STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case Nos. 03-13 and 04-03
Issued: April 21, 2004

AFSCME COUNCIL 93,

Complainant,

v.

STATE OF MAINE, DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES,

Respondent.

AFSCME COUNCIL 93,

Complainant,

v.

GOVERNOR JOHN ELIAS BALDACCI AND THE STATE OF MAINE,

Respondents.

DECISION AND ORDER

This matter comes before the Maine Labor Relations Board by way of two prohibited practice complaints filed by AFSCME Council 93 against the State of Maine. AFSCME is the certified bargaining agent for the Institutional Services unit. The first complaint, filed on March 27, 2003, (Case No. 03-13), alleges that the State of Maine failed to negotiate in good faith, thereby violating 26 M.R.S.A. §979-C(1)(E) and (A). At issue is the State's action in proposing legislation and in taking the position at the bargaining table to freeze all merit increases, including the advancement to a new pay step created in the collective bargaining agreement then in effect with AFSCME.
The second prohibited practice complaint, filed on July 7, 2003,

(Case No. 04-03), alleges essentially the same actions as the basis for a bad faith bargaining charge and also alleges further actions taken by the State regarding the continuation of certain benefits post expiration that AFSCME asserts are evidence of continued bad faith bargaining.

In our Interim Order dated September 29, 2003, we rejected the State's Motion to Dismiss the second complaint (No. 04-03) and granted AFSCME's request to consolidate the two cases. For reasons fully described in our Interim Order, we ordered that the consolidated matter be adjudicated based on the No. 03-13 complaint (with exhibits) and response, the State's written argument in No. 03-13, and evidence to be presented at the hearing on three specific paragraphs of complaint No. 04-03. Those three matters were the background on how step 7 came into existence, evidence of the State's termination of the 2002-2003 collective bargaining agreement, and evidence of the State's position on continuing certain benefits after the expiration of the collective bargaining agreement.

The evidentiary hearing was held on January 7, 2004. Chair Pamela Chute presided over the hearing, with Employer Representative Karl Dornish, and Employee Representative Carol Gilmore. Mr. Stephen Sunenblick represented AFSCME, and Ms. Joyce Oreskovich represented the State. The parties were given full opportunity to examine and cross-examine witnesses, and to introduce documentary evidence consistent with the subject-matter restrictions set forth in the Interim Order. Briefs were filed by both parties, the last of which was received on February 24, 2004. The Board deliberated this matter on March 18, 2004.

JURISDICTION

AFSCME is the bargaining agent within the meaning of 26 M.R.S.A. §979-H(2) for a bargaining unit of state employees. The State is the public employer as defined in 26 M.R.S.A. §979-A(5). The jurisdiction of the Maine Labor Relations Board to hear this case and render a decision lies in 26 M.R.S.A. §979-H.

FINDINGS OF FACT

Upon review of the entire record, the Board makes the following findings:

I. Background on How Step 7 Came into Existence

1. In February of 2001, AFSCME and the State began negotiations for a successor contract to the collective bargaining agreement set to expire on June 30, 2001. Edward Willey was the chief negotiator for AFSCME. Kenneth Walo, the Director of the Bureau of Employee Relations, represented the State. Tom Whitney, the International Representative for AFSCME, attended some of the negotiating sessions.
2. Two tentative agreements were reached prior to the June 2001 expiration date, but both failed to be ratified by AFSCME members. The parties continued negotiating. Sometime after the two tentative agreements had been rejected by the AFSCME members, Mr. Walo informed AFSCME that the State had reached the limit of what it could do in terms of general salary increases and other types of benefit increases having a cost, and that the only viable approach was to look at market pay.
3. The State conducted a market pay analysis throughout State government during 2001 in various forms. Viewing the market in this manner was new to negotiations. Although the State had always looked to what other employers paid, the State

never focused on comparability in terms of the State's job classifications versus the same classifications at other employers in Maine. For the five MSEA units (representing most State employees), the wage study group worked with a consultant to look at pay and benefits in the state labor market. The parties agreed to address positions that were not within a specified percentage of the market level. As a result, upward adjustments were made for a number of classifications by reallocating them to higher pay grades. This was referred to as a market pay adjustment. With the Maine State Troopers Association and the MSEA Law Enforcement Unit, the State ended up providing what was called an "availability stipend." It was a market pay adjustment of a certain amount per hour for availability, because unlike most law enforcement people in Maine, the State's law enforcement personnel were required to be available over a 24-hour period.

4. In late August, 2001, AFSCME and the State agreed to share the costs of hiring the same consultants that had been used for compiling market data for the other State employee groups. The joint Wage Study Committee decided to look at data from New Hampshire and Vermont as well, because there was very little data within Maine to analyze, given the nature of the positions in the Institutional Services unit as mental health workers and corrections officers.
5. The consultants looked at wages for 15 aggregated job titles by minimum, maximum and average wage and benchmarked the average wage for 5-year employees in the three states.
6. The final draft of the consultants' report was dated September 25, 2001. The consultants concluded that there was not a great difference in salaries and benefits for the AFSCME positions versus other employers. For long-term

employees, however, the consultants identified a significant difference. Employees in these positions reached the maximum of their pay grade and were at a dead end after just five years of service. In contrast, the wage scales in New Hampshire and Vermont and some places within Maine had more steps for the long-term employee.

7. The minutes of the meetings of the Wage Study Committee and the negotiation sessions indicate that both sides considered an additional step to be an appropriate response to the findings of the wage study. The parties differed on the number, size and timing of the steps. The parties continued to negotiate with the assistance of a mediator.

8. In late October, the parties were on the verge of an agreement that included an additional step in the pay scale with the increase payable on the anniversary date after the satisfactory completion of two years of service at step 6. Members of the AFSCME team were concerned that some members would not get the step 7 increase before the expiration of the contract because their anniversary dates fell after June 30th. They were worried that step increases would not be awarded after that date if no contract was in place.

9. The AFSCME team asked Mr. Walo (through the mediator) to provide a written assurance that the step increases would continue after the expiration of the contract. Mr. Walo explained to the mediator that he could not commit to an agreement on increases after the expiration of the contract. He explained that the practice had been to continue paying step increases during productive negotiations and that the State had never frozen merit increases.

10. Mr. Walo also spoke on the phone with Mr. Whitney and explained that he could not make the assurance AFSCME wanted because he could not bind another legislative body with such

a guarantee. He said even if the agreement itself went beyond the two-year biennium, the subsequent Legislature would have to fund the third year. Mr. Walo explained that once the tentative agreement was ratified and the cost items approved by the Legislature, the added step would become part of the overall wage plan. The funding for step increases after the expiration of the contract would be submitted as part of the "current services" budget. As such, it would not be considered or treated as a new expense, like a final tentative agreement, but would simply be treated as on-going expenses in the personal services line of the budget.

11. Mr. Whitney reported back to the AFSCME team that he felt he had an assurance that legislation would be submitted to pay for merit increases beyond the expiration of the agreement. The AFSCME team approved the tentative agreement and it was ultimately ratified by the membership.

12. During this same time period, the State's Human Resources Department was looking at various job classifications from a different perspective. In 2000 and 2001 there had been a number of reclassifications of Corrections staff, moving them to higher pay grades. In 2001, the State agreed with AFSCME to take a look at the mental health field as well and ultimately ended up doing some reallocations of those jobs by agreement[1]. The agreement on these reallocations was initially made in the summer of 2001, but was not finally signed off on until the contract was ratified.

13. Merit increases must be provided in accordance with the

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[1]A reclassification looks at whether changes in the duties or responsibilities of a job justify a change in pay grade. A reallocation looks at pay equity, that is, whether the pay is equitable relative to other positions in state government.

civil service law which states that increases are not automatic but must be based on satisfactory job performance.

14. Janet Waldron, Commissioner of Administrative and Financial Services, testified before the Legislature's appropriations committee on January 9, 2002, regarding the funding of the AFSCME contract. Her testimony and the legislation refer to the additional step as a market pay adjustment.

II. The 2003 Negotiations: The Agreed-Upon Record for 03-13.

15. Edward Willey has been the State of Maine Coordinator for AFSCME Council 93 since January of 2000. In that capacity, Mr. Willey is the Chief Negotiator for the bargaining unit representing certain institutional services employees of the State of Maine. Tom Whitney is the AFSCME International Representative who participated in many of the negotiating sessions.

16. The collective bargaining agreement entered into by the parties on February 1, 2002, was set to expire on June 30, 2003. The process of negotiating a successor contract began on February 13, 2003, at which time the parties agreed upon ground rules and discussed general matters.

17. AFSCME's minutes of the February 13, 2003, session indicate that Ken Walo, the Director of the Bureau of Employee Relations, described the status of the budget as "not pretty." Mr. Walo stated that the projected budget was 1.1 billion short and that Governor Baldacci did not propose a tax increase. The Governor proposed to freeze merit increases and have no furlough days. Mr. Walo stated that the merit freeze alone would save 6 million dollars. The AFSCME minutes note:

> Ken stated that if there were a way to find other savings than the merit freezes, they would truly like to discuss any avenue. There is

> definitely a problem with the budget. Hopefully we can be creative. There was much discussion on the merit increase freeze which does include the new Step 7 created at the last negotiation session and in the contract [that] expires 6/30/03. Members who have an anniversary date after 7/1/03 will not receive their merit/step but members who have an anniversary date between 1/1/03 and 6/30/03 will receive their merit/step.
>
> Tom Whitney stated that if the message is carried back to the members that the negotiated Step 7 may not happen after 7/1/03, the members are going to be extremely upset.
>
> Ken stated that the legislature has the right to freeze money and as of 7/1/03 there will hopefully be a new contract. We have the ability to find money some place else.
>
> Tom asked for clarification of the merit increase savings. Ken stated that the savings would be $6 million for all state employees.

18. Negotiations proceeded as scheduled on February 19, March 10, March 11 and March 17, 2003.

19. At the February 19, 2003, negotiating session, Mr. Walo gave Mr. Willey a copy of the merit increase freeze language in Section D-22 of the Governor's budget (LD 1319) and a copy of the revised language that was being proposed as an amendment. AFSCME's minutes describe Mr. Walo's explanation of the provision:

> . . . The first paragraph prohibits merit increases and the second paragraph states that if money can be found elsewhere, they could be funded. The savings of the freezes is 1.7 in 2003/2004 and 4.4 in 2004/2005. The freeze is on all funds. . .

AFSCME's minutes also note that Mr. Willey stated that they were upset that the step 7 negotiated in the last contract was not going to be funded and that the step 7 was the only reason AFSCME members ratified that contract. Mr. Willey then provided a verbal review of the Union's position on

various articles of the contract under consideration.

20. The provisions establishing a step 7 that had been negotiated in the 2002-2003 collective bargaining agreement were contained in Article 10 of that agreement. Sections 10(F) and (G) provide:

> F. Effective January 1, 2003, a new step shall be added at the end of each salary grade that shall be three percent (3%) greater than the current highest step. Effective January 1, 2003, an employee who has been at Step six (6) of his/her current pay range for at least two (2) years shall be advanced to Step seven (7) on his/her next scheduled anniversary date, pursuant to Section G of this Article. Thereafter, an employee shall advance to Step seven (7) on his/her next scheduled anniversary date after completion of two (2) years of satisfactory service at Step six (6) of his/her current pay range.
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> G. Employees shall be advanced to the next higher step on the salary schedule upon satisfactory completion of each year of service.

21. At the March 10, 2003, negotiating session, Mr. Walo gave more information on the status of the budget. AFSCME's minutes report:

> Ken stated that the budget for 2003 through June 14 is 23 million in the hole. The state is in the hole 24 million for year 2004 and an additional 24 million for year 2005. . . . The Governor had to change his proposed package for 2003, 2004 and 2005. It is worse than the last time we negotiated. The budget deficit impacts all bargaining units. All agencies have been flat lined with their 2003 budget which means in 2003/2004, 2004/2005 they will have the same money to spend that they did in 2002/2003.

Negotiations continued on various proposals during the March 10 session. The merit freeze issue came up again, as

reported in AFSCME's minutes:

> Tom [Whitney] asked a question to Ken regarding the amendment to the Governor's budget regarding the merit freeze. Ken stated that it is in the budget. 6.1 million dollar savings in the general fund. Tom stated that it is very troubling that we negotiated a Step 7 and bargaining integrity is in question. We need to find a way to fund the last negotiated contract. We need to live up to that commitment. We struggled to put a contract together last time and now the state not honoring its commitment.
>
> Ken stated that there is a change piece in new language in D22 of the amendment that was added last minute. It gives us language to negotiate with agencies and unions to find money elsewhere to fund the merit increases.
>
> Ken further stated that we couldn't bind future legislative bodies. We can only fund for a period of time - contract expiration. Tom further stated that we need to live up to the commitment. Ken stated that you have the right to voice your opinion to the legislature.

22. At the March 11, 2003, negotiating session, discussions continued on various contract proposals made by AFSCME. Mr. Walo provided Mr. Willey with proposed language to insert as a new paragraph to Article 10(G) of the collective bargaining agreement[2]. That proposal stated:

> The State and Council #93 AFSCME acknowledge that LD ___ containing Section D22, which forbids the awarding of merit increases during the period from July 1, 2003 to June 30, 2005, is currently pending before the Legislature. The parties recognize that Article 10 Compensation Section F and G shall only be effective during the period July 1, 2003 to June 30, 2005 if LD ___ Section D22 is not enacted. Should LD ___ Section D22 be enacted into law, the parties recognize that Article 10 Compensation Section F and G

[2]The 03-13 complaint indicates this happened on March 10th, but the minutes say it happened on the 11th. The date is not relevant.

> shall only be effective for the period from July 1, 2003 to June 30, 2005 if the State and Council #93 AFSCME reach an agreement to achieve the same amount of Personal Services savings as specified in LD ___ Section D22 in some other manner.

The AFSCME minutes indicate that Mr. Walo stated that the budget bill de-appropriates the merit money but also includes the ability to find the money in other personal services savings. The AFSCME minutes go on to state:

> . . . Tom Whitney stated that you could have negotiated with us to take merits away. Ken responded that yes, this is mandatory subject of bargaining. D22 allows us to find money elsewhere if we can find the funds.
>
> Tom stated that we want to put everything out there. . . . We need to understand your position. Ken stated that the state's position has been very clear. There is no money in the budget for bargaining. . .
>
> . . .
>
> Tom stated that we represent workers who deserve salaries and you say we can't pay them because of the budget deficit. This team needs to go down to the appropriations committee and testify that D22 is not a good idea. Ken stated that he has to have knowledge that he can fund what is being proposed. . . Ken stated that our job is to bargain in good faith and fund the agreement.

23. At the March 17, 2003, negotiating session, Mr. Walo presented a rough estimate of the costs of the proposals made by AFSCME and reiterated that there were no funds available to address the Union's issues. Mr. Willey stated AFSCME's position that anyone who became eligible for step 7 on Jan. 1, 2003, should receive it. The AFSCME minutes reflect extensive discussions about the parties respective views on the appropriateness and legality of the merit freeze. The issue was not resolved.

III. Evidence of State’s Termination of Contract

24. Section D-22 was enacted and signed into law as part of the budget bill on March 27, 2003, with an effective date of July 1, 2003. PL 2003, c. 20. As enacted, it froze merit increases for all state employees, regardless of funding source, for both years of the biennium. On June 12, 2003, the enacted provision was amended in a supplemental budget bill so that merit increases were frozen only for the fiscal year 2003-2004. PL 2003, c. 451, Pt. M, §1. The final provision that went into effect on July 1, 2003 reads:

> Sec. D-22. Merit increases. Notwithstanding the Maine Revised Statutes, Title 26, section 979-D and any other provision of law, any merit increase, regardless of funding source, scheduled to be awarded between July 1, 2003 and June 30, 2004 to any person employed by the Executive Branch, departments of the constitutional officers and the Department of Audit may not be awarded, authorized or implemented. These savings may be replaced by other Personal Services savings by agreement of the State and the bargaining agents representing state employees.

25. Mr. Walo hand delivered the following letter to Jim Beaulieu at AFSCME’s office in Augusta on June 18, 2003.

> Re: Termination of Agreement between the State of Maine and American Federation of State, County, and Municipal Employees, Council 93, Institutional Services Unit
>
> Dear Ed and Jim:
>
> I am writing this letter because we have not yet been able to reach an agreement for a new contract, and the current contract is nearing its end date. Pursuant to Article 57 of the current AFSCME Council 93 contract, “Term of Agreement

Termination", this letter is to give you notice that the State of Maine will be terminating the 2002-2003 Agreement between AFSCME Council 93 and the State of Maine, effective June 30, 2003. Pursuant to law, static status quo will then apply.

Under the SELRA, 26 MRSA §979-R, contractual provisions regarding arbitration of disciplinary action continue after the contract terminates until the time we do agree to a new contract.

I hope that we will be able to agree to a new contract in the near future.

26. Article 57 of the collective bargaining agreement provides:

<u>Term of Agreement</u>
<u>Termination</u>

<u>Term of Agreement</u>

This Agreement shall be effective from February 1, 2002 through June 30, 2003, unless otherwise specifically provided herein.

<u>Termination</u>

Unless otherwise specifically provided for herein, this Agreement shall apply to those employees in the bargaining unit on the date of the signing of this Agreement and shall be effective as of February 1, 2002 and shall remain in full force and effect until the 30th day of June 2003. It shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing at least one hundred twenty (120) days prior to the anniversary date that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than ninety (90) days prior to the anniversary date; this Agreement shall remain in full force and be effective during the period of negotiations or until notice of termination of this Agreement is provided to the other party in the manner set forth in the following paragraph.

In the event that either party desires to

terminate this Agreement, written notice must be given to the other party not less than ten (10) days prior to the desired termination date which shall not be before the anniversary date set forth in the preceding paragraph.

In witness whereof, the parties hereto have set their hands this 1st day of February, 2002.

27. The State terminated the contract because of concerns that the State would be faced with impairment of contract claims if the contract continued to be effective past June 30, 2003. If the contract had been in effect on July 1, 2003, when the law freezing merit increases went into effect, the State felt that an argument could be made that the law was an unconstitutional impairment of an existing contract.

28. Since the Maine Law Court issued its decision in the COLT case,[3] the State has taken the position that it is not required to continue to pay merit increases after the expiration of a contract. The State's practice has been to obtain the bargaining agent's agreement to allow the State to continue paying merit increases after the expiration of the contract as long as negotiations are productive and the parties have not reached impasse. Mr. Willey and Mr. Walo signed such an agreement in 2001 when the negotiation for a new agreement continued after the expiration of the old contract.

IV. Evidence of the State's position on continuing certain benefits after the expiration of the collective bargaining agreement.

29. At the time Mr. Walo's letter of termination was presented, the AFSCME Reprentative Jim Beaulieu had a number of questions about which benefits would be continued. Mr. Walo

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[3] Board of Trustees of the Univ. of Maine System v. Associated COLT Staff, 659 A.2d 842 (1995).

sent a follow-up letter on June 20, 2003, providing greater detail on this matter. The letter stated:

> I met with you Wednesday June 18, 2003, and gave you a letter indicating that the state was terminating the AFSCME contract on June 30, 2003. I explained to you at that time that it was necessary for the state to terminate the contract on June 30 because the legislature previously took action to freeze merit increases, and that legislation is effective July 1. The State was concerned that if the AFSCME contract continued into July 1, there could be legal implications for the State, as the legislature's action could be argued to constitute an impairment of the AFSCME contract.
>
> This action taken by the state is not intended to result in any employee in the AFSCME bargaining unit losing benefits. The State remains committed to continuing employees' benefits, other than merit increases, since they are now prescribed and controlled by law, under the June 2002-June 2003 collective bargaining agreement, including, for example, sick leave, holidays, vacation accrual and leave, seniority rights, hiring practices, longevity bonuses, educational leave, call-in pay, etc.
>
> I have offered to meet with you to explain any concerns you may have and to discuss this action. We are presently scheduled to meet on June 27, and as I mentioned to you on June 18, I would be happy to discuss this further with you and your negotiating team at that time. I am also willing to meet with you any time before that date to discuss this issue.

30. Mr. Walo testified that he wanted to help Mr. Beaulieau be able to address the concerns of AFSCME members regarding which benefits would continue. He felt that putting it in a letter form would give Mr. Beaulieu something concrete to be able to show the members.
31. On June 27, 2003, Mr. Walo sent another letter to

Mr. Beaulieu with a subject heading line of "Processing of Grievances Post-Expiration of Contract." The letter and the enclosure stated:

> Let this serve as a follow-up to my June 20, 2003 letter to you regarding the continuation of rights and benefits for employees after the June 30, 2003 contract expiration date.
>
> In the absence of a contract governing our relations as of July 1, 2003, as it relates to those employee rights and benefits outlined in my June 20th letter, the State must also make a determination of how to handle the issue of the processing of grievances post-expiration of the 2002-2003 contract. By statute, the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect. However, in the interests of maintaining harmonious relations, we are offering to continue to process non-disciplinary grievances as well through arbitration.
>
> Because the issue of merit increases is now prescribed and controlled by law, this offer does not extend to the processing and consideration of any grievance that involves or implicates merit increase steps under Article 10, Compensation, Section F and G of the 2002-2003 collective bargaining agreement, reflecting the period from July 1, 2003 through June 30, 2004.
>
> Therefore, we have drafted the enclosed agreement for your consideration.
>
> MEMORANDUM OF AGREEMENT
>
> The State of Maine and the American Federation of State, County, and Municipal Employees, Council 93 hereby agree as follows for employees in the Institutional Services bargaining unit:
>
> > 1. Until such time as a successor collective bargaining agreement goes into effect for the Institutional Services bargaining unit, the State agrees to continue the processing of grievances through arbitration, with the

> exception of any grievance that involves or implicates merit increase steps under Article 10, Compensation, Section F and G of the 2002-2003 collective bargaining agreement, reflecting the period from July 1, 2003 through June 30, 2004.
>
> 2. This agreement is intended to further harmonious relationship between the parties during contract negotiations. It is not intended, nor shall it be construed, to establish precedent or to be an admission by either party as to the legal obligation of either party in the absence of such agreement.

32. No one representing AFSCME ever signed the Memorandum of Agreement that was enclosed with the June 27, 2003, letter.
33. Ultimately, after consulting with the Governor's staff, Mr. Walo decided that it was in the best interests of harmonious relationships to continue to allow all grievances, not just disciplinary grievances, to go to arbitration. An exception was made for grievances related to merit increases, as merit increases would be prescribed and controlled by public law as of July 1, 2003.

DISCUSSION

AFSCME argues that the express terms of the collective bargaining agreement remove the case from the reach of the Law Court's decision in COLT and require the State to continue payment of step increases beyond the expiration of the agreement. Furthermore, AFSCME contends that the express language of the collective bargaining agreement obligated the State to continue paying step increases and to seek funding for this purposes, and that the State's action in proposing and advocating for the merit freeze therefore demonstrates failure to negotiate in good faith. AFSCME also claims that the State attempted to negotiate a waiver

of the union's right to grieve the non-payment of steps after July 1, 2003, thereby breaching its duty to bargain in good faith in violation of §979-C(1)(E) and, derivatively, §979-C(1)(A).[4]

It is well established that the duty to bargain includes a prohibition against making unilateral changes in a mandatory subject of bargaining, as a unilateral change is essentially a refusal to bargain. See, e.g., Teamsters v. Town of Jay, No. 80-02 at 3 (Dec. 26, 1980) (citing NLRB v. Katz, 369 U.S. 736, 743 (1962)), and Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806, 809-10 (Me. 1982). In cases involving allegations of unilateral changes after the expiration of an agreement, the terms of the expired agreement are evidence of the status quo that must be maintained. See, e.g., MSEA v. School Committee of City of Lewiston, No. 90-12 (Aug. 21, 1990) at 16.

The Maine Law Court squarely addressed the question of the continuation of step increases after the expiration of a collective bargaining agreement in Board of Trustees of the University of Maine System v. Associated COLT Staff, 659 A.2d 842 (1995). In that case, the union had argued that the University breached its duty to bargain when it unilaterally discontinued paying the annual step increases in the wage provision of the expired collective bargaining agreement. The question presented in COLT was whether the status quo to be maintained was the specific wages being paid at the expiration of the contract (the "static status quo") or the wage plan in effect at the expiration (the "dynamic status quo").

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[4]Section 979-C(1)(E) prohibits the employer from "refusing to bargain collectively with the bargaining agent of its employees" and §979-C-(1)(A) prohibits "interfering with, restraining or coercing employees in the exercise of rights guaranteed" by SELRA.

In COLT, the parties had negotiated a contract which provided for step increases to be paid on each of the three specified anniversary dates of the agreement. On each of those dates, employees would advance to the next step and receive the corresponding increase in wages. After the expiration of the agreement, the University continued the same wage scales, but discontinued the payment of annual step increases. The MLRB held that the discontinuance of the step increases after expiration of the contract was a unilateral change that violated the University's duty to bargain pursuant to 26 M.R.S.A. §1027(1)(A) and (E). The Board applied what it called the "dynamic status quo rule" that froze the system of step increases rather than freezing the wage itself. The Law Court reversed.

In overruling the Board, the Law Court stated unequivocally that the Board's decision was in "contravention of the statutory language and the legislative history of Maine's public employment labor relations law." Id. at 845. The statutory language and legislative history that the Law court cited in the COLT case are just as applicable to SELRA and the other collective bargaining laws enforced by this Board as they were to the University of Maine System Labor Relations Act.

The Law Court pointed out that the same section that imposes the duty to bargain also says "except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession." 26 M.R.S.A. § 1026(1)(C). The Law Court noted the considerable impact an increase in wages can have on the University's budget and cited a prior case decided under the Municipal Public Employees Labor Relations Law holding that the MLRB has no authority to impose duty to pay wage increases not agreed to by the employer. Id. citing Caribou Sch. Dep't v. Caribou Teachers Ass'n, 402 A.2d 1279, 1285-86 (Me.

1979). The Court also cited the legislative history of the Municipal Public Employees Labor Relations Law when noting that "the Legislature determined it important to protect public employers from forced concessions." Id. at 845, n. 5. The language of SELRA on this point is identical to that found in both the Municipal Law and the University System Act. Compare 26 M.R.S.A. §979-D (1)(E)(1), with §965(1)(C) and §1026(1)(C).

The Law Court also considered the exclusion of financial matters from binding arbitration in observing that "the Legislature was careful to protect the public fisc from wage increases that were neither bargained for nor approved by the public employer." Id. The Law Court cited the legislative history showing the frequent but unsuccessful attempts to give arbitrators binding authority over financial issues as an indication that the static status quo is consistent with legislative intent. Id. at 846 n. 6. All of the policies cited by the Law Court in COLT apply with equal force under SELRA. There is simply no basis for ignoring the sweeping language the Law Court used to describe its holding: "The static status quo rule is consistent with the Legislature's clearly expressed intent to protect municipal *and state agency* budgets from increases in wages imposed without agreement by the governing body." Id. at 845-46 (emphasis added.)

In the present case, AFSCME claims that the express language of the collective bargaining agreement in question removes it from the reach of COLT because it represents an express agreement to continue the payment of step increases after the expiration of the collective bargaining agreement. See Easton Teachers Assoc. v. Easton School Committee, No. 79-14 (March 13, 1979)(Wage escalator provisions do not continue after expiration unless the collective bargaining agreement provides otherwise). AFSCME's

argument starts with the proposition that the phrase "unless otherwise specifically provided herein" found in Article 57 of the collective bargaining agreement, which details the duration and termination of the agreement, allows for continuation of certain terms in the contract. Article 57 states, in relevant part:

Term of Agreement

> This Agreement shall be effective from February 1, 2002 through June 30, 2003, *unless otherwise specifically provided herein.*
>
> Termination
>
> *Unless otherwise specifically provided for herein,* this Agreement shall apply to those employees in the bargaining unit on the date of the signing of this Agreement and shall be effective as of February 1, 2002 and shall remain in full force and effect until the 30th day of June 2003. . . . (emphasis added)

From that starting point, AFSCME claims that Article 10(F) and (G) serve to "otherwise specifically provide for" the continuation of step increases beyond the 30th day of June, 2003. With respect to 10(F), AFSCME argues that the second sentence of the paragraph expressly vests employees with the right to receive the step after two years service at step 6. It states:

> . . . Effective January 1, 2003, an employee who has been at Step six (6) of his/her current pay range for at least two (2) years shall be advanced to Step seven (7) on his/her next scheduled anniversary date, pursuant to Section G of this Article.

Similarly, AFSCME contends that 10(G) includes an express agreement to remove step increases from the effect of the termination date (i.e., otherwise specifically provided for herein) by the use of the language: "Employees shall be advanced to the next higher step on the salary schedule upon satisfactory completion of each year of service."

There are a number of problems with the union’s argument. First, it requires the conclusion that the language of 10(F) and (G) constitute an express exception to the contract’s termination date as provided for in Article 57 (i.e. “Otherwise specifically provided for”). There is no evidence in the record, including AFSCME’s own minutes of the negotiating sessions, that the parties intended the wording of 10(F) and (G) to be a specific exception to the effect of the contract termination. Second, it requires that the Board conclude that a combined reading of these provisions is an express enough agreement on continuing the payment of step increases to overcome the holding of COLT. Given the sweeping language of COLT, we do not think it is credible that the parties would voluntarily use such imprecise language and roundabout reasoning to make such a significant exception. Finally, such an interpretation is directly contrary to all the evidence in the record of the parties’ understanding of the legal situation on continuing step increases once the collective bargaining agreement expired. There is no evidence to support the conclusion that the parties intended this language to create a contractual obligation to continue paying step increases after the termination of the collective bargaining agreement.

For the foregoing reasons, we conclude that the 2002-2003 collective bargaining agreement does not require the continued payment of step increases beyond the June 30, 2003 expiration. We further conclude that the Law Court’s holding that the status quo rule does not require the continued payment of step increases after the expiration of the agreement applies with equal force under the provisions of SELRA. Thus, there is no basis for concluding that the failure to award merit increases after the expiration of the 2002-2003 agreement was an unlawful unilateral change in violation of §979-D-(1)(E).

AFSCME also contends that by proposing and advocating for statutory language to freeze merit increases, the State engaged in bad faith bargaining in violation of §979-D(1)(E). There appear to be two separate arguments for this proposition: First is the contention that during the negotiations leading to the creation of the new step 7, the State's negotiator assured AFSCME's negotiating team that funding for continued payment of step increases after the expiration of the contract would be routine or, as AFSCME put it, "pro forma." AFSCME contends that the State's subsequent position proposing a budget that froze all merit increases was therefore bad faith bargaining. The second argument is based on what AFSCME considers the express language of the collective bargaining agreement obligating the State to continue paying step increases and to seek funding for that purpose.

There is no dispute that Mr. Walo told the AFSCME negotiating team in October of 2001 that funding for continuation of the step increases would be included in the personal services line of the "current services" budget for the next biennium. As such, the funds would be viewed as an on-going expense rather than as a new cost item. It is also clear that neither party anticipated the budgetary problems that led to the proposal to freeze all merit increases in 2003. At the time the agreement was negotiated, AFSCME asked for written assurance that the steps would be funded for the next biennium; the State's representative made it very clear that he did not have the authority to bind the next legislature. In spite of this unequivocal denial of AFSCME's request, the Union argues that the failure to seek funding for the step increases was itself bad-faith bargaining.

AFSCME's position on this issue is indistinguishable from a position contending that an attempt by an employer to negotiate a

concession from the union constitutes bad faith bargaining. This is simply not the case. There is nothing in SELRA that states this or even suggests the employer is precluded from negotiating reductions in benefits. See Bridgton Federation of Public Employees v. Hamill, No. 81-54, at 7 (Mar. 3, 1982) (benefits may be reduced or eliminated as a result of collective bargaining). In the present case, the State's budgetary woes resulted in the budget proposal and the corresponding bargaining proposal to freeze merit increases unless the parties could negotiate alternative personal services savings. An attempt by an employer to negotiate a concession would be considered bad faith bargaining only if, in the totality of the circumstances, the Board was convinced that the employer lacked the desire or intent to reach an agreement or was trying to subvert the bargaining process. This is the basic analysis used for a charge of failure to negotiate in good faith: examining all of the conduct and deciding whether the charged party demonstrates "a present intention to find a basis for agreement." Waterville Teachers Ass'n v. Waterville Board of Education, No. 82-11, at 4 (Feb. 4, 1982).[5] There is no evidence here, nor does AFSCME even

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[5]The test which we apply in evaluating alleged violations of the duty to bargain in good faith has been outlined as follows:

> A bad faith bargaining charge requires that we examine the totality of the charged party's conduct and decide whether the party's actions during negotiations indicate "a present intention to find a basis for agreement." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); see also Caribou School Department v. Caribou Teachers Association, 402 A.2d 1279, 1282-1283 (Me. 1979). Among the factors which we typically look to in making our determination are whether the charged party met and negotiated with the other party at reasonable times, observed the ground-rules, offered counterproposals, made compromises, accepted the other party's positions, put tentative agreements in writing, and participated in the dispute resolution procedures. See, e.g., Fox Island Teachers Association v. MSAD #8 Board of Directors, MLRB No. 81-28 (April 22, 1981);

argue, that the State was attempting to avoid making an agreement by proposing a merit freeze.

AFSCME also argues that it was bad faith for the State to propose legislation to preclude it from paying for the benefits that AFSCME contends the State had an existing contractual obligation to continue. There appear to be two bases for this argument. The first is that Article 10, by its terms, requires the continuation of all step increases and that the first clause of Article 10 required the State to seek funding for the continued step increases.[6] There is no question that the agreement was funded through June 30, 2003, and we have already held that there was no contractual obligation to continue the steps after that date. There is no need, therefore, to consider this argument further.

The second assertion AFSCME makes is that the merit freeze did not apply to the step 7 increases because it was a market wage adjustment that was an express part of the consideration for the acceptance of the agreement. It is true that the step 7 was a market pay adjustment: it was an adjustment made in response to the market pay study. The new step was designed to address the problem identified by the study. The express language of the

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> Sanford Highway Unit v. Town of Sanford, MLRB No. 79-50 (April 5, 1979). When a party's conduct evinces a sincere desire to reach an agreement, the party has not bargained in bad faith in violation of 26 M.R.S.A. Sec. 964(1)(E) unless its conduct fails to meet the minimum statutory obligations or constitutes an outright refusal to bargain.

Kittery Employees Assoc. v. Strahl, No. 86-23, at 10-11 (Jan. 27, 1987), quoting Waterville Teachers Assoc. v. Waterville Board of Education, No. 82-11, at 4 (Feb. 4, 1982).

[6]Article 10 begins, "The State shall prepare, secure introduction of and recommend passage by the Legislature of appropriate legislation in order to provide the benefits described in this Article."

agreement in 10(F) and (G), however, provided that the movement along the expanded pay scale would be subject to satisfactory performance. This express language was consistent with the merit principles contained in the civil service laws[7] and in SELRA.[8]

AFSCME raises a concern that permitting the State to advocate for legislation to freeze merit increases is contrary to the Board's prior holdings that an employer's negotiating team has an obligation to recommend passage and funding of tentative agreements. See, e.g., Teamsters Local No. 48 v. City of Westbrook, 89-05 at 10 (Oct. 25, 1988), and Union River Valley Teachers Ass'n v. Trenton School Committee, Nos. 80-28 and 80-32, at 4 (May 30, 1980). Again, this concern is misplaced because the State was not advocating a position that was inconsistent with a tentative agreement, nor was the position taken by the State inconsistent with its duty to bargain. Our holding here that the State has not engaged in a failure to bargain in good faith does not weaken our prior holdings regarding a bargaining team's obligation to present the final tentative agreements to the principal party for ratification.

AFSCME also claims that the State attempted to negotiate a waiver of the union's right to grieve the non-payment of steps after July 1, 2003, in exchange for the continuation of other

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[7]5 M.R.S.A. §7065, sub-§ 3 provides: **"Salary increases based on merit.** Salary advancements within an established range shall not be automatic, but shall be dependent upon specific recommendation of the appointing officer and approval of the commissioner. The recommendation shall be based upon standards of performance as indicated by merit ratings or other pertinent data. No advancements in salary may be made until the employee has completed the probationary period."

[8]§979-D(1)(E)(2) provides that the duty to bargain "shall not be construed to be in derogation of or contravene the spirit and intent of the merit system principles and personnel laws."

benefits and grievance arbitration, an action AFSCME argues is bad faith bargaining. We reject this argument because it mischaracterizes both the law and the facts.

The duty to maintain the status quo while negotiating a successor agreement includes the duty to continue the grievance procedure. See Teamsters Union Local No. 48 v. Boothbay/Boothbay Harbor Community School Dist., No. 86-02, at 11 (March 18, 1986), citing Sanford Fire Fighters Ass'n v. Sanford Fire Commission, No. 79-62, at 10 (Dec. 5, 1979) and Easton Teachers Ass'n v. Easton School Committee, No. 79-14, at 5 (March 13, 1979). This duty does not, however, create a requirement to submit a grievance to arbitration even if there was an obligation to do so when the collective bargaining agreement was in effect. In a case arising under SELRA, the Law Court held that because the Uniform Arbitration Act requires a written arbitration agreement, a court has no authority to compel arbitration after the parties' collective bargaining agreement expires. MSEA v. BOER, 652 A.2d 655 (Me. 1995), citing 14 M.R.S.A. §5927-5928 (1980). In another case arising under the Municipal Law involving an attempt to compel arbitration, the Law Court held:

> As a matter of law, no obligation exists to arbitrate a grievance that arises after the expiration of a collective bargaining agreement unless that grievance involves rights that vested or accrued, or facts or occurrences that arose while the collective bargaining agreement was in effect. Lane v. Bd. of Directors of Maine Sch. Admin. Dist. No. 8, 447 A.2d 806 (Me. 1982). Here we are dealing with neither vested rights nor an occurrence during the term of the collective bargaining agreement. While an agreement is in effect, the terms and conditions therein are enforceable as a matter of contract and may be subject to arbitration. Once the agreement expires, however, the parties lose their contractual rights and are left with only the statutory duty to bargain in good faith. Lane, 447 A.2d 810. This duty requires the parties to

> maintain the status quo until either a new contract is ratified, or the negotiations reach a bona fide impasse. The remedy for a breach of the duty is a prohibited practice complaint before the Board, rather than grievance arbitration under the expired contract. Id. at 809-810.

Teamsters Local 340 v. Portland Water District, 651 A.2d 339, 341-2 (Me. 1994). The holding of these two cases is clear: the duty to bargain does not create a duty to arbitrate grievances after the expiration of the collective bargaining agreement.

In the present case, the collective bargaining agreement would have remained in effect following June 30, 2003, had the State not exercised its right to terminate the contract in accordance with Article 57 of the agreement. The Union does not question the State's right to terminate the contract. The Union contends that "the State may not seek to negotiate this termination by seeking a waiver of legitimate contract rights as a condition to the continuation of benefits that it must, as a matter of law, continue." AFSCME Brief at 11. The Union's argument mischaracterizes what happened. There was no attempt to negotiate the termination of the contract. Mr. Walo's letter of June 18, 2003, clearly states that the State was terminating the contract in accordance with its right to do so set forth in Article 57 of the agreement. There was no effort to negotiate anything in exchange. Mr. Walo's follow-up letter of June 20, 2003, reaffirms this.

The proposed agreement regarding the continuation of the arbitration provisions was presented 7 days later, on June 27, 2003. It had nothing to do with the termination of the contract, nor did it attempt to "continue the contract beyond its expiration." The proposal concerned the continuation of the grievance arbitration provision that was in the expired collect-

ive bargaining agreement. It offered to continue processing grievances through arbitration in exchange for the Union agreeing that it would not consider the State's action as precedent or an admission "as to the legal obligation of either party in the absence of such agreement." The offer did not extend to the issue of merit increases because, as Mr. Walo noted in the letter, that matter was "prescribed and controlled by law."

SELRA prohibits the State from bargaining over matters "prescribed or controlled by public law." Bureau of Employee Relations v. AFSCME, 614 A.2d 74, 76 (Me. 1992); 26 M.R.S.A. §979-D(1)(E)(1). SELRA is unique among the labor relations laws enforced by this Board because it defines various topics as mandatory subjects of bargaining "to the extent they are not prescribed or controlled by public law . . ." Thus, the enactment of the freeze on merit increases for FY 2003-2004 had the effect of removing that subject from the scope of bargaining, other than the bargaining specifically provided for in section D-22 itself.

To summarize, a general statement of the law is that grievance arbitration provisions do not survive the expiration of a collective bargaining agreement. With respect to disciplinary grievances, SELRA specifically provides that the arbitration provisions continue to be in effect.[9] The enactment of section D-22 removed the 2003-2004 merit increases as a subject of bargaining. Consequently, the State was precluded from bargaining or going to arbitration on that issue. The proposed agreement was an offer by the State to continue arbitration to

[9]26 M.R.S.A. §979-R provides "If a contract between a public employer and a bargaining agent expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect until the parties execute a new contract."

the extent permitted by law. In light of these facts and the legal obligations of the parties, there is no basis for claiming that the State violated its duty to bargain by proposing an agreement regarding the continued submission of grievances to arbitration.

In summary, we conclude that the State did not engage in a prohibited practice by failing to bargain in good faith in violation of §979-C(1)(E). There is therefore no basis for finding a derivative violation of §979-C(1)(A).

ORDER

On the basis of the foregoing facts and discussion and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §979-H, it is hereby ORDERED that AFSCME's complaint number 03-13 and number 04-03 are both DISMISSED.

Dated at Augusta, Maine, this day of April, 2004.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. §979-H(7) (Supp. 2003) to seek review of this decision and order by the Superior Court by filing a complaint, in accordance with Rule 80C of the Maine Rules of Civil Procedure, within 15 days of the date of the issuance of this decision.

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Pamela D. Chute
Chair

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Karl Dornish, Jr.
Employer Representative

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Carol B. Gilmore
Employee Representative