STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the matter of

CITY OF NEW LONDON

- and -

NEW LONDON POLICE UNION LOCAL #724
and COUNCIL #15, AFSCME, AFL-CIO

Case No. MPP-3480

In the matter of

COUNCIL #15, AFSCME, AFL-CIO, and
NEW LONDON POLICE UNION #724

Case No. NEPP-3562

- and -

CITY OF NEW LONDON

Decision No. 1443

Decided: September 3, 1976
Issued: October 12, 1976

APPEARANCES:

Siegel, O'Connor & Kainen
By: Donald Strickland, Esq.,
for the City of New London

Kopkind, Flynn & Raccio, P.C.
By: Frank J. Raccio, Esq.,
for the Union

DECISION and ORDER

The Proceeding

On February 23, 1976, New London Police Union Local #724 and Council #15, AFSCME, AFL-CIO, hereinafter the Union, filed with the Connecticut State Board of Labor Relations, hereinafter the Board, a complaint alleging that the City of New London, hereinafter the City, had engaged and was engaging in practices prohibited by the Municipal Employee Relations Act, hereinafter the Act, in that the City failed to initiate negotiations for a collective bargaining agreement within the time limited by the then effective agreement which was due to expire on June 30, 1976 (hereinafter the Contract). This is Case No. MPP-3480.

On April 21, 1976, the City filed with the Board a complaint alleging that the Union had engaged and was engaging in practices prohibited by the Act in that it insisted, over the City's objection, in using a device to record on tapes the negotiation sessions between the parties. This is Case No. NEPP-3562.

These cases were consolidated by order of the Board and came on for hearing before it on May 21, 1976, at which both parties appeared and were represented by counsel. Full opportunity was given to adduce evidence, examine and cross-examine witnesses, and make argument. Both parties filed written briefs which were received on August 27th and 31st.

At the hearing the City moved to dismiss the complaint on the ground that the Board lacked jurisdiction to determine claims which were exclusively contractual in nature, or, in the alternative, to refer the matter to arbitration.

On the whole record the Board makes the following findings of fact, conclusions of law, and orders.
Findings of Fact

1. The City of New London is a municipal employer within the meaning of the Act.

2. New London Police Union is an employee organization within the meaning of the Act and has at all material times been the exclusive statutory bargaining representative of uniformed and investigatory employees in the City’s police department with exceptions not here material.

3. The bargaining relationship between the parties extends back to the mid-1960’s and they have negotiated a series of collective bargaining agreements; the most recent of them was in effect from July 1, 1975 through June 30, 1976. This will be referred to hereinafter as the Contract.

4. Article XXXIII of the Contract provides that negotiations for a successor agreement may be initiated by a written notice from either party given not more than 180 nor less than 150 days before the Contract expires. This article also provides that an initial conference relative to the new negotiations must be held within five days of the receipt of such notice.

5. On January 29, 1976, William Wilson, the Union's chief negotiator, sent a letter to C. Francis Driscoll, City Manager, stating the Union’s desire to open negotiations for a successor agreement. This letter was received by the City either on February 1st or on February 2nd.

6. On February 4, 1976, Driscoll met Wilson in the Labor Department building and talked about the setting of dates for the new negotiations. Wilson said he "was hopeful he could set a date soon" but specified no date. Driscoll said he would be in touch with Wilson shortly and that Robert Smith, the City's director of the office of management, budget, and personnel, would be negotiator for the City.

7. On February 9, 1976, Driscoll wrote Wilson offering the date of March 3rd for the beginning of negotiations and stating, among other things, that the City was in the process of selecting an outside firm as negotiator.

8. Upon receipt of this letter Wilson by telephone advised Smith that he (Wilson) had a prior engagement on March 3rd. Wilson also called attention to the Contract provision noted above and to the requirement of Public Act 75-570, but offered no alternative date.

9. Shortly after this conversation Wilson's prior engagement for March 3rd was cancelled and he promptly telephoned Smith and stated his availability for the third.

10. By this time Smith had made another commitment for March 3rd and he so advised Wilson. In this conversation neither party offered alternative dates.

11. On February 13, 1976, Wilson wrote Driscoll again calling attention to Article XXXIII of the Contract and stating that an initial meeting concerning negotiations had to "be scheduled within five days of the initial notification of intent to negotiate. This letter also advised the City that the Union had "no alternative but to file a prohibited practice complaint" with the Board.

12. On receipt of this letter Driscoll instructed Smith to "try to straighten this out" and Smith telephoned Wilson and reminded him that a similar procedure had been followed in 1973. In this conversation Smith invited Wilson to suggest new dates. Wilson replied that he didn’t have one at that time.

13. On February 23, 1976, the Union prepared the prohibited practice complaint and on the same day filed it with the Board.
14. On March 3rd the City engaged the services of the law firm of Siegel, O'Connor and Kainen as negotiators.

15. On March 11, 1976, Donald Strickland, for the law firm, wrote Wilson about dates for negotiations and March 26, 1976 became scheduled as the date for the first negotiating session. Negotiations did in fact begin on that date.

16. The City's initial suggestion of March 3rd for the beginning of bargaining was made as a result of a computation by Smith which fixed it as the last date that would comply with the Public Act 75-570. This computation was a reasonable one.

17. The Contract contains provisions for grievances and binding arbitration as a last resort in the grievance procedure.

18. The contract in effect between the parties from 1971 to 1973 contained the same language as the Contract requiring an initial conference within five days of receipt of the letter of notification of intent to modify. Such a letter was sent on January 16, 1973, and the initial conference was held on February 22nd, without any objection from the Union or any insistence that the first conference be held within five days of the letter of intent.

19. At the first session on March 26, 1976, the City and Union discussed ground rules and agreed on some of them. Disagreement developed upon the City's proposal that there be no smoking at the sessions and upon the Union's proposal to tape record the sessions. After statements of views and discussion of these questions the meeting adjourned with agreement by the parties to review their positions.

20. The next session was held on April 9, 1976. At this time the City reluctantly withdrew its objection to smoking, but the Union continued to insist on the use of a tape recorder. 'This was discussed at some length. The City urged that the presence of a recorder inhibited the free exchange required for effective bargaining and pointed to decisions of this Board (referred to in the discussion). The Union complained of the City's taking of verbatim shorthand notes in past negotiations and urged that it needed the recorder to protect its position in the event of future arbitrations or proceedings before this Board in which disputes might involve what occurred at the bargaining table. The City agreed not to have verbatim notes taken at future sessions. The City also suggested that the Union seek a declaratory ruling from this Board on its right to insist on tape recording and that it would not object to such petition on the ground of mootness if negotiations proceeded in the meanwhile.

21. When agreement could not be reached on the matter of tapes the Union submitted to the City its preliminary contract proposals. The City representatives requested a caucus to consider them. At this session the Union had a tape recorder present but it was turned off at the beginning of the session upon the City's objection. When the City's negotiators returned after the caucus they were told the recorder would be turned on and it was turned on in spite of the City's objections to its use.

22. The City negotiators started to give their response to the Union's proposals but when the tape recorder was turned on over their expressed objection, they again left the room to discuss the situation. They did not, however, advise the Union negotiators; that this leaving was temporary or for the limited purpose.

23. The Union negotiators thought that the City negotiators had terminated the negotiations and left the room. When the City negotiators returned they found no Union negotiator present.

24. On April 9, 1976, Wilson sent a letter to the State Board of Mediation and Arbitration stating that "After two meetings with the City over ground rules between the parties, we have, in our opinion, reached an impasse." Based upon its contention that the Union had committed a prohibited practice by insisting to the point of impasse upon tape recording negotiating sessions over the objection of the City, the City filed a prohibited practice claim on April 20, 1976. Since the Union's declaration of impasse on April 9, 1976, no negotiations have occurred.
Conclusions of Law

1. This Board has jurisdiction to determine whether the City has fulfilled its statutory obligation to bargain with the Union in good faith. Section 7-470(a)(4).

2. This includes the jurisdiction to determine whether the City has failed to meet with the Union at reasonable times. Section 7-470(c).

3. In making this determination the Board has jurisdiction to consider and, if need be, construe the terms of an applicable contract, and of Public Act 75-570.

4. Except as noted in paragraph 3, supra, this Board does not have jurisdiction to determine questions of breach of contract or a question whether negotiations were begun within the time limited by Public Act 75-570.

5. The City attempted in good faith to schedule an initial negotiating session at a reasonable time: it attempted in good faith to meet its contractual and statutory obligations with respect to scheduling such meeting.

6. The City did not violate the Act in its conduct with reference to scheduling bargaining sessions.

7. The insistence by the Union in recording bargaining sessions on tape over the City's objection constituted a failure to bargain in good faith under the circumstances here.

Discussion

The complaint alleges that certain acts and omissions by the City constituted a failure to bargain with the Union in good faith, in violation of the Act. The City claims that the question presented concerns only a breach of the Contract and that this Board either lacks, or should decline to exercise, jurisdiction over such a question where the Contract provides a comprehensive grievance and arbitration procedure for the resolution of disputes over the meaning or application of the Contract. The City therefore moves that the Board either dismiss the complaint for want of jurisdiction or defer to the arbitration process. This motion is denied.

The Board undoubtedly has the duty and the correlative power to determine conduct (including non-action or delay) constitutes a failure to bargain in good faith as that term is defined in section 7-470(c) of the Act. And if the determination of such an issue involves incidentally a determination of whether a party violated the terms of an existing contract then this Board has jurisdiction to make this incidental determination as part of its duty to decide whether the Act has been breached.

The question properly before us is not, however, whether there has been a breach of contract as such, but rather whether the City's conduct amounts to a failure to bargain in good faith. This may include consideration of whether the City has observed its contractual obligations or attempted in good faith to do so, or whether any failure on its part was quite without justification or excuse. It may in other cases involve other questions of contract interpretation.

Viewing the matter in this light we find that the City's conduct in attempting to set up negotiation sessions after getting the Union's letter of January 26th did not constitute a failure to bargain in good faith, This letter was received on February 1st or 2nd. Driscoll conferred briefly with Wilson about dates on February 4th at which time the City showed willingness to start negotiations. At this meeting the Union suggested no specific date. During this period of time the City was in the throes of changing negotiators but was nevertheless willing to start negotiations before the change was made; The date first proposed by the City (March 3rd) was a reasonable one and one that the City believed in good faith was within the time limited by Public Act 75-570. The Union did not raise the five day provision until after the five days had elapsed. Neither party had raised or observed it in negotiations for the existing Contract, and the City followed the former practice.
The Union claims that the City breached the five-day provision in article XXXIII. True no negotiating session was held within the five days, but an issue of breach of contract would raise serious questions, e.g. whether the meeting of February 4th satisfied the requirement; whether the Contract puts sole responsibility for satisfying the requirement upon the City; whether the Contract is to be interpreted in the light of prior practice; whether the requirement was waived by the Union. In order to determine whether the City breached the Contract, all these questions would have to be answered. In order to determine the question properly, before us they need not be. If the City tried in good faith to meet its contractual obligations (as we find it did) and if it was reasonably cooperative in scheduling a meeting at a reasonable time (as we find it was) then it is beyond our jurisdiction to decide whether there was a technical breach of the Contract,

The Union also claims that the City breached its statutory obligation under Public Act 75-570. Section 2(a) of that Act provides:

"The negotiations between a municipal employer and a municipal employee organization shall commence at least one hundred twenty days prior to the expiration date of any current collective bargaining agreement subject to the provisions of sections 7-467 to 7-477, inclusive, of the general statutes."

This Act does not by its terms make failure to comply with this section a prohibited practice. Nor does it give this Board jurisdiction to police the section or to impose sanctions for its non observance. Nevertheless the command of this section may very well enter into a consideration of whether a party's conduct constitutes a prohibited practice under section 7-470(a)(4) and (c). No doubt the willful refusal by either party to begin negotiations within the time so limited would amount to a failure to meet at a reasonable time within section 7-470(c). Perhaps other conduct that violates Public Act 75-570(2)(a) may also constitute a prohibited practice. We do not decide more than is needed to discuss the issue before us. We hold that under the circumstances of this case, where the City made a reasonable and bona fide effort to comply with that section; where the Union offered no alternative dates within the statute; and where the City's offer was frustrated by a prior commitment of the Union's negotiator, there was no violation of the City's duty to bargain in good faith. The command of the statute is not directed to one party to the exclusion of the other: it is laid upon both. Whether either or both violated Public Act 75-570(2)(a) is not for us to determine in these proceedings. Ye decide simply that neither party may successfully charge the other with failure to bargain in good faith because of failure to hold bargaining sessions within the statutory time limit where the charging party has made no specific reasonable suggestions of a date within that limit and where the party charged has tried in good faith to comply with the statute. We find that to be the case here.

The Union's complaint must be dismissed on the merits so far as we have jurisdiction to decide them. This dismissal is of course without prejudice to any claim upon the issues we have no jurisdiction to decide, if such a claim should be presented to the appropriate tribunal.

II.

The issue raised by the City's complaint has been decided adversely to the Union in City of New Britain, Case Nos. HPP-2092, 2096, Dec. No. 1131 (1973). See also Town of New Canaan, Case No. HPP-1691, Dec. No. 865 (1969). In New Canaan we held that the question whether bargaining sessions should be recorded on tape was a negotiable ground rule but stated that if the parties could not agree upon the question this Board would "determine under all the facts presented whether a position insisted on adamantly is so inconsistent with the objectives of collective bargaining that the insistence constitutes a failure to bargain in good faith." Id. at p. 12. In New Britain after further experience and consideration we decided that "In our view the full attainment of the Act's purposes requires that such a device be used only if both parties agree; and that the unilateral insistence on its use, over objection, constitutes a refusal to bargain in good faith." New Britain, supra, at p. 10. Further experience and further reflection confirms this view,
We recognize that there is division of opinion upon the matter among members of NLRA. See St. Louis Typographical Union No. 8, ITU, 149 NLRB 750 (1964); Architectural Painters, Local 103, APL-CIO, 192 NLRB 760 (1969); Cantley v. United Express, Inc., 192 NLRB 694 (1971). And the Federal courts have not fully embraced the position we have adopted. See NLRA v. Southern Transport, Inc., 355 F. 2d 970, 23 A.L.R. 3d 694 (8th Cir. 1966). In the latter case the court found the insistence upon a tape recorder justified on the particular facts presented. Whether or not there may be situations which present a similar justification under our view we need not decide. We find that this case is not one of them.

It is true that the Union here urged that it needed the tapes to protect itself from a repetition of what it implied were false statements made by the City before the Arbitration Board and this Board in former cases where the course of prior negotiations had been called into question, but the only testimony on this score was broad and conclusory and no satisfactory evidence showed that such a thing had occurred. The members of this Board recall none in any case before it and no specific arbitration case was mentioned. We need not therefore decide whether such misstatements in the past would justify an insistence on tapes as the court found it would in Southern Transport.

ORDER

By virtue of and, pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is

ORDERED that

I. The Union's complaint in Case No. MPP-3460 be, and the same hereby is, dismissed without prejudice to the presentation to an appropriate tribunal of any claims over which this Board lacks jurisdiction.

II. The Union cease and desist from its insistence on the use of a tape recorder in bargaining sessions with the City over the City's objection to such use, and from conditioning the continuation of negotiations upon the use of a tape recorder.

III. The Union take the following step which the Board finds will effectuate the purposes of the Act, namely, upon request or on its own initiative continue negotiations with the City upon the terms and conditions of a collective bargaining agreement to succeed the Contract.

IV. Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the Union to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By

Fleming James, Jr., Chairman

Patrick F. Bosse

Kenneth A. Strobic