In the matter of
KILLINGLY BOARD OF EDUCATION
and
KILLINGLY EDUCATION ASSOCIATION:
Case No. TPP-6174
Decision No 2118
March 18, 1982

APPEARANCES:
Robert M. Bourke, Esq.
for the Board of Education
Ronald Cordilico, Esq.
for the KEA

DECISION and ORDER

On November 26, 1980, the Killingly Education Association (the KEA)* filed a complaint with the Connecticut State Board of Labor Relations (Labor Board) alleging that the Killingly Board of Education (School Board) had engaged in prohibited practices within the meaning of the Act Concerning School Board-Teacher Negotiations (the Act) in that the chief negotiator for the School Board had brought a newspaper reporter to a negotiating session and released copies of contract proposals made during collective bargaining negotiations to the reporter in violation of a mutually agreed-upon ground rule prohibiting press releases and public statements concerning issues in negotiation. In its complaint, the KEA requested as a remedy a cease and desist order and an order directing the School Board to make the KEA whole for the subsequent costs of mediation and arbitration incurred by the KEA in connection with the collective bargaining negotiations.

After the requisite preliminary steps had been taken, the matter was brought before the Labor Board for a hearing on May 28, 1981. Both parties appeared and were represented by counsel. Each party was provided a full opportunity to adduce evidence, examine and cross-examine witnesses, and make argument. Written post-hearing briefs were filed by both parties which were received by the Labor Board in July, 1981.

At the hearing, the KEA requested as an additional remedy that the School Board be ordered to make the KEA whole for reasonable attorneys' fees and costs incurred in the processing of this complaint.

Upon the whole record before us, we make the following findings of fact, conclusions of law and order.

Findings of Fact

1. The Killingly Board of Education is a local board of education within the meaning of the Act.

2. The Killingly Education Association is an organization of certified professional employees within the meaning of the Act and has at all material times been the exclusive statutory bargaining representative of the teacher unit in the Killingly school system.

3. The parties had a collective bargaining agreement in effect covering the period July 1, 1978 to June 30, 1981.

* The KEA is a local subdivision of its parent organization, the Connecticut Education Association.
4. On October 3, 1979, the Connecticut State Board of Labor Relations issued a prohibited practice decision in the matter of Killingly Board of Education -and- Killingly Education Association, Decision No. 1807.

5. In that decision, we dismissed a prohibited practice complaint filed by the KEA which alleged that then KEA chief negotiator Thomas Harvey had been demoted by the School Board as punishment and retaliation for his union activities. We found that although there was clear evidence of anti-union animus displayed against Harvey by Superintendent of Schools Anthony Muscente and some members of the School Board, the School Board's decision to demote Harvey had been motivated by legitimate economic considerations.

6. We also noted in that decision that the KEA had belatedly filed an amended complaint alleging that the anti-union statements and threats by Muscente and School Board members in and of themselves constituted prohibited practices. The amended complaint was not filed by the KEA until after the hearing in that case had been held and final submissions (briefs) had been filed. Because of the late filing of the amendment, we did not feel it proper to find a prohibited practice based solely on the anti-union statements and threats.

7. However, it was necessary to consider the evidence of anti-union animus by Muscente and School Board members as part of the analysis in passing upon the original complaint. In that regard, we made the following findings of fact in Decision Number 1807.

10. On June 20, 1978, at a private party Superintendent Muscente in a conversation with Mr. Davis /then president of the KEA/, stated that he would "destroy Tom Harvey" and that there was nothing that could be done to salvage him. Furthermore Superintendent Muscente said that there was a possibility that Harvey would be transferred to the Junior High School.

11. Subsequently, Mr. Smith, the Principal of the High School, asked Superintendent Muscente whether or not he had threatened Mr. Harvey's position. Superintendent Muscente's response was "Yes, I guess I did."

12. Sometime in June of 1978, Elaine Robbins, a teacher in the Killingly School System was requested to attend a meeting with Superintendent Muscente to discuss a complaint by a parent of one of her students. Ms. Robbins requested Mr. Harvey to attend as her union representative. During the discussion Mr. Harvey attempted to interject in Ms. Robbins behalf but was told by Mr. Muscente "you're to shut up,... You're not to speak unless you're spoken to. You're not going to run this place like you run other places."

13. On June 21, 1978, after a Board of Education meeting, Mr. Hill, a Board of Education member, stated to Mr. Harvey "I think you better watch your style in dealing with the Board of Education,... they can be quite vindictive."

14. Mr. Hill is the parent of the child that Ms. Robbins was called in to discuss with Superintendent Muscente.

15. There was considerable testimony given at the hearing evincing intense animosity by Board of Education members towards Mr. Harvey for his strong vocal stance in support of Killingly teachers.

16. Further testimony indicated that a number of Association members were reluctant to continue active participation in the Association for fear of retaliatory action.

8. Additionally, in Decision Number 1807, we took note of the threats made by Muscente and School Board members against Harvey and stated:

This does not end the matter. There is considerable evidence of verbal threats against Mr. Harvey because of his active union advocacy which we find very disturbing. Statements by the superintendent that he wanted to destroy or demote Mr. Harvey and the openly expressed animosity of some Board of Education members have the inevitable effect of diminishing the level of union advocacy and discouraging union activity. This kind of interference and restraint of protected union activity is prohibited by An Act Concerning School Board-Teacher Negotiations, See section 10-153e(b)(1). Although we cannot connect this anti-union conduct
to the elimination of the department head positions we do not by this deci-
sion and dismissal condone the conduct of the Superintendent and some Board
of Education members. Indeed, if the pattern of anti-union conduct shown
on the record here continues, we would find it appropriate to issue a cease
and desist order upon the proper filing of a complaint by the Association.

9. The relationship between the School Board and the KEA by September 1980 was
marked by mistrust and tension.

10. In early September, 1980, at the very beginning of the 1980-81 school year,
the KEA conducted a no-confidence vote among the teachers indicating the dissatisfac-
tion of the staff with the performance of Muscente.

11. The executive board of the KEA also decided to ask the Connecticut Education
Association (CEA) (the KEA's state parent organization) to conduct an inquiry of the
situation in the Killingly school system "for the purpose of determining whether or not
there was indeed a disintegration in morale, and a number of other things based upon
seven general areas that were outlined by the executive board of the KEA." The subject
matter of the CEA "investigation" was not shown in any way to involve the issues in the
upcoming collective bargaining negotiations.

12. Shortly after the no-confidence vote was taken, Robert Bourke, Esq., labor
negotiator and advisor for the School Board, approached KEA president James Wiegle
and KEA negotiating committee chairman Donald Caron and advised them not to make the no-
confidence vote public and not to proceed with the CEA "investigation." Bourke pro-
posed that the KEA instead permit him to try and arrange a private meeting in which they
could communicate their concerns directly to the School Board. Bourke stated that if
the KEA did not accept his proposal, he would have the School Board take a confidence
vote in Superintendent Muscente and would have to show a connection between the
no-confidence vote and the negotiations and label the no-confidence vote as being a ploy
in the upcoming contract negotiations.

13. Wiegle and Caron did not accede to Bourke's proposal.

14. After the meeting between Bourke, Caron and Wiegle, a reporter from the
Norwich Bulletin contacted Wiegle and inquired as to the results of the no-confidence
vote. Wiegle gave the results to the reporter. This was prior to commencement of
contract negotiations.

15. On September 9, 1980, the parties met to begin negotiations for a successor
contract to the 78-81 contract. Throughout the negotiations, Bourke was to act as chief
spokesperson for the School Board in negotiations with Muscente present to assist him
The KEA had a larger negotiating team for which Caron was chief spokesperson.

16. Bourke is an attorney specializing in labor law and is experienced in labor
negotiations.

17. At the September 9 meeting, the KEA made some substantive proposals in con-
nection with a reopener provision in the 78-81 contract. No substantive proposals were
made by Bourke on behalf of the School Board.

18. Ground rules for the successor contract negotiations were discussed at the
September 9 meeting. The KEA proposed a written set of ground rules and submitted that
proposal to Bourke (Ex. 3). The parties thoroughly discussed the ground rule proposals
made by the KEA with Bourke suggesting a number of changes in the KEA proposal and the
KEA agreeing to those suggestions.

19. One of the changes proposed by Bourke was an additional ground rule prohib-
iting press releases or public statements concerning issues in negotiations. The KEA
agreed to this addition.

20. The next formal negotiating session was held on September 18, 1980. Since
the September 9 meeting, the KEA had typed the ground rules discussed at that meeting
and at the September 18 meeting provided typed copies to Bourke and Muscente. The
typed copies were reviewed rule by rule by the parties, with Bourke suggesting further
revisions and the KEA agreeing. Bourke suggested that the ground rule concerning pro-
hibitions on press releases or public statements on issues in negotiation be expressly
limited to "until settlement is reached." The KEA agreed to this modification and
wrote the modification into the rule. (Ex. 4).

21. The express language of this ground rule differed from the express language
contained in the ground rules utilized by the parties for reopener negotiations the
previous year under the 78-81 contract. The ground rules in the earlier negotiations had expressly provided that press releases concerning issues in negotiation were prohibited until "settlement or impasse" is reached (Ex. 9). This language reflected the rule Bourke ordinarily agreed to in negotiations between employers and unions.

22. By the conclusion of the September 18 meeting, the parties had agreed to the ground rules as amended. Neither party suggested that the written rules be signed.

23. Although he did not express it at the September 18 meeting, Bourke considered impasse as an implied condition that would dissolve the prohibition on press releases or public statements concerning issues in negotiation.

24. At the September 18, 1980 meeting, the KEA also presented its initial substantive written proposals on a new contract. These initial proposals called for twenty-four or twenty-six changes from the 78-81 contract.

25. The changes proposed by the KEA included a ninety percent salary increase, a separate teacher lounge for non-smokers, a faculty work area with typewriter and duplicating machine, changes in the grievance procedure, improved sick leave, improved personal leave days, changes in the professional days provision, improvement in general leave, changes in promotional policies, agency shop changes, separation and recall procedures, retirement improvements, improvements in various insurance benefits, a new class size provision and extra curricular stipends.

26. The School Board made no substantive proposals on contract terms at the September 18 meeting.

27. The third negotiating session was scheduled for October 1, 1980. The ground rules provided that each party present its proposals on all issues in dispute by the third session. On the morning of October 1, the secretary to the Superintendent contacted the KEA and informed them that the School Board had not "finalized" its proposals and would not be able to present them on that date. The parties agreed to use the next scheduled negotiating session, October 6, as the third negotiating session.

28. The parties met formally for negotiations on October 6, 1980. Bourke was a few minutes late for the meeting. Bourke stated jokingly, "I am glad you arrived on time because I would have had to file an unfair labor practice for violation of the ground rules," This statement was in reference to another of the ground rules which provided that negotiating sessions "commence not later than five minutes after the designated time." (Ex. 4).

29. At the October 6 meeting, the KEA submitted modifications and additions to its earlier proposals submitted on September 18. Bourke submitted initial substantive contract proposals on behalf of the School Board. These called for six changes from the current contract language and no offer on salary.

30. The next negotiating session was held on October 9, 1980. At this session, the KEA proposed further modifications in its earlier proposals. Bourke made no new or modified proposals on behalf of the School Board. There were discussions between the parties on the class size proposal which had previously been submitted by the KEA.

31. The next negotiating session was scheduled for October 23, 1980.

32. Between the September 18 meeting and the October 23 meeting, Bourke had informal private meetings with Caron and Terry to discuss the negotiations. Bourke asked them whether the KEA was serious about a number of its proposals. Specifically, Bourke asked Caron whether the KEA was serious about the requested ninety percent salary increase. Caron responded by saying that "a very convincing case could be made for it."

33. At some point between the October 9 and October 23 meetings, Bourke decided that "there was no way I could legitimately sit there and counter-offer them. They had to give me something better." (Tr. 98). The School Board decided to make the parties' initial proposals public without prior warning to the KEA. The School Board believed that teachers in the bargaining unit did not know what the KEA was proposing in negotiations and that release of the initial September 18 KEA proposals would shock and embarrass the KEA negotiating team in front of the teachers as well as the public and would thereby create immediate pressure on the KEA negotiators to further modify their proposals. The School Board also wanted to mitigate any negative publicity to Superintendent Muscente and the School Board generated by the no-confidence vote and the CEA investigation by showing that the source of that publicity, the KEA, was itself unreasonable as evidenced by its bargaining proposals.
34. All the formal negotiating sessions up to and including the October 23 meeting were held in the superintendent's conference room in the School Board's administrative offices.

35. The only entries to the conference room were through either the superintendent's office, which bordered the conference room on one side, or through the secretarial work room which bordered the conference room on the other side. Each of these bordering rooms had a door into the conference room. The door between the superintendent's office and the conference room was a folding louvered door.

36. The KEA negotiators' usual practice, when entering the administration building for negotiations, was to proceed directly down the hall to the secretarial work room and then enter the conference room through the secretarial work room. This was always done without the need to ask permission to enter.

37. On October 23, when the KEA negotiating team entered the administration building, they were stopped in the hall and told by Muscente's secretary that he had told her not to let them into the conference room just yet.

38. Shortly thereafter, Muscente was on his way through the hall from the second floor and told the KEA negotiators that they could proceed to the conference room Muscente then entered his office through its hall door. The KEA negotiators proceeded to the conference room via their usual route through the secretarial work room.

39. As usual, the KEA negotiators arrived in the conference room before Muscente and Bourke. The folding louvered doors to the superintendent's office were tightly closed. It was unusual for these doors to be closed.

40. The KEA negotiators had brought with them revised contract proposals containing two modifications from their earlier proposals. The most significant modification was a reduction in the salary proposal from the initial ninety percent request to a twenty percent request.

41. In accordance with their usual procedure when making new proposals, the KEA placed two sets of their new proposals on the conference table in front of where Bourke and Muscente normally sat. The KEA negotiators then seated themselves at the conference table. As usual, Caron seated himself on the opposite side of the table from and facing, the folding louvered doors.

42. Shortly thereafter, Bourke entered the conference room through the louvered doors, closing them behind him, proceeded to the work room and then returned to the superintendent's office and again closed the louvered doors behind him.

43. Soon thereafter, Bourke returned to the conference room, opening the louvered doors slightly and closing them behind him. He addressed the KEA negotiating team asking, "Are all your people here?"

44. Bourke then seated himself at the table in front of one of the two sets of new proposals placed on the table by the KEA. Speaking very rapidly, Bourke announced that he was "disgusted" with what he termed "the events that had transpired of late" and stated that he had no faith in the credibility of the KEA people he had been working with. Bourke then declared that the negotiations were at an impasse and that the parties were at liberty to call in a third party mediator and that they could make whatever "releases" they deemed appropriate.

45. Bourke then pointed at Caron and said, "I want to talk to you," and asked the other members of the KEA negotiating committee to leave the conference room.

46. As the other members of the KEA negotiating committee began exiting into the work room, Bourke opened wide the louvered doors to the superintendent's office, walked to the superintendent's desk, and picked up a copy of the School Board's initial contract proposals and the KEA's initial proposals.

47. When Bourke opened the louvered doors, Caron saw Robert Burton, a reporter for the Norwich Bulletin, standing approximately three feet behind and to the right of the doors. At that moment, Caron did not know who Burton was.
48. At about that point, Connecticut Education Association Uni-Serve representative Lee Terry (who was about ten minutes late for the negotiating session) was just entering the conference room through the secretarial work room.

49. Bourke ushered Burton into the conference room and asked him to introduce himself to Caron and Terry. Bourke then handed over to Burton the copies of the initial proposals of the parties which he had just picked up from the superintendent’s desk.

50. Bourke stated to the reporter: “There was been a chain of events that have occurred that made me feel like it is impossible to go on negotiating” and “I am declaring an impasse.” Bourke turned to Caron and Terry and said, “Now is there anything that you want to say?”

51. Caron and Terry were shocked, confused and momentarily speechless, except that Terry told the reporter that Bourke had no right to give him the proposals. The meeting broke up at that point.

52. The next day, the following article appeared in the Norwich Bulletin:

Negotiations between the school administration and teacher's association collapsed Thursday when the board's attorney abruptly declared an impasse in talks and announced that he would request state mediation for further negotiations.

The move by Robert Bourke, the board's negotiating attorney, temporarily has ended negotiations which never really began. The Killingly Education Association, representing the teachers, submitted its original proposal. The board, through Bourke, had answered several points with counter-proposals, but had not countered key subjects, including wages, overtime, and class size requests.

And while the contract topic were at a standstill, other school system happenings were adding fuel to the fire. The KEA, in early October, announced a 'no confidence' vote in Supt. Anthony Muscente, the only school system representative in the contract negotiations.

The announcement brought a cry of "foul" from the board, which linked the vote with the negotiations. The KEA denied the claim saying the matter was related to a brouhaha of the summer involving the school’s athletic department.

The declaration of impasse stunned KEA Negotiator David Caron, who said he had come to the table with a new set of proposals for the administration. They never were delivered.

"No state of impasse exists," Caron declared in a written statement released later. "We have dates scheduled for negotiation meetings, and we are prepared to meet on that schedule. We have never given any indication that we are unwilling to compromise in order to achieve a fair settlement."

'No . . . Room to Negotiate'

Bourke attributed his declaration of impasse to "the basic proposals, which do not leave reasonable room for negotiation the entire scenario of the vote of no confidence and the lack of credibility of David Caron."

Bourke released to The Bulletin copies of both the teachers' proposals and the board's counter-proposals. He called "ironic" KEA protests that releasing the information was in violation of the negotiating ground rules, citing the release of the no confidence vote as a violation on their part.

The KEA proposals are initial offerings, and according to Caron, "the implication that we aren't negotiating is untrue. A settlement must include the public interest, and we are prepared to negotiate with that in mind. We are not trying to impose any hardships on the community."

The proposal offers salary increases averaging 90 percent, raising the starting salaries for the system from $9,972 to $18,461. It calls for a maximum class size of 25 students. It provides for $8 per hour overtime when a teacher is required to work beyond the regular school day. It asks for smoking and non-smoking lounges and for two free periods per day for the KEA president.

Aware of Other Settlements

Caron qualified the salary requests as "based on what the salaries would be if a cost of living raise was applied to the 1970 wage schedule." He added that "we are keenly aware of settlements in the 10 percent range in other towns," although he would not comment on the proposals he had brought to the table Thursday.

Bourke, however, alleged that Caron had said he was "very serious" about the 90 percent figures in negotiating session, and the attorney called the figures "so far out of line that, coupled with their credibility problems, I feel we are at an impasse." He added that he went public with the proposals to "show the Killingly people what we are dealing with."
The declaration, though, was not unqualified by offers from both sides to try again, despite carrying their dispute into the open. Caron said he was still willing to sit down with a mediator, and Bourke added later that a phone call from Caron would bring him back to the table.

The introduction of a state mediator would move the negotiations to a point they will reach on Nov. 15 at any rate. Under state law, mediation must be initiated at a certain time in negotiation, to be followed by binding arbitration, in Killingly’s case, on Dec. 15.

Caron said that the KEA would meet to discuss the status of its proposals further, but he added that the association probably would begin the next session with the as yet undelivered proposals, making the first set obsolete.

53. As a result of Bourke's public release of the parties' initial proposals, a great division was created within the KEA membership and there was harassment of KEA members by the community at large.

54. On October 28, 1980, Caron phoned Bourke to arrange another negotiating session. Caron asked Bourke why he had "done what he did" and what he had hoped to accomplish. Bourke replied that he knew there was a chance he would get caught on that but that he had to do something dramatic to get "you guys" back into line.

55. More negotiation sessions were scheduled. Caron insisted that there be "no more louvered doors in our negotiations" and insisted on a change of site for the meetings. The parties agreed to meet in the rectory of St. James Church for negotiations on November 10 and the afternoon of November 20, 1980.

56. The parties met on those dates. The KEA made new proposals containing further revisions. Few, if any, agreements were reached.

57. At the afternoon negotiating session on November 20, Bourke for the first time made a proposal on salary. The proposal was in the neighborhood of four percent and contained additional steps on the salary schedule, thus increasing the time it took for a teacher to reach maximum pay. At the hearing, Bourke characterized his own proposal as "ridiculously low."

58. That evening, the parties were scheduled for their first mediation session. At or prior to the mediation session, Bourke retracted the salary proposal he had made that afternoon.

59. After the mediation session, the parties remained apart on most or all of the issues. At that point, Bourke had no formal offer pending on salary. The parties were scheduled to begin binding arbitration on December 30, 1980.

60. On November 25, 1980, the KEA filed the prohibited practice complaint in this case.

61. At some point prior to entering binding arbitration, Bourke informed Caron that the School Board would not go above seven percent as the increased cost for the entire economic package (i.e. salary, insurance, etc.). And that the School Board would accept none of the new non-economic proposals advanced by KEA in the negotiations and that if the KEA did not drop the new proposals, binding arbitration was a "fait accompli."

62. During the week of December 22, 1980, Bourke and Caron met at Caron's home to discuss some of the items on which Caron felt agreement could very easily be reached. Some agreements were reached and these subsequently appeared as stipulated items in the subsequent arbitration award. (Ex. 7).

63. At the December 22 meeting, Caron again asked Bourke why he "did that" at the October 23 negotiation session. Bourke said, "Well, you know there was a chance—we knew there was a chance that it would come back on us, but it was something we had to do because of what you guys were doing." Caron responded asking, " Didn't you realize that we had new proposals right there on the table in front of you?" Bourke replied, "Sure, I knew that."

64. As part of the ensuing arbitration process, the parties filed briefs to the arbitration panel. In the part of the School Board's brief opposing KEA's agency shop proposal, one argument advanced by Bourke was that the KEA's agency shop proposal was "in violation of the ground rules agreed to by the parties for negotiations." (Ex. 6)
65. The arbitration panel issued its award on February 2, 1981. The panel selected the KEA's last best offer on salary which called for a salary increase slightly over ten and one-half percent. This was one of the highest, if not the highest, salary award in the state for a teacher contract that year. The arbitration panel rejected the other new proposals made by the KEA.

66. On May 13, 1981, Caron and the KEA secretary were scheduled to meet at the School Board's offices to proofread the contract that had resulted from arbitration.

67. At the May 13 meeting, Bourke asked to speak alone with Caron. Bourke tried to persuade Caron to withdraw the prohibited practice complaint. Bourke pointed out that the School Board had voted to terminate Muscente implying that this was done on the teachers' behalf and argued that the KEA should come back with an equal show of good faith by dropping the complaint. Caron again pressed Bourke on why he had done the things he had done at the October 23 negotiating session and Bourke stated, "Well, I had told the School/Board what I was going to do, and we decided that it was worth taking the chance at that time, because of all this mess that you people brought up."

68. In this discussion Bourke argued that the KEA had a good deal more to gain by dropping the charges than proceeding with them because, Bourke said, "The worst thing that could possibly happen would be that /he/ got a slap on the wrist."

69. On May 25, 1981, three days prior to the hearing, the following article appeared in the Norwich Bulletin:

A Killingly Education Association charge that the Board of Education bargained in bad faith during contract negotiations will be heard Thursday before the State Board of Labor Relations unless teachers and the board's labor attorney can resolve the issue sooner.

Board labor attorney Robert Bourke of Avon said that he hopes to resolve the longstanding issue with teachers before going to hearing.

Bourke said that the board's actions in the past month, which included a vote not to renew School's Supt. Anthony Muscente's contract, should show to the KEA that the board wishes to improve relations with teachers.

"If this thing goes to hearing, it's because (the KEA) enjoys confrontation," Bourke said, "There is no point to be proven."

The KEA filed a complaint with SBLR in November, charging the school board with violating contract negotiation ground rules during an Oct. 23 negotiating session.

At that session, Bourke, negotiating on behalf of the board, declared an impasse in negotiations and released copies of both sides' initial contract proposals to The Bulletin.

The KEA's negotiating chairman, Donald Caron, cried foul, arguing that impasse did not exist and charging Bourke with violating a ground rule which precluded release of proposals.

The hearing was slated after a SBLR assistant agent met with both sides during an informal conference on the issue in March. After discovering a dispute over the facts of the issue, she recommended a formal hearing, before a SBLR panel, to get to the bottom of the KEA's allegations.

Caron had maintained that before negotiations began, both sides agreed that there would be no press releases, nor would information regarding negotiations be circulated, until the two sides reached a contract agreement.

Bourke, however, maintains that the ground rule in question stipulated that none of these actions would be undertaken by either side until negotiations reached an impasse.

To make it more complicated, ground rules were never signed off.

Besides sorting out those facts, the SBLR hearing also will determine whether the board violated statutes regarding declaration of impasse.

Despite the fall's disagreements over such procedures, the KEA and the board eventually had a two-year contract determined for them last winter through binding arbitration.

Bourke said that since the teachers now have a contract, and the events of last month have assuaged some of their complaints, they should work toward contributing to a better relationship with the board.

Bourke said that there "is absolutely no reason" to go forward with the complaint since the outcome of the hearing, if it is in the union's favor, will not really benefit the teachers.

Though the union is asking SBLR to require that the board pay the full cost of binding arbitration and mediation as damages for the unfair bargaining allegation, Bourke said he doubts that will happen. The usual practice is that each side absorbs half of the cost of these proceedings.

"The worst thing that happens is that the Labor Board slaps me on the wrist," Bourke said.
Conclusions of law

1. The taking of unilateral action inconsistent with a mutually agreed-upon ground rule constitutes a refusal to bargain in good faith and a prohibited practice.

2. For their 1980 collective bargaining negotiations, the parties had a mutually agreed-upon ground rule that neither party would issue any press releases or statements to the public concerning issues in negotiations until a settlement on a new contract was reached, unless jointly agreed to in writing.

3. The question of whether this ground rule included by implication a further condition that press releases or statements to the public concerning issues in negotiations could be made in the event impasse was reached is not herein decided.

4. The parties had not reached a settlement on a new contract nor impasse in their negotiations when the School Board unilaterally brought a newspaper reporter to the October 23, 1980 negotiating session and released initial bargaining proposals of the parties to the reporter. These actions by the School Board were inconsistent with the mutually agreed-upon ground rule and constituted a refusal to bargain in good faith and a prohibited practice.

5. The defense offered by the School Board that impasse existed in negotiations on October 23, 1980, has no reasonable basis in fact, presents no reasonably debatable issue, is wholly frivolous and is asserted in subjective bad faith by the School Board.

6. This Board is empowered by the Act to award attorneys' fees and related Costs to a complainant where the defense raised by the respondent presents no reasonably debatable issue and is wholly frivolous.

7. The remedial purposes of the Act will be served by an order requiring the School Board to make the KEA whole for reasonable attorneys' fees and related costs in the processing of this case which resulted from the School Board's prohibited practice.

Discussion

From the outset, it is important to understand the background against which the collective bargaining negotiations between the KEA and the School Board began in September, 1980.

Approximately one year earlier, the Labor Board had issued a decision in a prohibited practice case brought by the KEA against the School Board. The facts found in that decision revealed a hostile, anti-union attitude on the part of some School Board members and by Superintendent Miscené toward then KEA president Thomas Harvey. In that case, there was substantial evidence presented showing that serious threats had been made against Harvey by both the Superintendent and some School Board members. The evidence in that case also indicated that these attitudes by School Board members and the Superintendent had instilled a reluctance in a number of Association members to continue active participation in the Association for fear of retaliatory action. In early September, 1980, relations between the KEA and the School Board were very difficult. The KEA conducted a no-confidence vote among Killingly teachers indicating their continued dissatisfaction with the Superintendent. The KEA also decided to ask the Connecticut Education Association (the KEA's parent organization) to conduct an investigation of the situation in the Killingly school system. Upon becoming aware of these events, the School Board's labor negotiator, attorney Robert Bourke, advised KEA president James Weigle and KEA negotiating chairman Donald Caron not to make the no-confidence vote public and not to proceed with the CEA investigation. Bourke suggested that they utilize him for private and direct communication of their concerns to the School Board. Bourke's offer was coupled with a statement that if his proposal were not accepted, he would (1) have the School Board take a confidence vote in the Superintendent, and (2) would have to show a connection between the no-confidence vote and the upcoming contract negotiations. Bourke's proposal was not accepted. The no-confidence vote was made public and the CEA investigation proceeded.

It has been our clear and longstanding interpretation of Connecticut labor relations statutes that ground rules for collective bargaining negotiations are a mandatory subject of bargaining and that the taking of unilateral action inconsistent with a mutually agreed-upon ground rule constitutes a refusal to bargain in good faith and a prohibited practice. Town of Stratford, Dec. No. 1069 (1972) (ground rules concerning public release of bargaining proposals); Town of Coventry, Dec. No. 1289 (1973);

* There was no evidence adduced at the hearing to show that the subject matter of the CEA investigation in any way involved the issues in the upcoming collective bargaining negotiations. (Finding 11, supra)
Collective bargaining is a difficult process and agreements are rarely easy to obtain. One of the great purposes behind our labor laws is the substitution of peaceful and orderly bargaining procedures for illegal and sometimes destructive self-help as the means for resolving differences over wages, hours and conditions of employment. To accomplish that purpose, this Board must interpret our labor relations statutes in a manner which promotes successful collective bargaining. In this regard, we have recognized that the give and take of the collective bargaining process may be seriously inhibited by immediate publicity of bargaining proposals. City of Stratford, supra; City of Hartford, supra. The past chairman of this Board, Fleming James, Jr., discussed the need for confidentiality in collective bargaining in a 1977 law review article:

"But such impairment or postponement of the free flow of information to the public may be justified. The familiar testimonial privileges also impede the free flow of information. They represent a judgment that in some situations and relationships the public interest is better served by encouraging free and uninhibited confidential communication than by full public disclosure. Speech and action become stilted and distorted when people are operating in a goldfish bowl. Thus, the giving of a privilege against disclosure involves a balancing of competing values, and it has been the Board's judgment that the give and take needed for successful bargaining would be seriously cramped by immediate publicity in much the same way that deliberations of a jury or of judges would be." (footnotes omitted) Darcy, supra, at p. 531.

Similarly, our State legislature has recognized the importance of confidentiality to the collective bargaining process and has expressed the clear public policy of the State by enacting "records, reports and statements of strategy or negotiations with respect to collective bargaining from mandatory public disclosure under the Freedom of Information Act" Section 1-19(b)(8) of the Connecticut General Statutes.*

Although we believe the need for confidentiality in collective bargaining to be critical, we have sought to give an appropriately narrow construction to ground rules prohibiting public release of information so that such ground rules do not unnecessarily impede the need for the public to know about "matters which bear on the decisions an individual may need to make in a free society."*** Thus, in City of Hartford, supra we held that to avoid collision with the First Amendment of the United States Constitution, such ground rules must be construed as limited to communications between the parties at the bargaining table itself and statements about what a party intends to propose at the bargaining table:

"With this in mind we construe the agreement here as covering only communications between the parties at the bargaining table itself (e.g. offers, counter-offers, positions advanced in bargaining, and the like) and statements about what a party intends to propose at the bargaining table. We do not believe that the parties here mutually intended to put any further restraint than this upon the field of free public discussion. This construction is the natural one; moreover it is the only one which would save the restrictive agreement from collision with the First Amendment." (emphasis added) City of Hartford, p. 4

In the present case, the parties agreed to ground rules which were reduced to writing early in their negotiations. The ground rule concerning prohibitions on press releases and public statements read as follows:

"No press releases or statements to the media will be made unless jointly agreed upon in writing until a settlement is reached." (Ex. 4)

This ground rule was added initially at the September 9, 1980 negotiating session at the specific suggestion of Bourke.*** Although the rule as written did not expressly restrict the prohibition only to issues in negotiations, the above discussion makes it

* See also Section 31-48b of the Connecticut General Statutes which prohibits employers, including boards of education, from electronically overhearing or recording bargaining discussions without the consent of all parties to the discussion.


*** The final five words of the rule were added in longhand by Caron at the September 18, 1980 meeting at the suggestion of Bourke.
clear that a broader construction of the rule would, in our view, be constitutionally impermissible. Whatever the breadth of the actual language used in the written rule, the testimony of both parties shows that there was an undisputed meeting of the minds that the ground rule was mutually intended to prohibit public release of issues in negotiations. This understanding was repeatedly testified to by Bourke and witnesses for the Association at the hearing.

Both parties also agree that the prohibition on public releases was intended to expire upon the reaching of a settlement for a new contract. However, the Parties presently disagree upon whether impasse was an additional event which would trigger release of the prohibition. The school Board argues that it was, while the Association argues that it was not. The weight of the evidence suggests that the only mutually agreed-upon condition for lifting the prohibition was the reaching of a settlement on a new contract. If impasse had been reached in negotiations by October 23, 1980, it would be necessary in deciding this case for us to determine definitely whether the parties did mutually intend impasse as an event triggering release of the prohibition. However, because we find that there was no impasse by October 23, 1980, Bourke's actions on that date were in violation of the ground rule under either interpretation.

We have had occasion in past cases to elaborate on what constitutes a final bargaining impasse justifying unilateral employer action.* In City of Willimantic, Dec. No. 1455 (1976) (hereafter, Willimantic II) we stated:

"Final impasse (within the meaning of the present rule) is reached when the process of bargaining gets to a point where no further bargaining will serve a useful purpose, and none is likely to occur. The Act's definition of collective bargaining recognizes the possibility that such a point may be reached by clear implication where it provides that the "obligation to bargain shall not compel either party to agree to a proposal or require the making of a concession." Sec. 7-470(c). Moreover the concept of final impasse is well recognized in federal labor law under statutes which were the models for our State legislation. See, e.g. Dallas Gen. Drivers, Local 745 v. NLRB, 555 F.2d 842 (D.C. 1966). Where good faith bargaining has not resolved a key issue and where there are no definite plans for further efforts to break the deadlock the Board is warranted in and perhaps sometimes even required to make a determination that impasse existed." Id., at 844. This determination is generally one of fact to be made under all the circumstances of the case. Willimantic II, p. 5.

We also treated this subject at length in Ledyard Board of Education, Dec. No. 1564 (1977), wherein we noted the Connecticut Supreme Court's ruling in West Hartford Education Assn. v. DeCourcy, 162 Conn. 566 (1972), as to when an impasse will be found to exist.

The Employer seeks to avoid this line of cases by asserting that in this case an impasse existed which justifies the Employer's unilateral change. The NLRB, federal courts and our state Supreme Court have indeed recognized that when the parties have reached final impasse in bargaining, the employer is free to promulgate unilaterally a change which he has offered to the union during the bargaining which came to naught. NLRB v. Intercoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961); West Hartford Ed. Assn. v. DeCourcy, supra, at 596-600. We have adopted this rule under the "Municipal Act" in City of Willimantic, Decision No. 1455 (1976). But final impasse under this rule is reached only when the process of bargaining gets to a point where no further bargaining will serve a useful purpose and none is likely to occur. City of Willimantic II, supra, p. 5. And the Supreme Court has specifically rejected as "inaccurate" the claim that impasse may exist with reference to a particular issue, and, even though the parties are still negotiating about other topics, the deadlock on the individual issue permits the board to implement its last proposal thereon." West Hartford Ed. Assn. v. DeCourcy, supra, at 597.

Instead, "only if the deadlock on the critical issue demonstrates that there is no realistic possibility that further discussion would be fruitful in bringing the parties together generally on salaries and other conditions of employment, can we conclude there is an impasse." DeCourcy, supra, at 598. We cannot conclude on this case that an impasse existed prior to the Employer's unilateral change. There was progress in reaching agreement at almost every step of the negotiation process. It is true that on June 17, 1976 the parties expressed the thought that "impasse" existed on salary issues so as to require third party intervention through mediation. But the mediation...

* See Darcy, supra, pp. 534 to 536.
and arbitration procedures of Section 10-153f are a continuation of the bargaining process and are designed to, and do, produce final agreement in some cases. The "impasse" which the parties believe requires the initiation of the processes available under Section 10-153f is not necessarily the final impasse which justifies unilateral employer changes. 

Ledyard Bd. of Ed., p. 4.

In considering all the circumstances surrounding the bargaining process to determine whether a bona fide bargaining impasse exists, we have placed heavy emphasis, even prior to the Ledyard decision, upon the importance of first exhausting mediation. City of Willimantic, Decision No. 1321 (1975) (hereafter, Willimantic I). Another critical consideration is the number of bargaining sessions which have taken place. Willimantic I, supra; Ledyard, supra. The amount of prior bargaining is also emphasized in the Leading text of American Labor Law C. J. Morris, The Developing Labor Law BNA (1971):

VIII. IMPASSE

The duty to bargain does not require a party "to engage in fruitless marathon discussions at the expense of frank statements and support of his position."379 Where there are irreconcilable differences in the parties' positions after exhaustive good-faith negotiations, the law recognizes the existence of an impasse. 380

380 Usually the more meetings, the better the chance of a finding that an impasse had arisen. Fetzer Television v. NLRB, 317 F.2d 420, 53 LRRM 2224 (CA 6, 1963).

The totality of the circumstances existing on October 23, 1980 demonstrate not only that no impasse existed in the negotiations by that date, but also that there was not even a factual basis present to support a reasonable belief that an impasse existed.

It is true that the parties were far apart in their initial bargaining positions. The Association had initially proposed a ninety percent salary increase* and had requested numerous economic and other improvements for the new contract. The School Board had offered no salary increase for the new contract and had proposed a limited number of changes in the existing contract.** In evaluating the initial proposals of the parties, we are mindful that initial proposals in collective bargaining are rarely realistic or reflective of the serious goals of the proposing party. It has been our long experience that experienced labor negotiators know this and give the bargaining process some time to unwind to allow the wheat to separate from the chaff.*** We are also cognizant of the fact that unions in teacher negotiations in this State often commence negotiations with dozens of proposals initially on the bargaining table and that the Association's initial list of twenty-four or twenty-six proposals was not unusual as such negotiations go.

Prior to the October 23rd meeting, only a limited amount of negotiations had yet taken place and the services of a mediator, although available, had not been utilized.**** There had been just four formal negotiating sessions. The September 9th meeting was almost exclusively devoted to ground rules negotiations and the September 18th meeting covered both ground rules and substantive issues. The parties were successful in reaching agreements on ground rules. Only the October 6th and 9th meetings were exclusively devoted to discussion of substantive issues. At both the October 6th and October 9th meetings, the parties exchanged proposals, the KEA modified proposals, and there was some discussion on the KEA's class size proposal.

* The record does not reveal whether this was proposed for one year or whether it was intended to be spread out over a multi-year contract.

** The record does not indicate the nature of the School Board's proposed changes.

*** Attorney Bourke testified that he has had a specialized law practice limited exclusively to labor relations and "EEO" law since 1971 (Tr. 91). Bourke also testified that he recognized the School Board's own initial salary proposal (which was not presented until November 20, 1980) to be "ridiculously low" (Tr. 108).

**** Section 10-153f(b) of the Act provides that "either party" may initiate mediation before the time when the Act itself requires that mediation be imposed.
Between the September 18th and the October 23rd meetings, there had also been some private informal meetings between Bourke, Caron and Terry. In these meetings, Bourke had asked if the Association were serious about a number of its proposals, specifically the initial ninety percent salary increase. Caron had responded by saying that "a very convincing case could be made for it." The School Board argues that Caron's response demonstrated an inflexible position on the Association's part. We strongly disagree with that characterization. Although the percentage increase was clearly unreal istic, Caron's response was hardly one which indicated that his position was fixed in stone. Rather, his response appears as an invitation to discuss the Association's rationale and justifications for its position, Caron's response was the opening of a door (however slightly), rather than a closing. On the other hand, Bourke's testimony demonstrates that the School Board was inflexible and not amenable to reasoned discussion on any of the KEA's new proposals except salary. Bourke's direct testimony was clear in this regard:

MR. BOURKE: The items what went into mediation included all of the KEA new proposals, which the Board steadfastly refused to accept in any form, ....... Given those items, there was no way, unless the KEA completely dropped their requests, that we could avoid mediation or binding arbitration. The KEA's position throughout was they would not drop those proposals, and in fact, they did not.

CHAIRMAN JAMES: When you say "drop," you mean to include lower?

MR. BOURKE: No, drop them completely, because the Board's position was we would not accept them in any form.

CHAIRMAN JAMES: You would not accept any salary raises?

MR. BOURKE: No, not salary. I am talking about the new proposals they wanted. (Tr. 100, 101)

On their face, the new KEA proposals all appear to have concerned mandatory subjects of bargaining and indeed the School Board has not argued that any of the KEA's proposals were outside the scope of mandatory bargaining. It is perhaps the most fundamental principle of labor law that the parties have a duty to bargain in good faith over mandatory subjects of bargaining. DeCourcy, at pp. 576, 577; Morris at p. 389. Although the Act's duty to bargain does "not compel either party to agree to a proposal or require the making of a concession," Section 10-153e(d), the Act does require both parties to "participate actively so as to indicate a present intention to reach agreement with respect to salaries and other conditions of employment, or the negotiation of an agreement," Section 10-153e(d), and the type of unreasoned take it or leave it attitude implicit in the School Board's position toward all of the KEA's proposals except salary, is the type of bargaining approach which has traditionally been held indicative of bad faith bargaining. DeCourcy, supra; Town of Guilford, infra. Similarly, a party cannot condition its own making of counter-proposals upon "more realistic" offers by the other side. Hownet Corp., 197 NLRB 471, 80 LRRM 1555 (1972). Even though the School Board is not required to make concessions by way of counter-proposals in order to fulfill its duty to bargain in good faith, DeCourcy, p. 590, it must at a minimum provide something more than bald statements that the School Board "would not accept the KEA's new proposals other than salary/ in any form or that these proposals were "way out of line." In this regard, the second circuit court of appeals has recognized that:

"The purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema. NLRB v. General Electric Co., 418 F.2d 736, 72 LRRM 2530 (CA 2, 1969), cert. denied. 397 US 965, 73 LRRM 2600 (1970).

In a similar vein, we have held that:

"...a main purpose of collective bargaining is to assure that each party's final stand shall be taken in the light of full discussion based on full disclosure of unprivileged facts and reasons. Each party still has it in his power to refuse an offer; the only thing he has to fear from full discussion is that he may be convinced by his adversary's arguments or - perhaps - that his own position may be made to look arbitrary or foolish. We think it is within the purposes of collective bargaining to expose bargainers to those risks. Town of Guilford, Decision No. 1715-B (1980) aff'd in Town of Guilford, et al v. Connecticut State Board of Labor Relations, Dk. 187676 (Superior Court, New Haven J. D., September 30, 1981) Hadden, J.

There is no evidence that the KEA was unwilling to discuss reasonably its proposals or even to modify them when subject to the test of reasoned negotiation; however, the
School Board's unsubstantiated and absolute position, as testified to by Bourke, negated any reasonable possibility for such discussions. We therefore find that the totality of the School Board's conduct demonstrates that its participation in negotiations, even prior to October 23, 1980, failed to meet the minimum standards for good faith bargaining.*

Finally, and conclusive in and of itself on the question of whether impasse existed on October 23, 1980, the KEA negotiating team came to that meeting with modified proposals in hand including a reduction from ninety percent to twenty percent in the KEA's salary proposal, which was physically placed on the table for the School Board negotiators. Bourke knew that new proposals were being submitted by the KEA at that meeting, but he did not even give the KEA negotiators a chance to state their position before rushing into his speech, declaration of impasse, and ushering of the reporter into the negotiating room. Bourke's actions gave every impression of trying to preclude any discussion on bargaining issues which might interrupt the School Board's prearranged media event.

We conclude that the state of the negotiations on October 23 did not even remotely resemble a situation wherein impasse had been reached. Neither exhaustive nor good faith negotiations had taken place. There had been no resort to mediation, even though it was available. The KEA had not taken an intransigent stand deadlock the negotiations, and indeed had expressly opened the door for reasoned discussion on its proposals and had a substantially reduced salary proposal on the table. The School Board was not justified in unilaterally declaring impasse on that date simply because it believed the KEA's initial proposals to be unreasonable or "way out of line" or, as is discussed further below because it was upset about negative publicity resulting from the no-confidence vote and the CEA inquiry. On the record before us, it is evident that the defense offered by the School Board that impasse existed on October 23, 1980 has no reasonable basis in fact, presents no debatable issue, and is wholly frivolous.**

The record demonstrates that the School Board had in fact two purposes for releasing the parties' initial negotiating proposals. One was to subject the KEA to public embarrassment and internal strife for the purpose of pressuring the KEA into modifying its bargaining proposals early on in negotiations. As discussed above, at least in the absence of an impasse, this tactic was illegal in light of the ground rule.*** The other purpose was to improve the public image of the School Board and the Superintendent at the expense of the KEA by portraying the KEA as irresponsible and unreasonable. The School Board was highly concerned about the public impression created by the release of the no-confidence vote and the continuation of the CEA investigation, and felt that the negative publicity resulting therefrom could at least be mitigated in the eyes of the public by discrediting the source of that publicity. Neither of these purposes justifies the actions taken by the School Board. If the School Board wished to counter the public statements of the KEA, its members and representatives had a constitutionally protected right to respond publicly or even to launch a media offensive of its own, so long as

* Although the KEA has not alleged that the School Board engaged in an independent prohibited practice by failing to bargain in good faith prior to October 23, 1980, we are obviously not precluded from evaluating the School Board's pre October 23, 1980 negotiating conduct as part of the analysis to determine whether impasse existed on that date and whether the ground rule was violated as alleged by the KEA. See Connecticut Yankee Catering Co., Inc., Dec. No. 1566 (1977), aff'd in Connecticut State Labor Relations Board v. Connecticut Yankee Greyhound Racing, Inc., et al, 175 Conn. 625 (1978).

** In the October 24, 1980 newspaper story (Ex. 5), Bourke is identified as having claimed that the KEA's release of the no-confidence vote constituted a violation of the ground rules. This argument was not raised as a defense by the School Board at the hearing or in its brief and it clearly would not have constituted a valid defense for two reasons. First, that release took place before the ground rule was proposed by Bourke and agreed to by the KEA. Second, the subject matter of that release did not fall within the mutually agreed-upon subject matter of the ground rule (i.e., issues in negotiations) and as is discussed above, even if the ground rule had been mutually intended to be more broad, it would have been void for constitutional reasons as applied to subject matter beyond the issues in negotiations. With regard to the CEA "investigation" there was also no evidence presented suggesting that the subject matter of the "investigation" concerned issues in negotiation.

*** Even in the absence of the ground rule, the School Board's action would have violated the duty to bargain in good faith. In Stratford, supra, we held that release of bargaining proposals while negotiations are ongoing is prohibited, at least in the absence of impasse, unless the parties have agreed to permit such releases. Moreover, it may be that the School Board's illegal release of the proposals, coupled with its clear intent to embarrass and divide the KEA also constitutes a prohibited practice under Section 10-153(b)(1) or (2) of the Act, See State of Connecticut (Comptroller), Dec. No. 13871 (1980). This latter question was not addressed by the parties in this case and is therefore not decided.
(for the purposes of this case) they abided by the ground rule by keeping the issues in dispute at the bargaining table out of such a campaign. Instead, the School Board chose an illegal course apparently calculated to take advantage of the KEA's reliance upon the very ground rule which the School Board's chief negotiator had initially proposed in the negotiations.

We also conclude from the record before us that the School Board's actions on October 23, 1980 were conceived and executed with a knowing and callous disregard for the Act. This conclusion could be inferred solely from the utter absence of facts to support a reasonable belief that impasse existed on October 23, 1980 and Bourke's specialized background in labor law. However, there is further support in the record for such a conclusion. Bourke's uncontradicted testimony regarding admissions which Bourke subsequently made to him are highly revealing of Bourke's and the School Board's true state of mind on October 23, 1980. Bourke testified on direct examination that he phoned Bourke on October 28, 1980, to explore the possibility for further negotiations:

Q. And what did you say to Mr. Bourke?
A. Well, the first thing I wanted to know is why he had done what he did.
Q. Did you ask him?
A. I did. "What did you hope to accomplish by all that?"
Q. And what did Mr. Bourke respond?
A. He said that he knew that there was a chance that he could get caught on that, but he had to do something dramatic to get us guys, or "you guys" he said back into line. (Tr. 34, 35)

Caron also testified that a conversation took place between him and Bourke in the week of December 23rd at a negotiating session held at Caron's home. On direct examination, in reference to what had occurred on the night of October 23rd, Caron testified that he asked Bourke:

A. "Why did you do that?"
Q. And what did Mr. Bourke respond?
A. He said again, "Well, you know there was a chance -- we knew there was a chance that it could come back on us, but it was something we had to do because of what you guys were doing."
Q. Did you ask Mr. Bourke whether he knew anything about your intention to make proposals on the night of October 23rd?
A. Yes, I did.
Q. And what exactly did you say?
A. I said, "Didn't you realize that we had new proposals right there on the table in front of you?"
Q. And what did Mr. Bourke say?
A. He said, "Sure, I knew that." (Tr. 37, 38)

Caron also testified to further admissions made by Bourke in a conversation between them at Caron's home on May 13, 1981. This was at a meeting with another KEA representative to review some of the language contained in the new contract. Caron testified that Bourke asked to speak alone with him and Caron agreed. Bourke proceeded to try and convince Caron to withdraw the present complaint. On direct examination, Caron testified as follows:

THE WITNESS: This present proceeding. He alluded to the fact that the Superintendent was already scheduled to be terminated by an act of the Board, that the Board was showing good faith with the KEA in voting to terminate the Superintendent, that it would be time for the KEA to come back with an equal show of good faith, and that we had a good deal more...

* When asked at the hearing what his understanding of "impasse" was, Bourke was evasive, but finally testified that his definition was not "a formal court ruling of what was an impasse. We were talking about a ground rule, not a formal, necessarily legal definition, but a point in time where we were at loggerheads, and no further progress could be seen." (Tr. 102). From this testimony it appears that Bourke was attempting to imply that the parties had agreed to a unique operative definition of impasse to suit this specific set of negotiations and that therefore the traditional and well-known legal definition of the term has no relevance to the parties' ground rule. There is no evidence whatsoever in the record to support such a contention. Indeed, in Bourke's testimony he admitted that the parties did not discuss any unique definition of impasse in their ground rule negotiations (Tr. 102) and he testified that the critical element of impasse that "no further progress could be seen" was within his understanding of "impasse" for purposes of the ground rule.
to gain by dropping our claim to this proceeding than by going through with it.

Q Was any reference made to what had occurred on the night of the 23rd?
A Yes, because once again I asked Mr. Bourke, but why did you do this in the first place, and at that time he said, "Well, I had told the Board what I was going to do, and we decided that it was worth taking the chance at that time, because of all of this mess that you people brought up."

Q Is that the total of the conversation that you remember relating to that point on the 23rd?
A Well, I remember we went around about that quite a while, and again Mr. Bourke was trying to convince me that we had a good deal more to gain by dropping the charges than by proceeding with them. He also said, "The worst thing that could possibly happen would be that he got a slap on the wrist."

Bourke testified at the hearing, but he did not deny making any of the statements attributed to him by Caron in the above three excerpts from the transcript. The KEA argues that Bourke's characterizations of a cease and desist order as a "slap on the wrist" on May 13, 1981 and in the May 25, 1981 newspaper story (Ex. 8) demonstrate his and the School Board's light regard for such an order and therefore serve as the basis for an inference that the School Board was willing deliberately to violate the law because a cease and desist order would be an acceptable price to pay for what the School Board sought to accomplish on October 23, 1980. The School Board argues that these comments were made in the context of attempting to persuade the KEA to settle this case and therefore do not reflect either the School Board's or Bourke's true attitude toward a cease and desist order. The School Board's argument is plausible, but it is seriously undercut by Bourke's repeated admissions demonstrating that the School Board's concerns for getting caught (as opposed to any concern about the legality of the School Board's actions) were outweighed by its perceived necessity for taking the actions of October 23, 1980. Additionally, the statement made by Bourke to the newspaper reporter (Ex. 8) was clearly not made in settlement discussions with the KEA and thus falls outside the scope of the School Board's argument. These factors, in addition to Bourke's knowledge of the meaning of impasse and the absence of any reasonable basis to believe that impasse existed on October 23, 1980, demonstrate persuasively that the School Board made a deliberate choice knowingly to violate the law because it believed the potential rewards outweighed the anticipated sanction.

At the hearing, Bourke represented that he had offered a settlement of this case to the KEA and that it had been refused. On the record, Bourke offered to agree to enter into written ground rules in the future and to be bound by those rules (Tr. 4). Bourke also stated that he would agree to a stipulation containing an admission of having "broke the law." Bourke characterized the KEA's refusals to accept his settlement offers and its insistence upon proceeding to a formal hearing as "nonsense" (Tr. 115). We do not take Bourke's offer of settlement as evidence relevant to the merits of this case. However, his characterization of the KEA's refusal to settle on his terms as "nonsense" warrants comment in connection with the remedy which we order. The record shows good reason for the KEA's insistence upon a Labor Board order rather than merely an agreement from the School Board. Bourke had proposed and the KEA had agreed to the ground rule for the 1980 negotiations, which Bourke and the School Board had subsequently flagrantly and deliberately violated in this case. If the KEA felt that it could not rely on a settlement based upon Bourke's representations as to his and his client's future actions and instead felt it necessary to have this Board issue an order, that decision can hardly be characterized as "nonsense." This situation is pointedly illustrative of the further damage which the School Board's October 23rd, 1980 actions inflicted upon a collective bargaining relationship that was already in deplorable straits. If the School Board's representations of its future actions were not accepted by the KEA, it has itself to blame.

In fashioning an appropriate remedy, we are guided by Section 10-153e(e) of the Act which defines the remedy power of this Board. That section provides:

If, upon all the testimony, said board determines that the party complained of has engaged in or is engaging in any prohibited practice, it shall state its finding of fact and shall issue and cause to be served upon such party an order requiring it to cease and desist from such prohibited practice, and shall take such further affirmative action as will effectuate the policies of subsections (b) to (d) inclusive of this section. (emphasis added)

The present case is marked by an intentional violation of the Act and a wholly frivolous defense. Moreover, the very nature of the violation was such that it undermined any
reasonable likelihood that the matter could be settled short of a formal hearing and order by this Board. We are rarely confronted with a case presenting all these elements and indeed can recollect none. There has never been any doubt that this Board has authority under the Act to make complainants whole for losses suffered as a result of prohibited practices. City of Stanford, Dec. No. 874 (1969) (reinstatement and back pay); Town of East Hartford, Dec. No. 1116 (1973) (reinstatement and back pay), aff'd Town of Newton Board of Education vs. Connecticut State Board of Labor Relations, et al, Dk 109307 (Court of Common Pleas, Hartford County, December 11, 1973); Town of East Hartford, Dec. No. 1439 (1976) (reinstatement and back pay), aff'd Connecticut State Board of Labor Relations v. Town of East Hartford, Dk 214657 (Superior Court, Hartford J. D. May 12, 1976); Burns v. Ledyard Board of Education, Dec. No. 1564 (1977) (payment of interest); Town of Winchester v. Connecticut State Board of Labor Relations, 175 Conn. 349 (1978) (reinstatement and back pay). For general discussion of the Labor Board's remedy power, see Connecticut State Board of Labor Relations vs. Connecticut Yankee Greyhound Racing, Inc., et al, 175 Conn. 625, 640 (1978). Given the extraordinary circumstances of the present case, we feel it necessary and appropriate to order the School Board to make the KEA whole for its expenses incurred in the investigation, preparation, presentation, and conduct of this case, including the following costs and expenses incurred in these proceedings: reasonable counsel fees, salaries, witness fees, transcript costs, travel expenses and other reasonable costs and expenses to be determined in a hearing on such damages before this Board in the event the parties are not able mutually to agree upon the amount in question. We believe this remedy will effectuate the policies of the Act by making the KEA whole for losses which it necessarily incurred as a result of the School Board's illegal actions and encourages compliance with the requirements of the Act. We also believe that the policy reasons observed by the National Labor Relations Board (NLRB) in awarding attorneys' fees and costs are served by our order in the present case.

In arriving at this remedy we follow the directive of the Connecticut Supreme Court that "the judicial interpretation accorded the federal act is, as we have earlier noted, of great assistance and persuasive force in the interpretation of our own acts because our statutes dealing with labor relations are closely patterned after the NLRA and because the language of the three acts is essentially the same." Town of Winchester v. Connecticut State Board of Labor Relations, 175 Conn. 349, 358 (1978); DeCourcy, supra. It is particularly appropriate to look to federal interpretations of the National Labor Relations Act (NLRA) in the formulation of remedies because the remedy language in the NLRA very closely parallels that contained in the Act. The NLRA provides:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any such person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. (emphasis added) 29 U.S.C. 160 (c).

Based upon the above quoted language, the federal courts have held that an award of attorneys' fees and related costs is properly within the NLRB's discretion. International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB (Tiidee), 426 F.2d 11243, 73 LRRM 2870 (D.C. Cir. 1970) cert. denied 400 U.S. 951, 75 LRRM 2752 (1970); Food Stores Employees Union, Local 347 v. NLRB (Hecks), 476 F.2d 546, 82 LRRM 2955 (D.C. Cir. 1973) rev'd on other grounds 417 US 168, 86 LRRM 2209 (1974); International Union of Electrical Workers v. NLRB (Tiidee II), 502 F.2d 349, 86 LRRM 2195 (8th Cir. 1974) cert. denied 421 US 991, 89 LRRM 2358 (1975); Federal Prescription Service, Inc. v. NLRB, 496 F.2d 813, 86 LRRM 2185 (8th Cir. 1974) cert. denied 419 US 1044, 87 LRRM 3033 (1974).

As the NLRB stated in Tiidee Products, Inc., 194 NLRB 1234 (1972) in awarding attorneys' fees and other costs to both the complainant union and to the NLRB itself:

"We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available." p. 1236

In a concurring opinion, then Chairman Miller expressed his view that the remedy ordered effectuated the purposes of the NLRB because the union was forced to bring charges and otherwise participate in extended proceedings because of the employer's frivolous resistance to its statutory duties. p. 1238.
Although at least the federal court of appeals for the District of Columbia appears to believe that the remedy power of the NLRA empowers the NLRB to award attorneys' fees and related costs in broader circumstances, the NLRB has generally limited such awards only to cases where the defenses raised are "patently frivolous" and do not present "debatable issues."* In the present case, both of those circumstances clearly exist. Moreover, as is discussed above, the nature of the violation effectively precluded any reasonable possibility for settlement short of a formal hearing and order. For these reasons, the present case is peculiarly appropriate for the remedy ordered and we need not decide here whether other special circumstances (absent a frivolous and non-debatable defense) may justify a similar remedy.

As for the KEA's request for mediation and binding arbitration costs incurred in connection with the current collective bargaining agreement, we find the causal nexus between the School Board's prohibited practice and these costs to be less strong than the nexus between the prohibited practice and the attorneys' fees and costs ordered herein. The remedy ordered will, in our view, do full justice and effectuate the policies of the Act;

Finally, it cannot be ignored that when considered in light of our earlier decision, this case reveals a pattern of conduct evincing a lamentable disregard by the School Board itself for the rights of Killingly teachers under the Act. We sincerely hope that for the future, the School Board will approach its labor relations responsibilities in a manner consistent with the letter and spirit of the School Board-Teacher Negotiations Act.

ORDER
By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Act Concerning School Board-Teacher Negotiations, it is hereby ORDERED, that the Killingly Board of Education shall

I. Cease and desist in the future from engaging in unilateral action inconsistent with agreed-upon ground rules for collective bargaining.

II. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Pay to the KEA its costs and expenses incurred in the investigation, preparation, presentation, and conduct of this case, including the following costs and expenses incurred in these proceedings: reasonable counsel fees, salaries, witness fees, transcript costs, travel expenses and other reasonable costs and expenses to be determined in a compliance hearing on damages before this Board in the event the parties are not able mutually to agree upon the amount in question within thirty days of the receipt of this Decision and Order.

(b) Post immediately in a conspicuous place in each school within the Killingly school system where members of the bargaining unit customarily assemble, and leave posted for a period of sixty (60) consecutive days from the date of posting, a copy of this Decision and Order in its entirety.

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

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By

Fleming James, Jr.**

/s/ Kenneth A. Stroble

Kenneth A. Stroble

/s/ Patricia V. Low

Patricia V. Low

*See Heck's, Inc., 215 NLRB No. 142, 88 LRRM 1049 (1974) in which the NLRB expressed its view that awarding attorneys' fees and costs should be limited to cases involving a frivolous and non-debatable defense. However, at p. 768 (NLRB Reporter) of its decision, the NLRB implied that it might take a different view towards awarding similar extraordinary remedies in future cases.

**Deceased prior to final deliberation on this case.