Among the factors which we typically look to in making our determination are whether the charged party met and negotiated with the other party at reasonable times, observed the groundrules, offered counter-proposals, made compromises, accepted the other party's positions, put tentative agreements in writing, and participated in the dispute resolution procedures. See, e.g., Fox Island Teachers Association v. MSAD #8 Board of Directors, MLRB No. 81-28 (April 22, 1981); Sanford Highway Unit v. Town of Sanford, MLRB No. 79-50 (April 5, 1979). When a party's conduct evinces a sincere desire to reach an agreement, the party has not bargained in bad faith in violation of 26 M.R.S.A. §964(1)(E) unless its conduct fails to meet the minimum statutory obligations or constitutes an outright refusal to bargain.

Waterville Teachers Assoc. v. Waterville Board of Education, No. 82-11 at 4 (Feb. 4, 1982).

The record shows the City and NEPBA discussed retroactive payment of wage increases during the mediation session on February 1, 2016. The union members viewed it as an important issue because the City had not agreed to make the wage increase

retroactive for the prior one-year agreement. While there is a dispute about what the City Manager told the Union about the City Council's likelihood of approving retroactivity, it is clear that NEPBA knew that Mr. Bless had to get the Council's approval. The ratified MOA contained a sentence that made the 2016 wage increase prospective only. The Union argues the City's failure to expressly inform the Union negotiators of this added sentence and the City's failure to underline or otherwise highlight that new sentence in the MOA was bad faith bargaining. We disagree.

Applying the established standard cited above, we are unable to conclude that City failed to bargain in good faith as required by §965(1)(E). The evidence the Union relies on to support its charge that the City failed to bargain in good faith, that is, the City led the union to believe retroactive pay would be approved and drafted the MOA with an intent to deceive the Union about the retroactivity issue, is not supported by the weight of the evidence.

We do not find that the failure to highlight the key sentence was intentional. The City Manager credibly testified that the omission occurred because it was late at night and he was in a rush to send the mediator a corrected MOA that included the retroactivity issue. Furthermore, the City Manager failed to highlight another revision, relating to the higher wage increases, which was favorable to the Union and appeared in the top row of the chart directly below the sentence at issue.

Critically, both Union officials testified that they saw the new sentence before ratification, but did not think it precluded payments for wage increases retroactive to the first

of January. Thus, to the extent the City Manager had intended to surreptitiously insert language into the agreement (which we have not found), he was not successful. In light of the Union officials' testimony that they were aware of the language, this case is one of contract interpretation. As the parties' agreement provides that matters of contract interpretation are subject to the grievance procedure, that is the forum in which to address the dispute. This Board does not have jurisdiction to resolve grievances. See, e.g., State of Maine v. MSEA, 499 A.2d 1228, 1239 (Oct. 29, 1985) (the MLRB has jurisdiction over prohibited practices complaints, but not over grievances.)

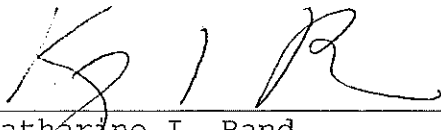
ORDER


On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S. §968(5), the complaint is dismissed.

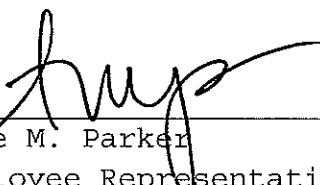
Dated at Augusta, Maine, this 22nd day of November, 2017.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 MRS §968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.


Katharine I. Rand
Chair


Robert W. Bower, Jr.
Employer Representative


Amie M. Parker
Employee Representative