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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Docket No. 2481CV00148

* * * * *

COMMONWEALTH EMPLOYMENT
RELATIONS BOARD,
Plaintiff,

v.

NEWTON TEACHERS ASSOCIATION and
MICHAEL ZILLES, IN HIS
OFFICIAL CAPACITY,
Defendants

* * * * *

BEFORE THE HONORABLE CHRISTOPHER BARRY-SMITH

Woburn, Massachusetts

Room 710

January 26, 2024

Lisa Cimmino

Approved Court Transcriber

APPEARANCES

For the Commonwealth Employment Relations Board: Massachusetts Department of Labor Relations 2 Ave de Lafayette Lafayette City Center Boston, Massachusetts 02111 By: Lan Kantany, Esq.

For Michael Zilles, in his Official Capacity and Newton Teachers Association: Massachusetts Teachers Association 2 Heritage Drive, 8th Floor Quincy, Massachusetts 02171 By: Richard A. Mullane, Esq. Laurie R. Houle, Esq.

For Other Interested Party Newton School Committee: Valerio Dominello and Hillman, LLC One University Ave., Suite 300B Westwood, Massachusetts 02090 By: Jennifer King, Esq.

1 (Court called to order.) 2 (11:19 a.m.) 3 THE COURT: Good morning. 4 THE CLERK: Good morning, Your Honor. 5 MR. MULLANE: Good morning. 6 MS. HOULE: Good morning, Your Honor. 7 MS. KANTANY: Morning. 8 THE CLERK: Your Honor, we have all parties here on Docket 9 Number 2481CV00148, Commonwealth Employee -- Employment 10 Relations Board vs. Newton Teachers Association. If the 11 parties could please stand and identify yourself for the Court 12 and the record, starting with the plaintiff. 13 MS. KANTANY: Lan Kantany on behalf of the Commonwealth 14 Employment Relations Board. Good morning. 15 THE COURT: Good morning. 16 MS. KING: Good morning. Jennifer King on behalf of the 17 Newton School Committee. 18 THE COURT: Good morning. 19 MS. HOULE: Good morning. Laurie Houle on behalf of the 20 Newton Teachers Association and Mr. Michael Zilles. 21 MR. MULLANE: Good morning, Your Honor, Rich Mullane, co- 22 counsel with Ms. Houle for the Newton Teachers Association and 23 Mr. Zilles. 24 THE COURT: All right. Good morning. Well, let me just 25 ask you, is there any update? Is the strike still underway?

1 MS. HOULE: It is, Your Honor. 2 MS. KANTANY: Yes. 3 THE COURT: Okay. Well, let me just start by asking, I 4 said in my order that -- well, you know, I hoped I set coercive 5 fines in an amount that would ensure compliance with the law. 6 That hasn't turned out to be true. And I said if this matter 7 wasn't resolved by Friday, we'd get back together to see what 8 the next steps were. 9 So let me just start by asking what does each side think 10 the next step should be. So the state and the city, what's 11 your request as to what the next step should be? 12 MS. KANTANY: The Board believes that the fines should 13 continue through the weekend, that they should be significant 14 enough to coerce compliance with the Court's orders. The 15 Newton Teachers Association has a significant amount of money. 16 I believe there's an affidavit submitted today by 17 Superintendent Nolan where she watched a video, and I've 18 watched this video as well. It's a publicly-accessible video 19 from January 24, 2024 where Mr. Zilles speaks about the ongoing 20 negotiations and strikes and, in response to the question 21 regarding the contempt fine structure, says that they've gotten 22 commitments from a lot of people to help them out. 23 And in our memorandum to our first motion for contempt 24 fines, we attached the donation page that the Newton Teachers 25 Association --

1 THE COURT: Let me interrupt. I really want to just hear, 2 at the outset -- we'll have a chance to discuss the pros and 3 cons of whatever either side thinks should happen. I just want 4 to hear what the plaintiffs are asking for. What do you think 5 the next step should be? So you said coercive fines should 6 continue. What are you asking for, in what amount? 7 MS. KANTANY: I think they should continue in the same 8 structure that Your Honor has ordered with the doubling. 9 THE COURT: So Sunday night, 8:00 p.m., \$400,000? 10 MS. KANTANY: I -- there should be a fine for the -- fines 11 for the contempt over the weekend as well, Your Honor, because 12 they have failed to stop inducing, encouraging, and condoning 13 the strike. And in the Boston Teachers Union case, there was 14 no ongoing strike. It was just the failure to call off the 15 strike vote, and in that case, the Court ordered a \$30,000 fine 16 for the failure to disavow a scheduling of a strike vote. 17 So I think it's appropriate to continue fines over the 18 weekend for their failure to disa- -- I mean, we're not using 19 the word disavow anymore, but for failing to say that the 20 strike is canceled and for continuing to double those fines. 21 THE COURT: Okay. So I said Sunday at 8:00 p.m. You're 22 saying no, it should be Saturday and Sunday? Is that what 23 you're saying? 24 MS. KANTANY: Friday, Saturday, and Sunday. 25 THE COURT: All right.

1 MS. KANTANY: And we understand -- you know, the real
2 purpose is to get the students back to work on Monday. Today
3 we can't get anyone back into the schools, so the real purpose
4 is to get everyone back to schools on Monday. And so there --
5 that's the idea --

6 THE COURT: Well, so I'll just tell you, as I consider
7 whether there should be additional coercive fines, I'm -- it's
8 Friday. School's not happening today. I'm thinking of the
9 next one is Sunday at 8:00 p.m. because the consequence is no
10 school on Monday. I appreciate that you're saying, well, it
11 should actually be daily for every day, which would include
12 Friday and Saturday, but I'm not going to do that. If there's
13 going to be any more coercive fines, they're going to be Sunday
14 at 8:00 p.m. Okay. So understanding that's my framework, what
15 is your request?

16 MS. KANTANY: Well, I think it's too difficult to -- I
17 think it should at least be \$400,000, because they can pay that
18 amount. If we're looking at the four factors in the United
19 Mineworkers case --

20 THE COURT: Okay, 400,000 --

21 MS. KANTANY: -- and in Fall River, at least --

22 THE COURT: And what does the union think the next step
23 should be?

24 MS. HOULE: Thank you, Your Honor.

25 THE COURT: If the strike continues.

1 MS. HOULE: I appreciate that, Your Honor, and we are in
2 concurrence with your thoughts in terms of sort of a pause over
3 the weekend, since they're not withholding services over the
4 weekend. And I understand you don't want too much of the
5 argument right now, so let me just sort of short-circuit it
6 here.

7 We're very concerned about the lack of urgency the School
8 Committee has had at the table, and I can get into more
9 details, but if we're going to really effectuate an end to this
10 crisis, then we need to actually go back to the original order
11 from CERB and your original injunction as well, which I
12 understand you're not a big fan of affirmative actions from the
13 Court, but the concept of good-faith bargaining -- and there
14 are very specific ways that we think help --

15 THE COURT: I'm going to interrupt, because this is what's
16 been on my mind, too. And so let me say some things, and then
17 I'll ask you for further argument in the context of what I have
18 to say, all right?

19 MS. HOULE: All right.

20 THE COURT: Because I spent -- I had the week to look into
21 this legislation and its history, and it actually confirmed a
22 lot of what I suspected, but I think it's critical to look at
23 the statute together, and so Section 9 and Section 9A. We're
24 here. The order concerns both, right? Section 9A is the
25 prohibition on strikes, and it permits, quote, unquote,

1 "appropriate proceedings in the superior court." Okay, so
2 that's what we have.

3 But as I've had a chance to think about this a little more
4 and look into what was driving the legislature here, this is
5 not a new dynamic, right? The legislature was discussing, in
6 the late '60s and early '70s, should we keep the ban on
7 strikes. They did. And the legislative history says over and
8 over, if we're going to keep the ban, we need a new -- we need
9 a solution, a new process.

10 There was a whole bunch of different ideas. One of them
11 was binding arbitration without agreement of the parties. That
12 didn't happen. One of them was this interesting idea of a
13 settlement commission where everyone submitted their last and
14 final offer, and some group of people, an odd number, would
15 just choose the result, and that was ending the strike. But
16 they didn't choose that either.

17 What they relied on was Section 9, which is essentially
18 collective bargaining plus, with the aid of a mediator, with
19 this fact-finding idea, which, I'd love to hear whether that's
20 actually, you know, been used yet or not. But the legislature
21 decided, as it continued the ban on strikes which was already
22 in place, to do what it could to bolster collective bargaining
23 through this mediator, through -- so I view the two things --
24 (indiscernible at 11:27:04) I view -- the two things are a part
25 of a single statute, okay, so I think it's really important to

1 consider both as I decide what the legislature meant when it
2 authorized appropriate proceedings in the superior court.

3 So the legislature didn't offer any guidance with respect
4 to appropriate proceedings, and all that's developed is this
5 concept of coercive fines. And I understand that; the idea is
6 to coerce compliance with the law. I chose to do that a little
7 bit differently than the prior cases had, but only because I
8 think it was logical and I think it's true that you don't know
9 what it takes to coerce compliance with the law until it works
10 or doesn't work. So that's why I thought it was worthwhile to
11 try this escalating penalty starting a little lower than prior
12 cases had but increasing more dramatically.

13 And so that's where we are. But I also hypothesized on
14 Monday that compared to the discussions at the table, I found
15 it hard to believe that any fines along the lines that had
16 historically been used would really make a difference. And I
17 think that's also true, the week bears that out to be true, but
18 also, if public statements are correct about what's at issue at
19 the bargaining table, a single bargaining point like the cost-
20 of-living adjustments, the parties are 21 million or \$22
21 million apart. So it supports the notion that fines of 10 or
22 50 or 100 or even 200, when the stakes are that high and the
23 scope of discussions is that broad, I think it supports that
24 it's unlikely to make a difference. And this week has shown
25 that coercive fines, even if they accelerate, don't appear to

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1 make a difference unless they get really, really big, right?
 2 So the next step, if what you're interested in is compliance
 3 with the law, is, escalating coercive fines haven't worked, so
 4 the next step is to keep escalating.
 5 It seems like to make a real difference, if what we're
 6 talking about is tens of millions of dollars involved at the
 7 negotiating table, would be a really big fine. And the
 8 plaintiffs might want that, and if we get into next week, we'll
 9 be talking about a million dollars.
 10 Here's the problem with that. If I view Section 9 and
 11 Section 9A together, I don't think there's any indication from
 12 the legislature that there was an intention that the courts
 13 play any meaningful rule in breaking impasses. The solution
 14 that they came up with in 1973 to break impasses was continued
 15 collective bargaining with the aid of a mediator and maybe some
 16 other bells and whistles, and arbitration only if the parties
 17 agreed.
 18 So my concern is that if I keep escalating the coercive
 19 fines, it will undermine the collective bargaining that's
 20 supposed to be the solution. The way it would undermine it is
 21 obvious, but I'll state it for the record, and that is, if the
 22 city were to rely on escalating fines, then it can fold its
 23 arms and not negotiate in good faith, knowing that sooner or
 24 later the fines will get big enough that they'll either end the
 25 strike or accept a collective bargaining agreement. I'm not

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1 to ensure compliance. They haven't. My concern is, continuing
 2 to escalate I think undermines the statutory regime here that
 3 the legislature put in place.
 4 So I wanted to share that with everybody. I don't know
 5 what the right answer is, but I'm not going to keep escalating,
 6 because it's just too easy to predict that that would undermine
 7 effective collective bargaining or productive or fair
 8 collective bargaining. Okay, so --
 9 MS. KANTANY: May I respond?
 10 THE COURT: You may. I'm going to give everybody -- I'm
 11 going to give everybody a chance to respond. This leads me to
 12 two conclusions. I shared the first one already. I'm not just
 13 going to keep doubling, because I don't think that makes sense.
 14 I'm open to what the next step should be, because I do think
 15 I'm still allowed to issue coercive fines to ensure compliance
 16 with the law, so we'll hear argument on what that should be.
 17 But the other part, and I think this is what counsel was
 18 referring to before I cut her off, was, I think it's really
 19 important, given the connection between the Section 9A ban on
 20 strikes and the solution of Section 9 collective bargaining, to
 21 think more about the second half of my order from Monday, which
 22 required both sides to do -- to engage in good-faith
 23 bargaining.
 24 So I am prepared to consider additional coercive fines in
 25 some amount, but before I keep issuing coercive fines, I need

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1 suggesting that's happened here, because I don't know, I don't
 2 know what's happening at the bargaining table, but that's the
 3 dynamic that could happen if the fines keep escalating. Sooner
 4 or later, they'd be big enough to make a difference in the
 5 collective bargaining.
 6 My concern is, I don't think the legislature intended for
 7 the courts to be issuing fines that were so large that they
 8 undermine collective bargaining being fair and effective and
 9 productive, or else if they really wanted that to happen, they
 10 should have been more clear.
 11 So I have no guidance from the legislature exactly what
 12 appropriate proceedings in the superior court mean, and we have
 13 this obvious dynamic that if the fines get too high, the
 14 solution identified by the legislature will be ineffective
 15 because it could force one side to either stop the strike or
 16 reach a collective bargaining agreement that isn't the product
 17 of, you know, full negotiation or fair negotiation.
 18 So that's a long way of explaining, I am not inclined,
 19 having thought about this a little more and seeing the fines
 20 escalate, I'm not inclined to keep escalating the fines,
 21 because it will undermine what the legislature identified as
 22 the solution here, which is productive, fair collective
 23 bargaining, okay.
 24 So I've changed my mindset a little bit. I'm perfectly
 25 comfortable with the fines so far, because they were designed

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1 some information, some help ensuring myself that the good-faith
 2 bargaining aspects of the second portion of the order are being
 3 complied with.
 4 So those are my two thoughts. On the second one -- so
 5 I've just told the plaintiffs I will consider further coercive
 6 fines, but I need some information about -- to assure me that
 7 good-faith negotiations have continued over the last five days
 8 and will continue over the weekend. And so my first question
 9 is, how can we do that efficiently and effectively, what are
 10 your thoughts, and then secondly is just, what is the proper
 11 coercive fine.
 12 So I'm done with my context, and let me ask first
 13 plaintiff and then the defense to address both sides.
 14 MS. KING: Okay.
 15 THE COURT: So before we talk about coercive fines, how
 16 can I get some assurance -- I don't know if it's an affidavit
 17 or your representations or somebody needs to inform me, yes,
 18 these have been good-faith negotiations over the last five days
 19 while I've been issuing fines. So go ahead.
 20 MS. KING: Okay. Yeah, I'd be happy to speak to that,
 21 Your Honor. I think at the outset, I'll -- you know, I'll also
 22 defer to CERB counsel, certainly we have this language in the
 23 order relative to good-faith bargaining. Good-faith bargaining
 24 does not require that the School Committee or parties engage in
 25 bargaining during the duress of a strike. As I mentioned on

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1 Monday, members of the negotiation subcommittee are taking off
 2 time from their own jobs to be at the table. Every day, we
 3 have been engaged in mediation as contemplated by the
 4 legislature. Everyone has been there as often as possible.
 5 And with all due respect, it really isn't necessary to
 6 look that much into the negotiations that are ongoing.
 7 Certainly we have the language in the order, and I understand
 8 the point on the legislative intent. However, the School
 9 Committee has been very clear with the union and the defendants
 10 that they will allow the core members of the bargaining team to
 11 remain and bargain and be paid through to do that as long as
 12 everyone else goes back to work and the strike ends. That is a
 13 more-than-fair compromise. You can engage in good-faith
 14 negotiations and not violate the law and engage in an illegal
 15 strike.
 16 I do have a member of the bargaining team available if --
 17 you know, to be able to provide some context on that, but I
 18 think from the Committee's position, and again, it's not
 19 entirely relevant to the coercive fines piece --
 20 THE COURT: Well, but it's relevant --
 21 MS. KING: Sure.
 22 THE COURT: -- because I just said --
 23 MS. KING: Right, I understand.
 24 THE COURT: -- I am comfortable proceeding with coercive
 25 fines only once I have --

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1 MS. KING: Right.
 2 THE COURT: -- mean something --
 3 MS. KING: Sure.
 4 THE COURT: -- so that's what I'm looking for.
 5 MS. KING: Certainly, and I would again defer to CERB
 6 counsel on that point. But again, I do have a member of the
 7 negotiation team here who can speak to the efforts that are
 8 being made on behalf of the Committee, you know, to engage in
 9 that bargaining around the clock and can likely shed some light
 10 on their position on the union's sort of lack of good-faith, I
 11 think, on that end.
 12 And I know we're, you know, talking about the negotiation
 13 and coercive fines, but just before we go too far, it is
 14 important to note that we are at a juncture that -- and I know
 15 we spoke on Monday about non-economic and incalculable harm,
 16 and you touched on compensatory fines, and we mentioned that
 17 typically these things get worked out in a return-to-work
 18 agreement.
 19 The Committee is not optimistic that that is going to
 20 occur, and it is -- I think you may have seen in the affidavit
 21 we put in today, it is incurring significant financial expenses
 22 due to the strike. The Fall River SJC case said that
 23 compensatory fines can be appropriate, and these enforcement
 24 actions -- and we are at a juncture that we are going to ask
 25 that this Court consider compensatory fines, and we would be

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1 MS. KING: Right.
 2 THE COURT: -- some information satisfying me that good-
 3 faith negotiation --
 4 MS. KING: Right, right.
 5 THE COURT: -- has been occurring for the last week. So
 6 that's why it's relevant.
 7 MS. KING: Understood.
 8 THE COURT: And my question is how best to get me that
 9 information. I have no position on the matter.
 10 MS. KING: Right.
 11 THE COURT: I mean, I can read the papers, but
 12 everybody --
 13 MS. KING: Right.
 14 THE COURT: -- each side says the other is not doing a
 15 good enough job. Okay.
 16 MS. KING: Sure, yeah, so understood.
 17 THE COURT: I need something to --
 18 MS. KING: Yeah.
 19 THE COURT: -- to -- good-faith negotiation, by the way,
 20 has to mean something. I'm not saying --
 21 MS. KING: Right.
 22 THE COURT: -- it means people --
 23 MS. KING: Yeah.
 24 THE COURT: -- have to stop their jobs and be available 12
 25 hours a day. I don't know what -- but it has to --

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1 more than cooperative in giving that evidence. But again, I
 2 have a member of the negotiating team here who is able and
 3 willing to provide the information you're looking for.
 4 THE COURT: Okay. And I guess we've already -- and when
 5 it comes to coercive fines, you think they should basically
 6 continue on the trajectory that I started at the beginning of
 7 the week?
 8 MS. KING: We would agree with that, and just as a minor
 9 point, I understand that, you know, you would not be open to
 10 doing it over the weekend. We hear that, but we do think that
 11 it would include at least today, Friday, which was a scheduled
 12 school day.
 13 THE COURT: Yeah, I guess -- and you might be right. My
 14 only thinking on the -- the reason I just said one fineable
 15 event, and that was the night before, because that meant there
 16 wasn't going to be school the next day, is, I appreciate that
 17 every hour of every day and every day there is a new violation,
 18 but it seems to me the real consequence is whether school is in
 19 session or not.
 20 So I think I'm inclined to just stick to one day. The
 21 only reason I wouldn't do multiple days over the weekend is
 22 because they're not -- we wouldn't otherwise be in school on
 23 the weekends, and therefore I'm just focused on Monday. But
 24 I'll consider what you said. Maybe it's more appropriate to do
 25 something different.

1 So let me ask the union for your initial response with
2 respect to those two issues, how can I get basic information
3 with respect to good-faith bargaining before I consider further
4 coercive fines, and what should the fines be?

5 MS. HOULE: I feel like Your Honor was in my head last
6 night and -- because our position is consistent with what you
7 were saying. We have to look at the statute as a whole and the
8 purpose of 150E. And you articulated what had been the fear
9 and what we believe has become reality is that the system is
10 being abused.

11 The reason the -- you know, the School Committee had said
12 that good-faith bargaining doesn't require them to bargain
13 during a strike. That is why there was an order from CERB and
14 from you requiring them to continue to bargain. There's the
15 law and there's the practical side of things, right?

16 And so in order to move this process forward, we're
17 concerned about the lack of urgency. And I have, you know,
18 talked with the union last night and we had very specific
19 suggestions for Your Honor that we think would be very helpful
20 in, like, taking a pause this weekend. Our position would be
21 in line with what you originally said, let's take a breather,
22 let's get the parties really concentrating over this weekend,
23 see if they can make significant progress, hopefully resolve
24 everything, and understanding that there would be a deadline.
25 There has to be a deadline, we get that.

1 But to move forward, you know, one of the -- so for
2 example, specific examples that we'd like to see addressed, the
3 parties -- the Section 9 process that you -- we called it in
4 past procedures that you had referenced, in many circumstances
5 works great, wasn't here, but part of the problem with that is
6 that when they enter mediation, all of a sudden the parties
7 aren't in the same room at the same time, and everything's
8 being relied upon, you know, the mediator going back and forth.
9 And significant -- you know, things are lost in translation.
10 The parties aren't forced to face each other, to articulate
11 their concerns, to advance proposals face-to-face. They
12 started over the weekend bargaining face-to-face again, and
13 they reached two TAs.

14 THE COURT: Over the week.

15 MS. HOULE: Over the weekend.

16 THE COURT: Oh.

17 MR. MULLANE: Last weekend.

18 MS. HOULE: Last weekend --

19 THE COURT: All right.

20 MS. HOULE: -- they bargained face-to-face. They reached
21 two TAs, tentative agreements --

22 THE COURT: I'm going to stop you, because I have a
23 feeling you might be asking me to add to the order to require
24 face-to-face negotiations or something like that, or the
25 details of how good-faith bargaining works. That does not seem

1 like my job.

2 MS. HOULE: I understand what you're saying, but I think
3 that -- I think it is appropriate. I think that you have great
4 discretion here, because what happened is, the School Committee
5 stopped bargaining face-to-face and there's been no progress
6 since then, since Tuesday. So if the parties, you know, can
7 commit to -- the union has said they will bargain 24/7. I know
8 the School Committee's going to say that's unrealistic, but
9 that's their commitment. We need a commitment of time.

10 We need a commitment of face-to-face. I would suggest
11 that even -- and this is not any ding on the DLR's mediators.
12 I've worked at state and federal enforcement agencies. I have
13 a lot of respect for them, but sometimes you just need to shake
14 things up. So if the parties commit to hiring an outside -- a
15 skilled outside mediator, maybe logistically it won't work,
16 bring a new face into the room, you know --

17 THE COURT: So I can -- let's -- I can sit here and agree
18 or come up on my own, or at your suggestion, with all sorts of
19 ideas --

20 MS. HOULE: Sure.

21 THE COURT: -- to make good-faith negotiations work
22 better. I don't think that's my job. One reason is, when they
23 set up this statute, there is an agency that is to oversee
24 public union relations. It's not me. And I think it would be
25 really unwise, unless the legislature said it was the

1 judiciary's job, to start getting into the details. And this
2 is part of the problem. The only blunt instrument I've got is
3 this coercive fines, and it just took a little bit of thinking
4 to realize that the coercive fines, once they get too big,
5 undermine the whole point here, which is productive, effective,
6 you know, aided collective bargaining.

7 MS. HOULE: Yes. Your Honor --

8 THE COURT: But that doesn't mean I'm ready to go further
9 and have a judge get into the details. If anyone -- because
10 there's an agency that should be able to get into the details
11 and provide -- but in the end, the parties are the ones who are
12 going to be responsible for breaking the impasse or not, and my
13 conclusion is that my role has to be quite limited, in part
14 because the inefficacy of my role has been borne out this week,
15 and the only way to overcome that inefficacy is for me to jack
16 up the fines, which I've already said doesn't seem to me
17 consistent with the legislative scheme.

18 MS. HOULE: I do believe, you know, in terms of what you
19 were saying and giving the time over the weekend without the
20 School Committee having, you know, our concern, anyway, about
21 they're just going to wait out the fines to break the union,
22 maybe that will be enough to get some sort of urgency in
23 getting this deal done so we can get kids back in the classroom
24 on Monday.

25 THE COURT: Okay. So let me ask a question. If I were to

1 say -- remember on Monday I gave you an opportunity to contend
2 that good-faith negotiation wasn't taking place?
3 MS. HOULE: Yup.
4 THE COURT: And you weren't ready to take me up on that.
5 If I were to say I need some information, is it the union's
6 contention right now that there is not good-faith negotiating
7 or just that things need to be a little more urgent and done
8 better?
9 MS. HOULE: No, in talking with my clients last night,
10 they do not believe that the School Committee is bargaining in
11 good faith, which I sort of started to get into how I thought
12 we could address that. But the lack of face-to-face
13 bargaining, the lack of movement, the fact that the mayor is
14 not at the table and the School Committee is not bringing the
15 mayor to the table, when she seems to have the authority and
16 the purse strings, they're getting bogged down in one
17 particular School Committee proposal, and so very little
18 interest from the School Committee on dealing with the whole
19 host of other issues that are still outstanding at the table.
20 These are some of the indicia. I feel like -- my client
21 feels like the School Committee is kind of doing these surface-
22 level indicia so they can go on in the process and say we're at
23 the table, we're doing all this, but not really meaningfully
24 coming to the table with a sincere intent to reach agreement,
25 which is what the case standards say.

1 MS. KANTANY: Second point --
2 THE COURT: But the challenge is, the dynamic that can
3 create is pretty obvious, right?
4 MS. KANTANY: No, I understand, yes --
5 THE COURT: And that is that --
6 MS. KANTANY: -- I understand your concern.
7 THE COURT: -- one side, who's not subject to fines, gets
8 to fold their arms and say that's it, that's the best we can
9 do, and --
10 MS. KANTANY: May I address that?
11 THE COURT: -- maybe you're allowed to do that, but that's
12 what I mean -- but there's a conflict, right? I'm not -- the
13 conflict arises when the coercive fines get too big. That's my
14 conclusion, okay. And so I'm not saying it happened, but it's
15 an obvious dynamic that could happen, and that's when I get
16 concerned about undermining the so-called solution that's in
17 the statute. I acknowledge another part of the statute says
18 you can't strike, so -- but I think -- I'm trying to find a way
19 to apply all of the statute.
20 I'm not saying that I've decided the ban, the strike ban,
21 you know, isn't enforceable or something. It's part of this.
22 I'm just saying that the solution so far of coercive fines has
23 been ineffective and risks undermining continued collective
24 bargaining, which is the only solution to the impasse that's
25 out there. That's -- anyway, so --

1 THE COURT: Well, gauging sincere intent is a pretty
2 difficult task, but --
3 MS. HOULE: Agreed, Your Honor, I agree.
4 THE COURT: All right. So let me just say, you offered to
5 have a School Committee explain here's the -- here's our good-
6 faith negotiating. The reason I'm not taking you up on that
7 right now is because I wanted to hear whether, in fact, it was
8 the position of the union that it's not good faith. And I
9 guess I heard yes, that's their position, but it sounds awfully
10 difficult for me to start gauging good faith. So without
11 calling witnesses right now, at least, tell me what -- tell me
12 your response, or whoever would like to.
13 MS. KANTANY: I want to address kind of the concept that
14 these fines are undermining the collective bargaining process.
15 The strike is undermining the collective bargaining process.
16 It is not meant to be part of the collective bargaining
17 process. The fines are meant to stop the strike from
18 occurring. The parties can continue to negotiate when the
19 teachers comply with the law, and it hasn't worked in this
20 case, because they have a significant amount of money, and
21 there are donations that we do not know what the amount of
22 those donations are. And so the fines are very important to
23 return them back to work and continue negotiating in good
24 faith.
25 THE COURT: So, but --

1 MS. KANTANY: Well, the union has disregarded the process
2 set forth in Section 9 by going out on strike instead of
3 engaging in -- they are engaging in mediation, but there's more
4 to that process. There's fact-finding and continued
5 negotiations, and instead, they've taken unilateral, illegal
6 steps to influence the collective bargaining process.
7 And to put that aside, I do want to address the idea that
8 the School Committee -- and I'm not in the room, I know that's
9 really for the School Committee to address, but Chapter 150E,
10 Section 6 says that, "The employer and the exclusive
11 representative, the union, shall meet at reasonable times and
12 shall negotiate in good faith," some more that's not really
13 important, "but however, such obligation shall not compel
14 either party to agree to a proposal or make a concession."
15 So the idea that the School Committee, because they are
16 saying we have nothing in response, that that is bad-faith
17 bargaining, this clearly states that that, in itself, isn't.
18 And it's a -- it's -- it would be a large fact-finding process
19 for the Department of Labor Relations, my agency, to determine,
20 and it's not appropriate for these proceedings --
21 THE COURT: Well, that's what I was going to ask, because
22 I read the statute and I understand what most of it means,
23 because I know what a mediator is, and that's been employed,
24 right?
25 MS. KANTANY: Correct.

1 THE COURT: That part of Section 9. And I read about this
 2 fact-finding process. I went back to look at the papers. Has
 3 that -- have we gone through those hoops as well, and the
 4 answer is no?
 5 MS. KANTANY: No. After --
 6 THE COURT: Is that ever used?
 7 MS. KANTANY: It has been used, rarely, because the
 8 Department does prefer that the parties reach an agreement, so
 9 we tried to exhaust the mediation process first, and then after
 10 the mediation process has been exhausted --
 11 THE COURT: I see.
 12 MS. KANTANY: -- we would declare impasse --
 13 THE COURT: And fact-finding is sort of like a third party
 14 -- it's not binding, but a --
 15 MS. KANTANY: It's not binding, correct.
 16 THE COURT: -- third party comes in and makes commentary
 17 on the back-and-forth and, I assume, sort of shames one side
 18 and says you haven't really addressed A, B, and C, you've only
 19 focused on D, and it's worth whatever it's worth, sort of like
 20 public pressure. Am I understanding it correct? Because I've
 21 never seen it in action.
 22 MS. KANTANY: Correct, correct. It's not used that often
 23 in these types of cases. There's binding arbitration for
 24 police and fire which would look like a decision in these non-
 25 binding arbitration cases, but --

1 And I get the sense from the legislative history the idea
 2 was just to make that hurdle as high as possible as opposed to,
 3 say, we mean it, it can never happen. And I think that's
 4 further reflected in the absence of a remedy, and the only
 5 remedy that's come into play is this notion of coercive fines,
 6 which, if we were to be honest, we could say that should start
 7 at a dollar -- on the day one, it could be anywhere from a
 8 dollar to ten million dollars. Ten million might really
 9 enforce the law. But that wasn't the case -- that wasn't the
 10 approach taken by my predecessor, so we're in this world where
 11 we have coercive fines, and I've already expressed my concern
 12 that it undermines the solution identified by the legislature.
 13 So I guess I'm just saying I understand that it's
 14 balancing different parts of the law and the prohibition says
 15 what it says, but when the legislature had a chance to -- this
 16 legislative history shows that they said if we're going to --
 17 basically, my words, if we're going to keep the strike ban, we
 18 have to have an alternative process, solution. And they
 19 considered a bunch of things, and what they came up with was
 20 these mild aids to the collective bargaining process, which is
 21 what we're in the middle of. And I guess I'm just saying I
 22 think Section 9 is as important as Section 9A. They at least
 23 have to be read together, and that's the conclusion I've come
 24 to.
 25 So I didn't get an answer from the union yet on my

1 THE COURT: Right.
 2 MS. KANTANY: -- like I said, not binding.
 3 THE COURT: Okay. Well, I guess that raises the question,
 4 if the legislature set up a couple different aids to collective
 5 bargaining, mediation and this fact-finding process, which I
 6 have no view on what difference it makes, but it is in the
 7 statute, should that be a next step before the more dramatic
 8 involvement of a court's involved, you know, more coercive
 9 fines, or is nobody asking for it, this fact-finding concept?
 10 MS. KANTANY: I think everyone wants to continue
 11 mediation. Obviously the Department and the School Committee
 12 believe that negotiations and mediation and collective
 13 bargaining should continue without the strike, but I think
 14 everyone's interest is to reach a collectively-bargained
 15 agreement. And so the fact-finding piece isn't on the table
 16 yet. It may be, but I think that's a process that the DLR is
 17 in charge of.
 18 THE COURT: Okay. I appreciate the incongruity behind
 19 having a strike ban and then me suggesting that there's limits
 20 to enforcing the strike ban if they undermine collective
 21 bargaining, but part of my thinking is, the legislature was
 22 aware of this dynamic. These legislative reports from the '60s
 23 and early '70s say over and over again that the strike ban is,
 24 you know, practically unenforceable and they acknowledge that
 25 it still remains a tool in the hands of a union.

1 question of, if I'm satisfied there's good-faith negotiating
 2 underway and I think that compliance with the law is required
 3 and there needs to be a coercive fine Sunday night, what's the
 4 amount that's appropriate in your view?
 5 MS. HOULE: With all due respect, Your Honor, I think
 6 that's an unfair question to ask of me at this point. I am --
 7 my -- you know, I am not my client, and I am more focused on
 8 keeping my clients focused on being at the table, trying to
 9 make progress at the table within the confines of the concerns
 10 that we previous raised. So it's not, with all due respect, a
 11 question I can actually answer.
 12 THE COURT: All right. So if I ask the plaintiffs to show
 13 me, you know, meaningful evidence of good-faith bargaining so
 14 that I can continue with coercive fines, what is your approach?
 15 Would you cross-examine the witness? Would you call your own
 16 person, file your own affidavit?
 17 MS. HOULE: I understand the quagmire that you're
 18 identifying, Your Honor, and here's the sticky wicket for us,
 19 right? So we're in this process. We're in mediation. You
 20 know, we believe they're bargaining in bad faith. I don't
 21 think you, and I tend to agree, want to get into the weeds of
 22 having a whole hearing on whether there's good faith or not.
 23 As you pointed out, that's the job of the DLR.
 24 But here's our problem. You know, we could seek that on
 25 contempt under this process. It might, you know, enmesh you in

1 that, which doesn't seem to be where you want to go, and I
2 don't blame you. We could file yet another -- we have a
3 pending bad-faith bargaining charge before the DLR. We're
4 still waiting for a decision on that. We could file another
5 one because we feel they're bargaining in good (sic) faith.
6 It's not going to help us now, because that's a process that's
7 going to take months if not years to run. I mean, it's not
8 even being investigated, you know, for one to two months.
9 So the union is really between a rock and a hard place
10 here. I understand, you know, their conduct is what brought us
11 to this point before you, Your Honor, but that was why I came
12 in with some very specific ideas, and even if you're not
13 inclined to incorporate them into an order, and I certainly
14 respect that, certainly an expectation --
15 THE COURT: I will hear them.
16 MS. HOULE: Yeah.
17 THE COURT: I've expressed my skepticism, but go ahead,
18 tell me what you think --
19 MS. HOULE: Yeah.
20 THE COURT: -- would aide --
21 MS. HOULE: Yes.
22 THE COURT: -- the balance between good-faith negotiations
23 and --
24 MS. HOULE: Sure, Your Honor.
25 THE COURT: -- ending the strike.

1 effectuate something there at the table. The union is more
2 than willing to have her come into the process at the table at
3 this point, maximize the time. I understand it's not 24/7 --
4 THE COURT: Do you think the legislature envisioned a role
5 for the courts where they would dictate who had to be in a room
6 in order for it to qualify as good-faith bargaining?
7 MS. HOULE: I think we're in unchartered territories, Your
8 Honor.
9 THE COURT: Well, I hypothesize they didn't or else --
10 MS. HOULE: Yeah, and I under --
11 THE COURT: -- or else they would have said it.
12 MS. HOULE: And I understand that, Your Honor, and I
13 understand that these might not -- although we would like to
14 see them end up in an order, but we do have a number of people
15 here who have regular communications with the School Committee,
16 if not part of the School Committee, and I think hearing, you
17 know, an expectation, even, in a statement from you from the
18 bench would be extremely helpful and maybe influential. Maybe
19 even the DLR can, you know, convey to the mediator this is
20 something that, you know, at least the union feels would be
21 very important to keeping the process moving forward and to
22 hopefully more efficiently get to an agreement.
23 THE COURT: Well, okay. I'm flattered that you think that
24 my views on how to run a collective bargaining discussion
25 should carry any weight. That's not what I do. That's not my

1 MS. HOULE: And I appreciate that, and I think even a
2 strong expectation from the Court if it's -- would be helpful.
3 As I said, we need the parties face-to-face. It's -- when
4 they're this deep in this quagmire, it's really difficult to
5 have meaningful -- to rely -- and it's almost unfair to the
6 mediator to have to wrangle something of this scope and go back
7 and forth between the parties and not have the parties have to
8 face each other and see the impact of what they're proposing
9 and to be able to have that much more efficient, by the way, if
10 we're really under a time crunch here, without having to go
11 through the mediator. Face-to-face bargaining I think is
12 absolutely essential. You know, we've talked -- I think you
13 were very prescient in your observation about the potential
14 impact of fines, and I think that we've already seen that.
15 The mayor holds the purse strings. The mayor is who the
16 School Committee has to keep running back to. There's some
17 question of whether the School Committee bargaining team really
18 has the authority to make decisions at the table, and so if
19 they're constantly having to go back to the mayor, that's also
20 inefficient, if nothing else.
21 THE COURT: Well, you also don't want them agreeing to
22 things that are then vetoed by the purse strings, right, so --
23 MS. HOULE: Yeah, let's get -- let's get --
24 THE COURT: -- it seems like that has to happen.
25 MS. HOULE: Yeah, let's get the person who can really

1 -- I've never done that in my job. I don't have any views on
2 that, and I don't think that's what judges are supposed to do.
3 MS. HOULE: I understand, Your Honor. It's just more a
4 matter of tools, giving the parties the tools, getting them to
5 use the tools at the same time --
6 THE COURT: Right.
7 MS. HOULE: -- to hopefully get there.
8 THE COURT: Right. But the legislature gave the agency
9 the tools, and it's mediation and it's fact-finding process,
10 and --
11 MS. HOULE: Yes, Your Honor.
12 THE COURT: -- absent the parties' agreement, there's not
13 something more that breaks impasses. All right. I'm going to
14 give you a chance to respond to what we're talking about, and
15 I'll tell you what I think I want to see if the parties can do
16 this afternoon.
17 MS. KING: Just by way of response on a few pieces there,
18 Your Honor. I hear you feel the conflict between Sections 9
19 and 9A, but the language of 9A is clear relative to the illegal
20 striking. And I'm really struggling with the terminology lack
21 of urgency here. It writes large of the pot calling the kettle
22 black. We are there every day. We have people, again, taking
23 time off of their own jobs to be there with the union every day
24 engaging in mediation.
25 At the same time, the union isn't at the table; they are

1 out engaging in demonstrations. Why is it that the core
2 bargaining members can't be at the table engaging in mediation
3 and everyone else back in the classroom so our students aren't
4 harmed through this process.

5 The mediator himself has said that the face-to-face
6 dynamic actually is not productive, and his stance has been
7 that they should not be face-to-face at this time. I think
8 that's important to consider in the good-faith bargaining
9 piece.

10 And I think the School Committee's position would be that
11 it's receiving regressive proposals from the union, increasing
12 their asks for certain proposals. Yes, they have reached
13 tentative agreements on certain language items, but as you
14 pointed out, yes, there is some conflict in the wages piece,
15 and again, hearing the conflict between 9 and 9A.

16 However, it is entirely possible, it is not mutually
17 exclusive for us to have teachers in the building while good-
18 faith bargaining is taking place. We can have appropriate
19 designated members from the union engaging in these discussions
20 with the School Committee while the remainder of the teachers
21 are in school so our students are not harmed. Right now we
22 have 20 percent of the student population who receive special
23 education services who we're going to owe compensatory services
24 to. We have METCO students who are unable to obtain an
25 education and our general education students that are going to

1 be deprived of, you know, their educational benefits as well.

2 We could probably go back and forth all day on the good-
3 faith bargaining dynamic, but I think you're going to hear a
4 lot of back-and-forth on either end. And I think you hit a
5 good point that we have to afford deference to the agency
6 which, you know, oversees, you know, Chapter 150E. We afford
7 deference to the fact that the mediator has felt that the face-
8 to-face negotiations are no longer productive. We would defer
9 to the parties when fact-finding is appropriate, but it is
10 entirely possible for us to follow through with the CERB order
11 and your order for bargaining to continue to take place while
12 no longer having the strike. And we would ask, again, that you
13 consider, you know, what is it going to take to coerce
14 compliance, and that, you know, seems to be a reasonable, you
15 know, compromise that can certainly be taken.

16 At this point, as I've mentioned, you know, the School
17 Committee is incurring significant expenses for a variety of --
18 for police details, overtime of other staff members. They've
19 opened up childcare centers to provide activities for families
20 that really don't have the daycare options, and they're going
21 to owe compensatory services and need to provide those to
22 students. But there's just a plethora here, and --

23 THE COURT: Let me just --

24 MS. KING: Yes.

25 THE COURT: So in case I've misled anybody, you are

1 correct; I think the legislature envisioned that collective
2 bargaining would continue until it was successful without
3 strikes. That's plainly what was envisioned. And I agree.
4 And that's why I entered an order that required the strike to
5 end, and that's why I started with the coercive fines.

6 So I do want to be clear, that's the way it's supposed to
7 work. My concern arises five days in, once I determine that
8 coercive fines in the hundreds of thousands of dollars doesn't
9 appear to make a difference, I get very concerned that the next
10 step is not what the legislature involved (sic). And as
11 someone said, this is uncharted territory. Every other time,
12 these things have ended in one, two, three or four days.

13 Okay. So this one's different, and so I have to
14 determine, given the statute as a whole, did the legislature
15 intend those coercive fines to reach the point that they made
16 the collective bargaining one-sided, even though the thing
17 that's leading to the coercive fines is, in fact, illegal,
18 okay. I don't expect you to agree with me, but that's the way
19 I'm viewing the challenge.

20 Okay. Here's what I'd like to do. I will -- I anticipate
21 entering a coercive fine that would kick in Sunday if school's
22 not back on Monday, and the question is how much, but I will do
23 that only once I get some information satisfying me that good-
24 faith negotiation is underway.

25 I'm pretty reluctant to sort of make this -- it's not

1 going to -- I don't want to have an evidentiary hearing. I
2 think it's fair, since that obligation is on both sides, to get
3 a representation either from the School Committee or from their
4 lawyers explaining sort of, like, you know, I don't want to
5 call it proof, I want to -- information satisfying me that the
6 negotiations have continued in good faith, whether that's a
7 rough chronology of how many times we've been back and forth,
8 how many of the different topics in dispute have, in fact, been
9 subject to new offers from one side or the other. There's a
10 bunch of different ways we can gauge it.

11 What I am concerned, what I want to avoid or what I hope
12 not to hear is that there's been a -- we're just -- one side or
13 the other, we're just going to ride this out because we're
14 counting on the fines. And as I said, I don't expect that, I
15 don't know what the facts are, but I feel like I want to
16 satisfy myself that that dynamic is not playing out before
17 issuing coercive fines.

18 So I have an obligation for roughly the next two hours.
19 Are the parties available this afternoon? My thought would be
20 either to satisfy my concern that there's good-faith
21 negotiation underway, you can submit an affidavit with a
22 chronology and I can ask questions if I have them, but I know
23 that's short time, or you can have a person, as you mentioned,
24 explained the chronology and sort of the rough outlines of
25 good-faith negotiation. And if I have questions, I'll ask

1 them, but not a cross-examination concept, because if the union
2 wants to give me information, they do it with their witness or
3 their lawyers' representations.

4 I suspect it's going to remain very difficult to define
5 good-faith negotiation, and the hurdle will be -- well, I won't
6 say it'll be low. It'll just be -- I think there should be a
7 hurdle, because the order requires it, and I want to get some
8 information this afternoon so that I would then be comfortable
9 in moving on to the question of what should a coercive fine be.

10 So my question is, are you all available either to have
11 that witness explain the chronology or -- I suppose I might
12 rely on lawyers' representations, to do that this afternoon?
13 And then that way at the end of the day, before the weekend, I
14 will announce, if I'm satisfied, a coercive fine to kick in
15 Sunday night? Are you all available this afternoon?

16 MS. HOULE: Of course, Your Honor.

17 MS. KANTANY: I am, yeah.

18 MS. KING: I would just say the Committee has a hard stop
19 about 3:30, 3:45.

20 THE COURT: Oh, okay. All right. Then why don't I ask --
21 and let me just say, if I knew this in advance, I would have
22 told you yesterday. I determined just yesterday that before I
23 continue with any fines, it was very important to have some
24 satisfaction of -- with respect to good-faith bargaining.

25 MS. HOULE: We appreciate that, Your Honor.

1 THE COURT: Okay? So this afternoon is all I have. Why
2 don't we reconvene at 2:30. I understand if somebody has to
3 leave at 3:30, then they can leave, so they'll go right first,
4 or maybe it's possible -- we can do this in an expedited
5 fashion. What I'm interested in is a chronology that shows
6 that each side has been engaged, because I do not view it as my
7 job to get into the details of exactly who should be making
8 what offers. Far from it, I just want to make sure there's not
9 a folding of the arms and a lack of negotiation.

10 And once I do that, then by the end of the afternoon I'll
11 hear a little more argument on what the proper coercive fine is
12 and I'll tell you what it is before the end of the weekend so
13 everyone can take that into account, if it makes a difference.
14 My hypothesis has been true so far, that it doesn't really make
15 a difference, because the stakes are much higher in the actual
16 negotiation, but I'll continue down the path that's been set
17 for me by the -- the not-well-guided path that's been set for
18 me by the legislature.

19 MS. KANTANY: May I also request information about the
20 amount of donations that the NTA has received? Because it's
21 clear in the communications that they're relying on these
22 donations to assist them in paying the coercive fines.

23 THE COURT: You may ask them. I'm not going to insist
24 they tell me. If I want to --

25 MS. KANTANY: I think it's an important --

1 THE COURT: If I want to ask them, I'll ask them this
2 afternoon, because ability to pay is a factor in determining --

3 MS. KANTANY: Yes.

4 THE COURT: -- what an appropriate fine is.

5 MS. HOULE: I think it's an overstatement to say they're
6 being relied upon. It's more, I think, morale than anything,
7 but yes, Your Honor, whatever information will get us to the
8 table and get to an agreement, we are happy to.

9 THE COURT: Okay. So with apologies for not being able to
10 continue this right now, at 2:30 I should be back, and we will
11 hear from a witness or read an affidavit or something to give
12 me that sense. I'll ask questions if I have them. I'm going
13 to ask the same thing for the union's side.

14 MS. HOULE: Yes.

15 THE COURT: That might be straightforward, it might not,
16 but I want to make sure I have that comfort before I continue
17 down this path for all the reasons I discussed earlier. Okay?

18 MS. HOULE: Yes, Your Honor.

19 MS. KANTANY: Thank you, Your Honor.

20 THE COURT: Thanks very much. See you at 2:30.

21 MR. MULLANE: Thank you, Your Honor.

22 (Case recessed at 12:10 p.m.)

23 (Case resumed at 2:38 p.m.)

24 (Court called to order.)

25 THE COURT: Good afternoon, Your Honor. Your Honor, we

1 have parties here on Docket Number 2481CV00148, Commonwealth
2 Employment Relations Board vs. Newton Teachers Association. If
3 the parties could please stand and identify yourself for the
4 court and the record, starting with the plaintiff.

5 MS. KANTANY: Lan Kantany on behalf of the Commonwealth
6 Employment Relations Board.

7 THE COURT: Good afternoon.

8 MS. KING: Jennifer King on behalf of the Newton School
9 Committee.

10 THE COURT: Good afternoon.

11 MS. GRADY: Good afternoon, Your Honor. I'm Jill Murray
12 Grady. I'm general counsel for Newton Public Schools.

13 THE COURT: Good afternoon.

14 MS. HOULE: Good afternoon, Your Honor. Laurie Houle for
15 the Newton Teachers Association and Michael Zilles.

16 MR. MULLANE: Good day, Your Honor. Rich Mullane, co-
17 counsel with Ms. Houle.

18 THE COURT: All right. Good afternoon. Thanks,
19 everybody, for your flexibility. So earlier I set a -- let me
20 give you a little context of what comes next. I decided that
21 in order to continue coercive fines, I wanted to be satisfied
22 to a degree that good-faith negotiating required by the other
23 few paragraphs of my injunction of one week ago was being
24 carried out so that that dynamic that I'm concerned about,
25 namely, coercive fines to enforce Section 9A, I'm concerned

1 that they could undermine the collective bargaining. So I want
2 to have some sense that that's not happening before I continue
3 down the path of coercive fines.

4 So I read the affidavits submitted by Anna Nolan, and I
5 guess my question is, how would the plaintiffs like to proceed
6 to -- give me a little more information. What do you think
7 would make sense?

8 MS. KANTANY: I'll defer to the School Committee.

9 MS. KING: Yeah. I think that Dr. Nolan's affidavit
10 speaks to the fact that the School Committee is and has been
11 complying with the order to bargain in good faith, speaking to
12 the many efforts and concessions that are being made, even
13 though the counsel for the Board spoke about earlier that isn't
14 necessarily a requirement in good-faith bargaining.

15 I think what you see in that affidavit is information that
16 the School Committee, under duress, is still going above and
17 beyond to meet the demands of the NTA during the bargaining
18 process. They are still continuing to make progress on certain
19 language pieces, but as you noted in the hearing earlier, the
20 parties are far apart on wages. But I think it demonstrates
21 that there has been good-faith bargaining there. Ms. -- or
22 Attorney Grady has been a member of the negotiation team, and
23 if any further details are needed, she can certainly speak to
24 that.

25 THE COURT: Okay. Well, before I get into that any

1 further, let me just ask the both parties, if you could try to
2 be concise in asking this question, what are the hallmarks of
3 good-faith negotiations? What should I be looking for? I
4 think I could guess, but you all practice in this area, I
5 suspect, so tell me what the hallmarks of good-faith
6 negotiating as compared to something else are. What should I
7 be on the lookout for? You can go first.

8 MS. KANTANY: I think what is not good-faith bargaining is
9 sort of what our realm of what we're looking for when parties
10 come before us, and that's things like if there's regressive
11 bargaining, parties step back on their proposals. That doesn't
12 necessarily mean, though, if one proposal is increased in terms
13 of the amount of money, that that's regressive bargaining if
14 it's tied to another proposal, so --

15 THE COURT: You can be regressive if you made a big change
16 somewhere else --

17 MS. KANTANY: Right.

18 THE COURT: -- but generally speaking, that's something
19 you'd classify as not good faith. Okay.

20 MS. KANTANY: Correct. If there's surface bargaining so
21 it doesn't appear that the parties are actually listening to
22 one another and just not interested in the reasoning behind the
23 proposals or the counter-proposals, that we may consider to be
24 surface bargaining, which is not bargaining in good faith.

25 What is not bargaining in bad faith is hard bargaining,

1 saying that we don't have more money, say we're not going to
2 move on our paid leave proposals. That's not bad-faith
3 bargaining. That, to us, is more of the hallmarks of hard
4 bargaining, which is permissible.

5 THE COURT: Okay. Let me -- I'll let you add more, but
6 while we're on the list of hallmarks of good faith versus
7 something else, what should I be looking for, from your view?

8 MS. HOULE: Yes, Your Honor. I find it a little curious
9 that the first thing that wasn't articulated by the CERB is
10 that the parties are to come to the table with a sincere desire
11 to reach agreement, and there are indicia of -- it can get a
12 little squishy, right? That's what the, you know, that's what
13 the DLR exists for in the normal course of things, to make
14 these sort of determinations.

15 But as articulated by Attorney Kantany with the surface
16 bargaining which we feel has been happening, that can happen in
17 many ways, you know, seemingly making some proposals but not
18 really making any meaningful proposals or changes. Look, I a
19 hundred-percent agree, hard bargaining is hard bargaining and
20 that's not necessarily unlawful, but if there's not a
21 (indiscernible at 2:43:53) desire to reach agreement. If there
22 are unnecessary delays either in scheduling or what we've -- we
23 have brought people here from our bargaining team as well, so
24 hopefully we can get the answers that you were looking for
25 between what's happened this week. But, you know, there's been

1 proposals on the table from the union since January 8th for
2 which they have no counters from the School Committee.

3 THE COURT: Okay.

4 MS. HOULE: That is unnecessary delays. That is not --
5 that is bad faith and certainly not indicative of good faith.

6 THE COURT: Okay. Anything else to add to the list?

7 MS. KANTANY: I can say that striking is, per se, bad-
8 faith bargaining. The Board has held that, so that's per-se
9 bad faith bargaining. Insisting on bargaining to impasse over
10 subjects that are permissible subjects of bargaining or
11 subjects that are not mandatory subjects of bargaining, so
12 things that are core managerial rights. Level-of-services
13 decisions are not mandatory subjects of bargaining. So the
14 parties can't insist on bargaining to impasse over those
15 subjects. That's what comes to mind.

16 THE COURT: Okay. So everything you all have said so far
17 makes sense. I don't know that it provides a whole lot of
18 precision, but it makes sense. But based on my perceptions of
19 what's going on, which is -- I don't know what you all are
20 about to tell me about what's actually been going on. I just
21 have a couple of questions.

22 So I gather -- this is not surprising in a school
23 negotiation, but there's many, many points of negotiation. If
24 I look at what Newton puts up on its website, I might not get
25 the number right, but there's at least 11 or 12 or 13 or

1 something like that, but there's all points -- there's dollars
2 amounts attached to each one.

3 And I guess I'm wondering, in the concept -- I'm sorry,
4 some of them have dollar amounts and some of them are
5 conditions, right, so there's not really dollar amounts. I'm
6 wondering if the concept of good-faith negotiation includes, in
7 some manner, you have to tackle everything together; you can't
8 focus for days and days on, like, one or two when you know that
9 there's a whole bunch of issues.

10 But is that a fair concept or not? I know it's
11 reasonable, if you make progress, to go sort of one at a time,
12 but I have this perception that each time there's been a day or
13 two dedicated to a particular topic, it seems to me it's one of
14 those non-monetary topics.

15 Is it good faith to sort of push to the side topics X, Y
16 and Z to focus on a few if you're not looking at the whole
17 picture together? And I'm not -- that's not a rhetorical
18 question. I have no view on the matter. I'm wondering if you
19 all have a proposed answer to that. The comprehensiveness of
20 negotiations, is that a concept that's within good faith?

21 MS. KANTANY: I think it is. I mean, I think the parties
22 can negotiate as long as it's working towards a resolution,
23 whichever manner -- if it's package bargaining, which
24 everything's kind of tied together, or piecemeal bargaining
25 where they address one issue at a time. That's -- it's

1 whatever gets the parties to an agreement. And as long as
2 everybody's having that fair and open mind, you know, it would
3 have to be very fact-specific, but --

4 THE COURT: Yeah.

5 MS. KANTANY: -- what the Board would be looking for.

6 THE COURT: Okay. Do you have a view on this notion of
7 comprehensiveness of negotiations?

8 MS. HOULE: Yes, I do, Your Honor, and I think, you know,
9 you sort of hit on it. It is probably going to be fact-
10 specific for each situation, but I do believe, as we have seen
11 here, if there is a hyper-focus by one party, an insistence on
12 one party on only addressing or primarily addressing one
13 article to the exclusion of others, particularly when that's
14 maybe not going well, then that is bad faith, because there are
15 plenty of other topics on the table, including non-monetary
16 topics that, like, as I said, the union's been waiting since
17 the beginning of the month for counters on and still doesn't
18 have counters on.

19 THE COURT: All right. That gets to -- your answers to
20 that question make sense, too. I don't know how important it
21 is, but it seems like it's fact-specific, but it seems unwise
22 or maybe unfair to, you know, focus on one for days and days
23 and days when you know there's 19 other issues sitting out
24 there. That's sort of what I was wondering. I have no idea if
25 it's important here.

1 There's a related topic on that, and again, this is just
2 from what one can read publicly, but there are, of course, big
3 financial topics, small financial topics, and then a bunch of
4 other things that aren't necessarily tied to finances. And,
5 you know, salaries and pay scales seems to be a big topic and
6 then cost-of-living adjustment seems to be a big topic, big
7 being defined by, at least according to the spreadsheets I see
8 on Newton's website, big dollars attached to them.

9 And I'm wondering if the concept of good-faith negotiation
10 requires, you know, due attention in some way to the what I
11 think of as big-ticket items. I'm sure the parties can agree
12 let's try to do these other small issues, let's try to get
13 momentum, but let's say if both sides aren't agreeing, we
14 really need to -- we can't go further on X, Y and Z until we
15 focus on these big-ticket items. Is that a concept I can have
16 in mind, or is that sort of not the way it works, if you have a
17 view?

18 MS. KANTANY: I'm not sure if the --

19 THE COURT: In other words, could you say -- and I haven't
20 -- I don't see this in your affidavit, so this is not a
21 specific question. If you say we are prepared to negotiate
22 every single conditions-related, you know, 12 different aspects
23 of this negotiation, we're sitting here, we're ready to talk,
24 and we will talk until we reach an answer, but we have gone as
25 far as we're going to go on COLA and pay scales, what I

1 perceive to be big-ticket items defined by dollars, is that
2 within good-faith negotiating or -- this is sort of a subset of
3 my comprehensiveness question.

4 MS. KANTANY: I mean, the way -- the specificity of that
5 question, that seems appropriate to say we've discussed this,
6 this is as far as we've gone, let's talk about some other
7 items. If we're get- -- if it's leading more towards refusing
8 to discuss the other items, that may -- you know, I'm not aware
9 of a specific case, but that could potentially be closer to
10 bad-faith bargaining, but I'm not aware of any particular case
11 that says it one way or the other.

12 THE COURT: Okay.

13 MS. KANTANY: I mean --

14 THE COURT: Go ahead.

15 MS. KING: And just to add, I think, another layer and
16 certainly jumping in that a lot of this is fact-specific, but
17 the situation you're describing might result in what's being --
18 what's called a package proposal that if we have, again, have a
19 big-ticket item but the rest of the outstanding pieces are sort
20 of tied into that pretty in-depth, what would happen is, a
21 proposal goes out and everything is really -- these are the
22 terms, this is everything, and it's really because everything
23 is so interconnected that it's difficult then to break
24 everything out into individual discussions. That is a tool
25 used sometimes in these -- in this bargaining, usually not

1 until later on in the negotiations, but that is a way that that
2 is occasionally addressed.
3 THE COURT: Okay. And what's your -- I'd consider this a
4 subpart of the comprehensiveness question. What's your
5 response about sort of putting things to the side not to be
6 touched --
7 MS. HOULE: Yeah.
8 THE COURT: -- are you allowed to do that?
9 MS. HOULE: Bargaining is clearly and obviously a dynamic
10 process, and oftentimes a party will be like, this is as far as
11 I can go, and maybe it's set aside, and the rest of the stuff
12 -- you build momentum, you build relationships. That's why
13 being face-to-face is so important. And oftentimes the really
14 hard stuff -- like, one of -- salaries are often the last thing
15 that's agreed to at the table a lot of times, because it is a
16 big-ticket thing and it's hard.
17 So a party may say, this is all the further I have to go
18 (sic). They negotiate some other stuff, whether they're non-
19 monetary components, whether they have some sort of monetary,
20 you know, influence or not. And then you come back and a lot
21 of times you hear this is as far as we can go, and maybe it is,
22 maybe it isn't. It's supposed to be a fluid process.
23 So I think, if I'm getting at your question, I am -- the
24 concern about hyper-focusing on one article or one proposal, if
25 the parties -- you know, in this case, the union has tried to

1 Sometimes it takes 30 minutes to respond to a proposal. I
2 don't mind if it takes two days if the response then breaks a
3 logjam.
4 I get a perception that whatever back-and-forth has
5 occurred, it might be issue-by-issue. And I perceive, and I'm
6 giving everybody a chance to say, oh, that's not what's
7 happening, that the big-ticket items, actually there hasn't
8 been a pace of progress in the last week. Is that a correct
9 perception or not?
10 MS. GRADY: Your Honor --
11 THE COURT: Go right ahead.
12 MS. GRADY: -- if I may, I've been at the table, so to
13 say. I think you're absolutely right. I think that there has
14 been a lot of disagreement on the types of proposals that have
15 been discussed and put forward. What I can say is that the
16 School Committee feels at this point pretty much all the
17 remaining proposals, which have been responded to, but then
18 just reasserted in January, they -- it's not that they were
19 never responded to; they were responded to but rejected --
20 pretty much all involve money. It's level of services,
21 staffing, certain -- so it is all tied into the big-ticket
22 item, which is money.
23 The School Committee has been very clear for months,
24 started with the package proposals, that you can't look at
25 these without looking at this, which is the money, right, these

1 go along with that but is not getting anywhere. And then if
2 it's -- if we can't get the other side to move past that, to
3 come back to it later, sure, I mean, we understand there's
4 important issues, for example, in the time and learning, but we
5 are in -- we're in a crisis mode, and there needs to be a sense
6 of urgency here. And if something is stuck, move on to
7 something else, come back to it.
8 So I think fact-specific, as we are all saying,
9 everything's kind of the totality of the circumstances, fact-
10 specific, but I think under those facts as it is bad-faith.
11 THE COURT: All right. Well, let me get to a fact-
12 specific question, because this is -- I think this question is
13 inescapable if all you do is read the different parties'
14 comments about what's going on here. I guess I'm -- and the
15 reason I asked about are you allowed to sort of say we'll talk
16 about X, Y and Z but not the big-ticket finance items, I have
17 this perception that maybe whatever has happened over the last
18 week, it's been about a series of different components of your
19 negotiation, but on those big-ticket items there's either been
20 no discussion or there's been no, you know, new offers.
21 When I think about negotiations making progress, I don't
22 really get into do they have to be face-to-face, because a
23 mediator could well say this is much better if I go back and
24 forth. I don't want to get into those types of details. If I
25 paint with a broad brush, I think that there is back-and-forth.

1 all cost money, and that's how we are -- the School Committee
2 has been looking at these negotiations.
3 What I will say, since the union went on strike, there was
4 some progress made on a few small things. The Committee has
5 put forward a new COLA proposal for a fourth -- what's called
6 the fourth year of the contract, has asked, in every session,
7 in every day, if they were going to respond to the district's
8 -- the School Committee's last COLA proposal before the strike
9 and have not received anything.
10 So to answer your question, it's really difficult to come
11 to agreement on things that have money and dollars attached to
12 them when you're not talking about it together.
13 THE COURT: Okay. I have my first observation on -- even
14 though I'm not expert on this, comprehensiveness is good,
15 package negotiating is good but that's --
16 MS. HOULE: I -- I --
17 THE COURT: -- that's besides the point I'm -- okay,
18 you're about to agree with me, that's great. What's your --
19 MS. HOULE: No, I'm not, actually.
20 THE COURT: Oh, you're not.
21 MS. HOULE: It depends. Certainly package proposals are a
22 tool that is sometimes used at the table, but actually, what is
23 part of the unfair labor practice charge we have pending
24 alleging bad faith was that the School Committee, months ago,
25 last summer, were insisting on these -- you know, not moving

1 off of the package things. And the union was trying to get
 2 agreements on single things, and they just kept insisting on,
 3 like, this all package or nothing.
 4 And so if it's used in a way that is actually stymieing
 5 productive back-and-forth at the table, then it is a problem.
 6 And as I said, that's something that we've raised and something
 7 that -- I have people here, so I don't want to talk too
 8 specifically, I haven't been at the table this week, but, you
 9 know, it can be a problem. So just saying --
 10 THE COURT: Okay, that's fair enough.
 11 MS. HOULE: Yup.
 12 THE COURT: That's fair enough.
 13 MS. HOULE: Thank you.
 14 THE COURT: I'll stick with my observation, but I
 15 understand there might be exceptions to that. Okay. You know,
 16 I really hesitate -- I question the value of getting too much
 17 into the details, because I think to the extent I am to -- I
 18 want to ensure compliance with the order, including the good-
 19 faith negotiating aspect, I think it's got to be pretty high-
 20 level. It makes no sense whatsoever to go proposal-by-
 21 proposal.
 22 I guess what I'm interested in and I perceive from the
 23 affidavits, well, we're there, we're negotiating, but I would
 24 like a little more. You just -- you started to give me a
 25 little more insight. I guess what I'd like is a little more

1 information to sort of show maybe the scope of discussions, how
 2 -- if there's 20 topics, you know, 11 have specifically been
 3 negotiated in the last five days or whatever it might be,
 4 something that might be helpful to sort of flesh that out.
 5 And then I'm going to ask you -- I've decided not to do
 6 this by way of witness and cross examination. I just want to
 7 hear from each side.
 8 MS. HOULE: Sure.
 9 THE COURT: And so could I ask for a little more insight
 10 -- it's fine with me, especially since one of your counsel is
 11 in the negotiations, I can just rely on counsel's
 12 representations, because they're going to be tested only
 13 because the union's going to tell me if they think it's not
 14 accurate.
 15 MS. HOULE: If I can just have a procedural and a
 16 clarifying question. Is there a Nolan affidavit besides the
 17 one you handed to me and Richard this morning?
 18 MS. GRADY: Yes, we just e-filed the one at 2:18. We were
 19 able to only get one printed copy --
 20 MS. HOULE: Okay.
 21 MS. GRADY: -- for ourselves. Sorry.
 22 MS. HOULE: Can I --
 23 MS. GRADY: I can pass it over, yeah.
 24 MS. HOULE: I'm at a little bit of a disadvantage because
 25 I don't have a hard copy.

1 MS. GRADY: Sorry. Yup.
 2 MS. HOULE: Thank you so much. I appreciate it. Also,
 3 Your Honor, since we do have some members of the bargaining
 4 team, can I ask one of them to come up and sit at the table
 5 with us in case I need clarification on something?
 6 THE COURT: Sure.
 7 MS. HOULE: All right. Thank you.
 8 THE COURT: A representative of each party -- well, even
 9 though you're an attorney, but every -- I'll consider a
 10 representative of each party to fill in the lawyers, so --
 11 MS. GRADY: Thank you, Your Honor.
 12 THE COURT: Can I get -- I guess I don't need to get an
 13 agreement, but I'm going to proceed by representations of the
 14 lawyers to describe generally the last, you know, week of
 15 negotiations, because I'm gauging compliance with an order in a
 16 relatively general way. Is it okay if we rely on the lawyers
 17 telling me instead of calling witnesses and the like, which I
 18 don't think is really what the legislature had in mind? Is
 19 that okay with you all? Plaintiff?
 20 MS. KANTANY: I am agreeable to that, but I do want to
 21 make clear that this is a complaint against the Newton Teachers
 22 Association. I think they're clearly in contempt of the court
 23 order, whereas the issue of bargaining in good faith, I don't
 24 think you're going to be obtaining any clear or convincing
 25 evidence of that.

1 THE COURT: Okay. That's a fair observation, and if I
 2 were in your shoes, I'd say it over and over, too, but I --
 3 that's why I tried to end this morning by saying that is true,
 4 that is the context we're here. The reason I'm doing this
 5 exercise is because the order that you all asked me to sign
 6 last week included the last three paragraphs requiring good-
 7 faith negotiating of each party, and therefore, in deciding
 8 whether to continue sanctioning on the first three paragraphs,
 9 I've decided it makes sense to gauge compliance with the
 10 overall order. So that's why we're here, but I understand what
 11 you just said.
 12 All right. So I'm happy to hear, with sort of a general
 13 chronology, to explain that, indeed, good-faith negotiation has
 14 been going on from the city's perspective.
 15 MS. GRADY: Sure. Would you like me to start from when
 16 your order came out or --
 17 THE COURT: Sure.
 18 MS. GRADY: -- pre-dating that? Okay. Parties were
 19 already in mediation for several months. There were some
 20 handful of tentative agreements that were reached before the
 21 parties went into mediation, so I just wanted to put that out
 22 there, that were almost all exclusively the union's proposals.
 23 When they reached a point that -- our counsel filed a 9A
 24 petition to get a mediator because we felt that we were at
 25 impasse, and that was granted, and we've been looking for a

1 mediator.

2 Things weren't moving. They were starting to move a

3 little bit. We were close on a few issues, then the strike

4 happened. Since Friday, I believe at least one -- two

5 tentative agreements -- that's what they're called until

6 everything's ratified; it's tentative on all of it being agreed

7 upon at some point -- have been reached between the parties on

8 two issues that the parties were -- had been close on. They

9 were able to close that deal.

10 There's been significant progress on this one proposal

11 that is too hard to get in the weeds on, but it's called the

12 time and learning proposal, and the parties have sat down and

13 made a lot of headway on that.

14 There had been some perceived headway on a different

15 proposal, parental leave, which has financial implications, and

16 another one about hours. There's been a little bit of back-

17 and-forth, but they kind of stalled yesterday.

18 There's been -- other than the School Committee putting

19 out -- revising its prior standing COLA offer, which had not

20 been responded to for the last one or two times it proposed,

21 and a proposal on health care, health insurance, as of -- as I

22 know, as of now has still not been responded to by the NTA,

23 despite multiple requests.

24 I do understand, and it's in Dr. Nolan's affidavit today

25 while we were here, the parties did -- there was a request and

1 salaries and COLA. Is that just at an impasse, we've got

2 these --

3 MS. GRADY: Well --

4 THE COURT: -- two sides and --

5 MS. GRADY: No, the district put out the last --

6 THE COURT: -- and that hasn't been discussed?

7 MS. GRADY: The district put out what's called a fourth

8 years, so they've revised their last -- despite asking for

9 weeks for a response to their COLAs here, our COLAs here, then

10 our COLAs here, then our COLAs here, at least from December,

11 they haven't responded, haven't responded. We then changed it

12 again -- two days ago? I don't know what day it is anymore.

13 Two days ago, three days ago, and it has not -- we thought that

14 was a significant problem. I believe the NTA reported they

15 felt like it was progress that day because of that and some

16 other things, has not been responded to.

17 THE COURT: Okay.

18 MS. GRADY: Thanks.

19 THE COURT: Thank you. I might ask more later, but what's

20 the union's perspective -- I'm sorry, you should introduce your

21 representative who joined us at the table.

22 MS. HOULE: Yes, Your Honor. If you just want to stand up

23 for a second.

24 MR. RUBIN: Sure.

25 MS. HOULE: This is -- introduce yourself?

1 I thought maybe they were sitting down in a smaller group to

2 discuss some impasse on one of the parental leave -- on the

3 parental leave proposal, but there was a document handed over

4 by the NTA that said we're not going to talk about anything

5 else until you agree to these three or four things that we put

6 on the table yesterday, which were responded to, but the

7 responses weren't well-received.

8 We've been meeting every day for 12 to 14 hours, Friday,

9 Saturday, Sunday, Monday, Tuesday, Wednesday, Thursday.

10 Fourteen hours may not be when we were meeting, but that's the

11 amount of time I would say that the School Committee and its

12 team has been in this negotiation process, meeting in the same

13 building with the NTA, some -- initially with face-to-face and

14 with a mediator. And I would also say they've also been doing

15 that as well.

16 THE COURT: Okay. I think we should all agree, when it

17 comes to the logistics like the number of hours involved, the

18 time spent developing a response is just as important as the

19 time spent at the table, so I'm not going to get into those

20 weeds.

21 MS. GRADY: Correct.

22 THE COURT: All right. I might ask more later, but --

23 MS. GRADY: Sure.

24 THE COURT: Well, I'm sorry, one more question. So that

25 -- the sort of glaring omission is those big-ticket items about

1 MR. RUBIN: Hi, I'm Dan Rubin. I'm director of School

2 Counseling at Newton South High School.

3 THE COURT: Nice to meet you. Thanks for being here.

4 MR. RUBIN: Thank you.

5 MS. HOULE: He's a member of the union's bargaining team.

6 We also have another union member and the recording secretary

7 here, so if I mess up, they're going to tell me and we can get

8 the correct information to you.

9 So as I've said, there's been some frustration, because

10 there's -- the union's had proposals out there for a while that

11 we believe have not been countered. So on Friday last week,

12 they were expecting the School Committee to come in with some

13 counterproposals, and they did not. They wanted to come in and

14 do some sort of presentation on market comparisons or something

15 like that, and the union was like, no, we need your proposals.

16 Saturday, you know, we've talked about this time and

17 learning that we feel has kind of bogged down the process here.

18 You know, the union shows up ready to negotiate. The mediator

19 comes in and says, oh the School Committee's working on their

20 time and learning proposal. It wasn't until about 4:00 p.m., I

21 believe, that they came in with, like, scribbled charts and no

22 actual contract language, which is really where the, you know,

23 the rubber hits the road.

24 And it was pretty much almost the end of the day before

25 they actually got a copy of their newest counter from the

1 School Committee with something that's been a problem through
2 the entire bargaining process even pre-dating that, without
3 tracking the changes they made, which then makes it very
4 difficult, on a document that is, I think, eight pages long or
5 something for the union to know what changes were made.

6 So the union then had to spend Sunday, almost four hours,
7 trying to figure that out and provide a fully-marked-up counter
8 to the School Committee, expecting, while they were doing that
9 work on the side, as you said, that's very important work, that
10 the School Committee would be doing other important work on
11 other proposals. But we didn't get any other counters from the
12 School Committee, including non-outstanding, non-monetary
13 issues.

14 So let's see here. We get to Monday and trying to sort of
15 make a more efficient process. The union coalesced all their
16 outstanding proposals into a Memorandum of Agreement form,
17 which is usually often the final form that these things take
18 when the parties reach agreement in their contract
19 negotiations, and they provided that. They waited all day, and
20 all they received back was a counter on the School Committee's
21 time and learning proposal.

22 Tuesday again -- so that was Monday. Tuesday again, union
23 is waiting to hear their counter. There was some, I think,
24 kerfuffle at the actual negotiations, but again, it's just been
25 kind of bogged down in that. It wasn't until Wednesday that I

1 think they got a little bit of movement on the parental-leave
2 issue.

3 But the NTA has come into this, they want face-to-face
4 bargaining. They were told by the mediator that the School
5 Committee had been saying since Saturday they didn't want to
6 meet face-to-face, even though that didn't actually stop
7 happening until Tuesday.

8 They're trying to move single proposals. The School
9 Committee is insisting on packaging things. The union's coming
10 in with their clear objectives. They're not getting such
11 things from the School Committee.

12 The union is providing information requests so they can
13 make informed decisions in terms of their counters and are not
14 getting responses. And they are, as quickly as they can,
15 turning around counter-proposals when they get something from
16 the School Committee that the School Committee is taking a lot
17 of time, which, you know, under normal circumstances, maybe,
18 you know, six months ago, that wouldn't have been a problem.
19 If we're trying to get the parties, you know, to an agreement
20 and the kids back in school on Monday, I think we need to be a
21 little bit more nimble and to move a little bit more quickly.

22 So if the union is working on a counter on one issue,
23 they're expecting the School Committee to come back with
24 counters on other issues and not just to wait on the time and
25 learning component.

1 And I ran out of time, so I didn't get to Thursday, but I
2 think -- I suspect it's more of the same.

3 THE COURT: So this Memorandum of Agreement that you
4 describe is sort of like a -- it's not nearly as detailed as an
5 eventual collective bargaining agreement, but does it --

6 MS. HOULE: No, actually --

7 THE COURT: -- but does it cover every single --

8 MS. HOULE: Yes.

9 THE COURT: -- one of the topics?

10 MS. HOULE: Yes, Your Honor. You've indicated you've
11 looked at the Newton Public Schools website. If you look at
12 the Newton Teachers Association website, they have all the
13 proposals and counter-proposals dated and up on their website.
14 And so (indiscernible at 3:09:15 -- away from microphone)
15 either of the 19 -- or the 21st, maybe it was, when the union
16 put in all their proposals into an MOA form, because that is
17 the form that a final agreement will take. And then once
18 that's signed, then the parties sort of coalesce the contract
19 and put all the changes into the actual contract itself.

20 THE COURT: All right. A precise answer isn't really
21 necessary -- or agreement between the parties isn't really
22 necessary, but how many topics are there that are under
23 negotiation? Is it like a dozen or is it two dozen or is it a
24 hundred?

25 MS. HOULE: If I may, it's quite a few. Stand up.

1 MR. RUBIN: I believe that at this point in time, it's
2 either 11 or 12 remaining specific items that are in the list
3 of proposals in the memorandum.

4 THE COURT: I see. Okay.

5 MS. HOULE: Your Honor, if I --

6 THE COURT: So your Memorandum of Agreement would capture
7 all of that in one place?

8 MS. HOULE: Correct. For example, not just parental
9 leave. We have Unit C, which is the instructional aides,
10 hours, elementary prep time, sub-coverage in pay, class size,
11 FMLA leave for relatives, years -- start of years, self-
12 directed time. There's, like, what actually happens when
13 school starts up in the beginning. Volunteering. There's some
14 dispute it's a non-monetary issue.

15 Obviously the COLAs, the step increases, what we call
16 longevity, which is sort of a -- kind of a bonus for a number
17 of years. The time and learning agreement that the School
18 Committee's proposal -- also, if you follow the news at all,
19 social workers are very important in these days to get into the
20 buildings to support the schools and the educator, students and
21 the educators that are working with them. So those are some of
22 the outstanding issues that Mr. Rubin was referring to.

23 THE COURT: Okay. Anything further you want to say about
24 good-faith negotiating?

25 MS. GRADY: No, Your Honor. I would just -- just two

1 quick points, so yes. One is that I think they did a good job
2 at summarizing a lot of the outstanding issues. I think that
3 almost all of them are either level of services or managerial
4 rights, which aren't required to -- mandatory, but they also,
5 more importantly, all involve money, and so I think that's a
6 big piece. I think there has been headway and back-and-forth
7 on some of the other -- I guess you could call -- everything
8 has a dollar sign attached to it in some way, but in some non-
9 monetary way.

10 I'll also say that the School Committee has been meeting
11 -- the School Committee's negotiating team, because it's only
12 three, four members of the School Committee, with the team that
13 consists of about 14 people. Every time we meet with the NTA,
14 there's a hundred new people or fifty new people, and so it
15 does get a little bit -- I think might interfere with the
16 timing of things. They're significantly large, and there's
17 different people all the time, but our team has been showing up
18 every day trying to get this done.

19 I don't think that it's fruitful to point fingers. I
20 don't think that we would take the position, argue that either
21 party is bargaining in bad faith. I think there's just
22 disagreement on some real big issues, and people are working
23 hard to try to get them done.

24 THE COURT: All right. Well, at least for today, I'm
25 going to turn back to the issue of compliance with the law. I

1 don't have a strong view as to whether either side is being
2 more fair than the other or not, but I think that to go any
3 further than demanding that people are, you know, making
4 responses and at the table would be getting into the details in
5 a way that I'm quite sure it's not my job.

6 So I'm going to return to the -- to what we started with
7 earlier in the week. The plaintiff says there's a law that
8 says you can't strike. On Monday, they asked for sanctions
9 because that's the only way anybody has presented as how we --
10 how the courts get involved to ensure compliance with the law.

11 I had an idea on Monday that I thought was a logical one.
12 As I expressed this morning, I'm concerned that it interferes
13 with collective bargaining in a way that wasn't intended by the
14 legislature, but I find that I -- I'm not going to find that
15 there's not good-faith negotiating, and I'm not going to delve
16 into it very deeply, because I would quickly start determining
17 who was in better faith as opposed to somebody being, you know,
18 not in good faith.

19 So we'll return to the more mundane issue of sanctions.
20 We talked about it this morning. I'm not going to continue
21 accelerating the sanctions as I suggested I was on Monday for
22 all the reasons I talked about this morning. So -- and I'm
23 inclined to just make it focused on whether school is in
24 session Monday or not rather than do it for each day, which
25 isn't really a business day, because I'm viewing business days

1 as school.

2 So I'll just hear from the parties again, trying to take
3 into account everything you've heard from me about my concerns
4 about what the role of the Court should be on what the next
5 steps should be, which means as of today, I'm not going to say
6 that either side's not negotiating in good faith. That should
7 remain on the table if -- I hope this doesn't last until next
8 week, but if it does, then any time someone continues to
9 solicit -- ask for coercive fines, any time that the city
10 continues to want coercive fines, you are welcome to explain to
11 me the prerequisite of, good-faith negotiating is not being
12 met. As of today I'm not ready to say that, but that's on the
13 table, because it's all in order.

14 Okay. But for today, I'm going to move on to coercive
15 fines, and I know we talked about it this morning, but what --
16 based on everything you've heard from me, what's your -- what's
17 the plaintiff's current view on the right answer?

18 MS. KANTANY: I think I expressed my concern before was
19 that the Newton Teachers Association has a large amount of
20 money, and I think the coercive fines have not worked because
21 of that. We did discuss getting the information about how much
22 donations they've received. I would like to hear that number
23 to figure out their ability to pay and how that's affecting the
24 effectiveness of the coercive fines, because at least from the
25 public statements from the president, it's not having an

1 effect, because they are receiving so many donations. So
2 that's what we're hearing.

3 So unless there's some other information we're missing,
4 they're saying they can afford it, and that's why it's not
5 working. That's why we've asked for at least a \$400,000 fine
6 starting for the -- if the strike continues on Monday.

7 THE COURT: Okay.

8 MS. KANTANY: Ahh --

9 THE COURT: Oh, I'm sorry, go ahead.

10 MS. KANTANY: You know, I think Your Honor has rightly
11 identified the problems with these fines and with trying to
12 continue bargaining. You know, we're not asking -- we want
13 bargaining to continue, but we also want the strike to stop.
14 And I think the legislature was aware that there are other
15 avenues, such as jailing teachers, which we're not looking for
16 here, but that would stop the bargaining. So the legislature
17 is aware of the scheme.

18 And so we're just asking for coercive prospective fines
19 that ensure them -- that are meaningful towards the Newton
20 Teachers Association, and a lower fine is not going to be
21 meaningful to them if they have the funds to pay it and all the
22 other factors that are in the Fall River decision.

23 THE COURT: Okay. As far as that factor of financial
24 resources, I'll take whatever information you would like to
25 tell me, because you asked earlier, I don't know if you want to

1 hear them. I'll hear whatever information you want to provide.
2 I don't know it'll make a difference, but --
3 MS. KANTANY: I don't know how --
4 THE COURT: -- you seem to have some information.
5 MS. KANTANY: I don't know how much money they've received
6 in donations. I --
7 THE COURT: Oh.
8 MS. KANTANY: I believe Attorney Houle has indicated that
9 she may seek that information. I'm not sure if she was able
10 to, but if she has it, I certainly think it's relevant to Your
11 Honor's consideration.
12 THE COURT: All right. Attorney Houle --
13 MS. GRADY: Oh, sorry. Briefly, Your Honor --
14 THE COURT: I know we're -- I know we're --
15 MS. GRADY: Sorry, just --
16 THE COURT: -- yeah, I'm sorry --
17 MS. GRADY: Sorry, I apologize, just --
18 THE COURT: Yeah, by all means, go ahead.
19 MS. GRADY: I just wanted to add a few points to Board
20 counsel. I apologize. We do (indiscernible at 3:18:39) concur
21 with the majority of the points, but we just sort of want to
22 emphasize a few more, that in the Committee's viewpoint, and
23 again, just sort of as discussed by CERB counsel, the current
24 structure isn't coercing compliance with the law or your order.
25 We need something further, and I know we discussed this in the

1 hearing this morning, but something does need to account for
2 today, because children are out of school today. There is a
3 strike today.
4 So if it means that the fines bundle from today through
5 Sunday and accrue so that Sunday there are fines basically that
6 represent Friday through Sunday, being on strike, encouraging,
7 condoning that strike, I think that is something that the
8 Committee would encourage that you look into proceeding with.
9 And again, just emphasizing that this bargaining can take
10 place without a strike. You know the School Committee has, you
11 know, its core team. The union has its core team. The
12 remainder of the individuals that are out, you know, can be in
13 the buildings, in the school with our children and help
14 accomplish this. I know just in the few hours since we had the
15 last hearing, at least on the Committee's side, it is certainly
16 looking into and considering other sort of creative options
17 that, you know, if mediation is not leading anywhere, what
18 further can sort of be done here.
19 And I think just lastly, and I know we speak to the
20 character and magnitude of the harm under the Fall River and
21 United Mineworkers test, children are not in school. They need
22 to be in school. It is a safe haven for them. They have a
23 right to an education, and it is extraordinarily important that
24 we coerce compliance for their best interest. Thank you.
25 THE COURT: Okay. Attorney Houle?

1 MS. HOULE: Yes, Your Honor, thank you. I'm glad Fall
2 River came up again, because I think at the end of the day, we
3 are grounded in that case, for better or worse. As I indicated
4 earlier, I think that the pause today and through the weekend
5 is critically important to the parties to be able to make
6 meaningful progress, to not have the -- I know you have not --
7 absolutely not accused the School Committee of it, but the NTA
8 is concerned that they have this motivation just to fold their
9 arms, sit back and try to break the union with these fines, so
10 give them a little bit of a breather and some equal footing
11 over the weekend, since school is not in session.
12 I think today, you know, is a wash. Let's -- Friday,
13 Saturday, Sunday, I'd consider that sort of part of a package
14 weekend thing. I understand you're going to set a deadline for
15 Sunday evening.
16 When we're talking about what that fine should be, you
17 know, again, you're hearing about the harm from the School
18 Committee. I can quibble with that. I think it's overstated.
19 It's temporary. There are ways to make up this time. You've
20 already expressed your views on the effectiveness of the fines.
21 I'll come back to financial resources and just want to,
22 before I do that, reiterate that the last factor is the
23 seriousness of the burden on the union, and that goes to what
24 we've been talking about all day in terms of bad faith and the
25 motivation of the School Committee to actually come to these

1 negotiations with urgency. But when we're looking at the
2 financial resources, we still have to be concerned that we're
3 not entering sort of the punitive level.
4 And I just keep hearing union's got all this money,
5 union's got all this money, but as we said when we were here on
6 Monday, it's not that simple, right. There might be what you
7 saw as cash on hand and any investments, but we already
8 articulated why over 50,000 of that investment account really
9 can't be touched, because it's not the union's money; it's for
10 a scholarship fund that it administers on behalf of a family.
11 And the dues that are owed, over a million in dues, of
12 affiliate dues to the MTA and the NEA that the NTA owes between
13 now and the end of the school year, and that is something that
14 the case that the SJC has said, you know, you back out, that's
15 not considered, you know -- that needs to be taken into
16 consideration by Your Honor and in determining the
17 reasonableness of its fines.
18 If -- you know, actually, for what the NTA brings in,
19 their projected dues for this year are four hundred -- just
20 over 430,000. It's not these millions of dollars that the CERB
21 seems to be portraying the NTA as having. And so, you know, I
22 think we need to keep that in mind when you are setting, you
23 know, potential fines moving forward. It would be hard-pressed
24 for me to say what that number would be. I think it should
25 wait until Sunday to be effective.

1 I appreciate and agree with, the continuing escalation
2 that you had set for this week would not be what we would
3 suggest moving forward. I think 400,000 is -- at this point,
4 400,000 plus what they owe for this week, the treasury is
5 empty.

6 They're going to hold a bake sale. I don't know how many
7 hundreds of thousands of dollars that's going to do. They have
8 a donation button on their website. It's not going to raise
9 millions of dollars. I believe when we talked to the treasurer
10 last night, it was about \$60,000, but it's not -- you know,
11 you'd always get sort of this flurry at the beginning and
12 that's usually it, and it's not certainly going to cover
13 millions of dollars of fines for the NTA.

14 So our request is that, as you indicated, you know, was a
15 possibility, give them the breather, deadline, you know, for
16 Sunday night and then a fine level that's not going to, you
17 know, basically break the union. Thank you.

18 THE COURT: All right. So on that, you mentioned the
19 concept of punitive. I think I've created a pretty good track
20 record to ensure that whatever I do is not punitive. They're
21 coercive, because the idea is to obtain compliance with the
22 law. And by starting modestly, in my view, and increasing more
23 dramatically than other judges have in the past, the idea is,
24 you prove that they remain coercive and necessary.

25 So the reason they're not punitive is because they're

1 coercive and they haven't worked, so that's why they would
2 escalate.

3 MS. HOULE: I understand --

4 THE COURT: I've already expressed my --

5 MS. HOULE: -- and appreciate your position, Your Honor.
6 I think that what I'm -- what I am urging is that we keep that
7 in mind, because at some point they could become punitive.

8 THE COURT: Okay. My frustration with the way the law
9 sets up is that the legislature, as it maintained the strike
10 ban, made comments about appreciating the futility of the
11 strike ban. It's really remarkable to see things that were
12 said in 1967, "Recent experience have shown the futility of the
13 strike ban. Where the penalty is a fine, it is readily paid,
14 in most instances, with a serious drain -- without a serious
15 drain on the union treasury. Union leaders have served prison
16 sentences and emerged heroes. Loss of jobs as a penalty is
17 impractical, because no large city can replace thousands of
18 workers at once."

19 So they knew it didn't -- the legislature knew it didn't
20 really work, decided we had to maintain it because of public
21 safety issues, principally. And my concern -- they're welcome
22 to do whatever they want, but my concern is, then they didn't
23 create the remedy. So all the remedy is, is this blunt
24 instrument of coercive fines, which I've suggested ad nauseum
25 today runs into the concept of promoting effective collective

1 bargaining.

2 Okay. So -- but I do think the law is the law, and I'm
3 going to continue with a coercive fine, and I'm only going to
4 make it applicable on Sunday at 8:00 p.m. And just to be
5 clear, the current coercive fines stand at \$375,000. Those
6 remain in place. We'll have to deal some other day with
7 exactly who collects those on behalf of the Commonwealth, but
8 I'm guessing somebody in this room knows, but I don't.

9 And in the absence of the end to the strike announced at
10 8:00 p.m. Sunday, a continued coercive fine of \$50,000 will be
11 issued. As to whether they'll continue next week, I anticipate
12 they will, and they'll remain 50 per day unless either of you
13 want to come and the plaintiff can ask for more. I'll expect
14 that if that happens, you'll be making an argument that there's
15 not good-faith negotiating on the other side. Or you can say
16 there shouldn't be any more, because you can go back to our
17 discussion earlier and say that over the weekend, something has
18 been amiss and there hasn't been good-faith negotiating.

19 I appreciate that that is markedly different than the path
20 I set on Monday, but I've tried to balance all aspects of the
21 statute, and that's what I'll do. I really hope that the
22 parties get serious about solving all of the provisions that
23 are subject to negotiation.

24 And my only observation, hearing from both sides about
25 what's been happening so far, is -- I've never done labor

1 negotiations, but I used to do plenty of negotiations, like
2 lots of lawyers do, and the concept of responding to everything
3 in a package or something close to that seems to me an
4 important aspect of making progress, but it's not really my
5 expertise.

6 I hope everyone has success over the weekend. That'll be
7 my order. I'm just going to hand-write it at the bottom of the
8 Monday order, continuing the dates, Sunday night being the next
9 one.

10 MS. KANTANY: Your Honor, just so I understand, it's
11 50,000 --

12 THE CLERK: You have to stand up.

13 MS. KANTANY: -- each day --

14 THE COURT OFFICER: Stand for the Court, please.

15 THE CLERK: Stand up.

16 MS. KANTANY: Oh, I'm so sorry.

17 THE COURT OFFICER: Thank you.

18 MS. KANTANY: It's 50,000 each day next week, hopefully
19 not continuing past Monday, but I just want to make sure I
20 understand the order.

21 THE COURT: I was going to go one day at a time, but why
22 don't I -- listen, I'm going to go one day at a time, because I
23 really hope that this does not continue into another week. And
24 I'll consider anew the concept that these fines need to be
25 more, but for the moment, I'm slowing down. So it's 50 for

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1 that day, and I'll tell you what, the plaintiff can just let me
 2 know what I presume I'll be able to read, that the strike
 3 continues on Monday, and I will just -- unless I get a motion
 4 from either side, I'll continue with another 50 on Monday. But
 5 I'm going to take it one day at a time in case I perceive
 6 something is amiss about the other parts of the order or you
 7 all want to call that to my attention.
 8 MS. KANTANY: Okay. Thank you, Your Honor.
 9 THE COURT: Okay.
 10 MS. HOULE: Thank you, Your Honor.
 11 THE COURT: Thank you.
 12 MR. MULLANE: Thank you, Your Honor.
 13 (Case concluded at 3:29 p.m.)
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 Newton Teachers Assn
 and Michael Zilles
 JUDGE: RECORDING DATE TRANSCRIPT I OF I
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