STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 03-14
Issued: February 23, 2004

IAM DISTRICT LODGE #4, Complainant, TOWN OF WISCASSET, Respondent.	DECISION AND ORDER

The IAM District Lodge #4 ("Union") filed this prohibited practice complaint on April 7, 2003, alleging that the Town of Wiscasset's unilateral implementation of a policy prohibiting the personal use of town-owned equipment was a refusal to bargain in violation of section 964(1)(E) of the Municipal Public Employees Labor Relations Law (MPELRL). The Town of Wiscasset ("Town" or "Employer") submitted its response on April 25, 2003. The Union was represented by Joseph Flanders, IAM Business Agent, and the Town was represented by David Barrett, Manager of Personnel Services and Labor Relations at the Maine Municipal Association.

At the June 10, 2003, prehearing conference, three joint exhibits were admitted into evidence and the parties agreed to work together to create a stipulated record. The stipulated record was filed on July 3, 2003, and the briefs were filed by September 3, 2003. The Board issued an Interim Decision and Order which addressed the legal issues in dispute and identified additional facts that needed to be clarified before the Board could issue a decision. The parties were offered the option of either submitting stipulations answering the questions identified by the Board or requesting an evidentiary hearing. The parties

submitted additional stipulations on November 21, 2003. The Board deliberated this matter on January 14, 2004.

STIPULATIONS

The parties submitted the following stipulations on July 2, 2003:

1. The International Association of Machinists (hereinafter referred to as the Complainant) has been certified by the Maine Labor Relations Board as the sole bargaining agent for the full time municipal employees of the Town of Wiscasset, Maine (hereinafter referred to as the Respondent) working at the Towns Highway Department, Solid Waste Transfer Station, Waste Water Treatment Plant, Town Office Secretarial Position, and Town Office Janitor/Maintenance position.
2. In late May of 2002 the parties entered into negotiations on a first Collective Bargaining Agreement (hereinafter referred to as CBA). David Barrett was the Chief Spokesman for the respondent. Selectmen Katherine Martine-Savage and Roy Barnes were also members of the respondents Bargaining Committee. Joe Flanders was the Chief Spokesman for the Complainant. Unit members Mark Johnson, Mark Jones, and Tony Colby were members of the Complainants Bargaining Committee.
3. The parties had several bargaining sessions and reached a tentative agreement on a first CBA on January 9, 2003. The Complainants fully ratified the CBA on January 21, 2003. The respondents fully ratified the CBA on January 28, 2003 and the parties shortly thereafter executed the CBA, which has an effective date beginning January 1, 2003 and ending December 31, 2004.
4. On March 10, 2003 complainant Steward Mark Jones filed a grievance over the respondent’s refusal of a request to use Town equipment for personal use after working hours in the

Town garage. The grievance was subsequently denied by the respondent.

5. On January 7, 2003 the Board of Selectmen adopted and issued a new written policy prohibiting employees from the personal use of Town owned property and equipment.
6. This new written policy was never brought up during the negotiations between the parties for the first CBA.
7. The new written policy was implemented by the respondents while negotiations were ongoing.
8. Prior to the respondent's adoption of the policy regarding the use of Town equipment and/or facilities, several members of the Board of Selectmen, both past and present, had knowledge that employees had been allowed to use various facilities and/or equipment for their own off work time personal use. Some members of the respondents Board of Selectmen, both past and present, had done so themselves.
9. Prior to the January 7, 2003 adoption of the new written policy prohibiting the personal use of Town Equipment and/or facilities there was no known written policy or action specifically addressing the use of Town owned equipment and/or facilities.
10. Article IXX of the CBA states that "all previous practices and policies not specifically modified by this agreement shall remain unchanged for the duration of this agreement."
11. The issue for determination is whether the policy enacted and implemented by the respondent on or about January 7, 2003 prohibiting town employees from the personal use of town owned property and equipment constitutes a prohibited practice.
12. The CBA effective January 1, 2003, through December 31, 2004 is admitted and marked as Joint exhibit #1.
13. The policy implemented by the respondent on January 7, 2003

is admitted and marked as Joint exhibit #2.

14. The complainant's grievance along with the respondent's answer to the grievance is admitted and marked as joint exhibit #3.

Joint Exhibit #2, the policy in question, states in full:

Town of Wiscasset
Guidelines for Use of Town Property & Equipment

The Town of Wiscasset purchases equipment and property items for the benefit of town employees to use in completing town responsibilities. Individuals and employees are prohibited from the personal use of town owned property and equipment. No town owned equipment shall be removed from town property for personal use.

In order to provide efficiency and cooperation, the loaning of town owned equipment by one town department to another is strongly encouraged. However, prior to such use by employees, the Department Head of both departments involved must give authorization.

Exceptions:

1. Any organization, group or other non-town government agency which requests property or equipment for fundraising events, special events or other tasks must have received prior permission from the Town Manager.
2. Department Heads may, but aren't required to, make photocopy services available to the public. Departments must charge a consistent rate per copy as the town office.
3. For the purpose of this policy the Wiscasset School Department shall be considered a town department and shall be eligible to borrow municipal equipment.
4. Department Heads may, with Town Manager approval, loan town property or equipment to other governmental agencies.
5. Town equipment purchased with the intention of loaning out to the public. For example, recreational sports equipment, fire department trash pumps, etc. The Department Head or the department head designee shall approve the loaning of this type of equipment prior to its loan.

Any violation of this policy by an employee will result in disciplinary action, up to and possibly including termination.

Adopted: January 7, 2003

Following the Board's Interim Order of October 14, 2003, the parties submitted the following additional stipulations:

1. Town Citizens, and other Town officials like members of the Board of Selectmen were offered the same opportunities to use various pieces of Town equipment for short-term personal use. Town citizens sometimes borrowed picnic tables and other non-tool items from the recreation department. Use of the Town garage for working on private vehicles, and the borrowing of tools was mostly limited in practice to Town employees and not citizens. An estimate of total usage indicates that employees were responsible for approximately 90% of the total personal use of Town equipment.
2. Using Town equipment for personal tasks was not a requirement of the job, nor was it necessary to perform job duties. The employees had total use of the equipment in question for all required job responsibilities.
3. The three department heads in departments where this practice was prevalent, public works, solid waste and sewer, all indicated that they had never presented applicants or new employees with the opportunity to use Town equipment as an employment benefit or condition of employment. Personal use of equipment does not appear to have ever been offered as part of the overall wage and benefit package.
4. Some individual members of the bargaining unit had knowledge of the practice of the Town allowing personal use of equipment prior to being employed with the Town and viewed this as a benefit.

DISCUSSION

The Union contends that by unilaterally implementing a policy on the personal use of town-owned tools or equipment

without first notifying the union, the Employer violated the Municipal Public Employees Labor Relations Law ("MPELRL"). Section 965 of the MPELRL requires the parties "to confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." 26 M.R.S.A. §965(1)(C). A public employer refusing to bargain collectively over one or more of these mandatory subjects violates section 964(1)(E). Inherent in the duty to bargain is 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)).

Three elements must be present for an employer's action to be an unlawful unilateral change: it must be unilateral, it must depart from a well-established practice, and it must involve a mandatory subject of bargaining. Monmouth School Bus Drivers & Custodians/Maintenance Assn./MTA v. Monmouth School Committee, No. 91-09 at 55 (Feb. 27, 1992).[1] There is no question that the Employer adopted the policy regarding the personal use of town equipment without advance notice to or negotiations with the Union. There is also no dispute that there was a long-standing practice of allowing employees to borrow or use various town-owned equipment and property for personal projects. Thus, the first two criteria for establishing an unlawful unilateral change are present in this case. The only question is whether the unilateral change was a change in a mandatory subject of bargaining.

As we noted in our Interim Order, the Board requires that a matter "materially or significantly affect the terms or

[1]There are four exceptions to the unilateral change rule, none of which are implicated in this case. See MSEA v. State of Maine, No. 78-23 at 4 (July 15, 1978).

conditions of employment" in order to be a mandatory subject of bargaining. AFUM, UMPSA and Assoc. COLT Staff v. Univ. of Maine, No. 82-15, 82-16, and 82-22, at 9-10. See also Portland Fire-fighters v. City of Portland, No. 83-01 at 4 (June 24, 1983), aff'd 478 A.2d 297 (Me. 1984)(finding that safety was "significantly and materially related to 'wages, hours, working conditions and contract grievance arbitration.'") We conclude that the policy implemented in this case was a mandatory subject of bargaining because the past practice was an established benefit of employment and because the policy was a change that materially and significantly affected working conditions.

In determining whether an established benefit provided to employees is a mandatory subject of bargaining, this Board and the National Labor Relations Board both consider whether the benefit "accrued out of the employment relationship." NLRB v. Central Illinois Public Service Co., 324 F. 2d 916 (7th Cir. 1963)(long-standing practice of selling gas at a discount to employees was a benefit that accrued out of the employment relationship and employer's unilateral discontinuance was a violation of its duty to bargain) Owens-Corning Fiberglass Corp., 282 NLRB 609 (1987) (established plan allowing employee purchase of company's product at a discount was a benefit that accrued to employees out of the employment relationship and unilateral change in plan was unlawful). The Maine Labor Relations Board has implicitly considered this issue of whether the benefit accrued to employees out of the employment relationship in two cases involving the University of Maine.[2] In the first case, the Board held that an athletic locker rental fee increase was not a

[2]As we noted in our Interim Order, the analysis of the subjects of bargaining is the same under the University of Maine System Labor Relations Act as the MPELRL.

mandatory subject of bargaining because the use of athletic lockers was not limited to bargaining unit employees but was offered to the public on the same "first come, first served" basis. AFUM, UMPSA and Assoc. COLT Staff v. Univ. of Maine, No. 82-15, 82-16, and 82-22, at 11-12 (Sept. 27, 1982). In the more recent University case, the Board held that a new requirement of membership fees for use of on-campus fitness and recreational facilities was not a mandatory subject of bargaining. AFUM v. Univ. of Maine, No. 98-18, at 7 (Jan. 12, 1999). In that case, the Board again noted that the recreational facilities were open to the general public and fees were charged to all persons using the facilities. Id. at 6.

In determining whether an established benefit is a mandatory subject of bargaining, the NLRB also considers whether the employees have an expectation that the benefit will continue. The NLRB will take into account both the length of time the practice has existed, the employer's statements about the benefit, and the employees' perception on this point. For example, in Getty Refining, the NLRB held that an employee recreation fund that received the profits from vending machines was not simply a gift or a gratuity but, given its long existence, gave employees an expectancy that fund would remain available. 279 NLRB 924, 926 (1986). See also Gratiot Community Hospital, 312 NLRB 1075, 1080 (1993)(". . . [B]y virtue of long custom, the provision of scrub uniforms to the RNs became an employment benefit and, thus, a mandatory subject of bargaining"); and Owens-Corning Fiberglass Corp., 282 NLRB 609 (1987)(plan allowing employee purchase of company's product had existed for over 25 years and was a significant benefit to participating employees.) The NLRB described this nexus to employment with:

. . . the board and courts have properly considered

> whether the program is a reasonable expectancy of the employment relationship, i.e., whether the program in fact acted as an inducement to employees to accept or continue employment.

McDonnell Douglas Aerospace Services, 326 NLRB 1391, 1396 (1998)(citations omitted)(Promise of enhanced benefit package was a term and condition of employment.) See Waxie Sanitary Supply, 337 NLRB No. 43, at 2 (2001) ("A holiday bonus is a mandatory subject if the employer's conduct raises the employees' reasonable expectation that the bonus will be paid.") In Doerfer Engineering, the NLRB concluded that the employer unlawfully discontinued a long-standing practice of permitting employees to use the employer's tools and equipment for personal projects. In its analysis, the Board considered the practice from the employees' perspective, noted that some employees had been told of the practice during their job interviews, and observed that it was a significant benefit of employment. 315 NLRB 1137, 1141 (1994), rev'd on other grounds, Doerfer Engineering v. NLRB, 79 F.3d 101 (8th Cir. 1996). In the University case involving the use of recreational facilities, the Board suggested that the outcome could have been different if the employer had presented the availability of recreational facilities as an employment benefit. AFUM v. University of Maine, No. 98-18, at 7.

An additional consideration is whether the benefit at issue is simply a token gift or is something having a more substantial effect on terms or conditions of employment. In Benchmark Industries, the NLRB held that the token gifts of holiday lunches and hams that had been given to employees for 3 years should not be characterized as compensation or conditions of employment. Such an "overly legalistic view of the employment relationship," the NLRB noted, "would burden the Board and the parties before it with cases where there is nothing more at stake than a dinner and

a 5-pound ham, given once a year." Benchmark Industries, 270 NLRB 22 (1984). The ultimate determination of whether a benefit is a token gift or a condition of employment is very dependent on the facts and circumstances of each case. See Mitchellace, Inc., 321 NLRB 191, 193 (1996)(discussing difficulty in categorizing matters that fall in the middle of the continuum of employer actions "ranging from those that obviously have material, substantial, and significant effects on terms and conditions of employment and those that obviously do not.")[3]

This Board's decisions also demonstrate that the specific facts and circumstances of each case are important in determining whether a change had a material or substantial effect on terms or conditions of employment. As we noted in our Interim Order, this Board has held on more than one occasion that a unilateral change to a practice of allowing employees to use employer-owned vehicles to get to work is unlawful. See Interim Order at 6. We also held (without analysis) that the unilateral discontinuance

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[3]For examples of NLRB cases on such issues, see Mitchellace, Inc. 321 NLRB 191, 194 (expansion of an 8-hour prohibition on employee use of elevators to a 24-hour prohibition a material, substantial, and significant change in terms and conditions of employment given that plant operated on 5 floors); Murphy Oil USA, 286 NLRB 1039 (1987) (rule banning card playing at work station while allowing it in lunchroom not a material change nor was minimal increase in paperwork required to borrow tools, but new rule banning posters and calendars at work station was a material change, as was a rule banning reading material and radios in the plant); Advertiser's Mfg. Co. 280 NLRB 1185, at 1191 (1986), enf'd, 823 F.2d 1086 (7th Cir. 1987)(use of free telephone for local calls and the opportunity to receive an incoming call are conditions of employment) and Pepsi-Cola Bottling Co. of Fayetteville, 330 NLRB 900 (2000)(same); Pacific Micronesia Corp. d/b/a Dai-Ichi Hotel Saipan Beach, 337 NLRB No. 66, (eliminating practice of allowing hotel employees to take home used flowers and drinking water and stopping practice of giving employees monthly supply of laundry detergent unlawful unilateral changes); Litton Microwave Cooking Products, 300 NLRB No. 37, at 331 (installation of synchronized clocks in plant and use of buzzers to indicate start and end of breaks not a material change because length of break periods not altered.)

of a practice of allowing employees to use small tools in the Town garage for repairs on the employees' personal vehicles was a violation of the statute. Teamsters Union Local #48 v. City of Auburn, No. 79-41, at 4 (Oct. 4, 1979)(employer conceded discontinuance of practice violated statute.) We continue to hold, as we did in the two University cases discussed above, that a matter must "significantly or materially affect the terms or conditions of employment" in order to be a mandatory subject of bargaining as a working condition. AFUM, et al. v. Univ. of Maine, No. 82-15, at 11[4]; AFUM v. Univ. of Maine, No. 98-18, at 6. In the 1982 University case involving rentals fees for athletic lockers, the Board noted that lockers were used during non-working time and they were merely a convenience to employees. AFUM, et al. v. Univ. of Maine, No. 82-15, at 11. Although other factors came into play, the Board emphasized that there was neither argument nor evidence of how athletic locker use had any connection to working conditions. Id. at 13. In the more recent University case involving membership fees for use of the recreational facilities, the Board also pointed out the lockers are used by faculty members during non-working hours for their convenience. No. 98-18, at 6-7. Again, there was no argument or evidence of any connection between the user fee and the working conditions of faculty members. Id. at 7. The Board concluded that in the circumstances, the imposition of membership fees for the use of the recreational facilities was not a mandatory

[4]The blocked quote of the U.S. Supreme Court's decision in Ford Motor Co. v. NLRB, 441 U.S. 448 (1979) on page 10 of this AFUM case contains this standard as well as the first paragraph of the blocked quote of the California appellate court's decision found on page 9. The second paragraph of the latter quote does not establish a standard, but merely lists examples of factors that are considered in the analysis. We think the Board's decision in the Monmouth case regarding the practice of allowing school bus drivers to take their own children on their bus runs improperly applied the second paragraph of the block quote as a legal standard. See No. 91-09, at 41-42.

subject of bargaining.

Our Interim Order gave the parties in this case the opportunity to submit additional stipulations relevant to the analysis of this issue. The subjects raised by the Board were the extent of the practice, whether it was a requirement of the job, and whether it was presented as a benefit in lieu of wages. On the latter two points, the stipulations indicated that the use of equipment for personal tasks was not a requirement of the job and the department heads never presented it as a benefit of employment, although some employees knew of the practice before their employment and viewed it as a benefit.

Had the parties stipulated that using town-owned equipment for after-hours personal projects was somehow a requirement of employment, it would clearly establish the practice as a working condition. Similarly, had the department heads made comments to current or prospective employees that the practice was a benefit of employment or that it was provided in lieu of wages, that evidence would support a conclusion that it is a mandatory subject of bargaining. Even though this was not the case, the fact that some employees knew of the practice before their employment and viewed it as a benefit of employment is significant.

In the present case, there is ample evidence indicating that the benefit at issue "accrued out of the employment relationship" and that employees viewed it a condition or benefit of employment. After reviewing the facts in this case, we conclude that, particularly with respect to the use of the Town Garage for working on private vehicles and the borrowing of tools, the Town violated its obligation to bargain by making a unilateral change in the established practice. The parties stipulated that this

practice was “mostly limited in practice to Town employees and not citizens.” The sentence preceding that in the stipulations states that Town citizens sometimes borrowed picnic tables and other non-tools items from the recreation department. The two sentences together indicate a significant difference in practice between citizens and employees, if not in the theoretical opportunity. The parties also stipulated that employees accounted for “approximately 90% of the total personal use of Town Equipment.” The initial set of stipulations stated that some members of the Town’s Board of Selectmen, both past and present, had used various facilities or equipment for their own personal use. When these facts are considered together, it is apparent that the actual use of Town facilities, tools and equipment by citizens was very small.[5] Considering the totality of the facts, we are persuaded that this is a benefit that accrued to employees out of their employment relationship.

We also conclude that the employees had a reasonable expectation that the practice would continue. The practice was a long-standing one that was well known among employees and among current and former members of the Board of Selectmen, and was viewed by some employees (at least) as a benefit of employment. Although there is no evidence that the Employer presented it as benefit, there is also no evidence that the Employer ever tried to disavow the practice. It is reasonable to conclude, therefore, that employees would expect this “perk” of employment to continue. The discontinuance of the practice was a material and significant change in the conditions of employment for the

[5]Furthermore, if borrowing picnic tables and other non-tool items from the recreation department are excluded from the analysis, the use of town tools and equipment by citizens becomes insignificant. We do not think that the mere fact that the practice of loaning town-owned tools and equipment was not limited exclusively to employees negates the fact that it was considered a benefit of employment in this case.

employees in this bargaining unit.

In summary, we conclude that the Employer's termination of the practice of allowing employees to use town-owned equipment, tools and facilities for personal projects significantly affected the terms and conditions of the bargaining unit employees. The Employer's action, without notice to the Union and opportunity to request bargaining, constituted an unlawful unilateral change in violation of 26 M.R.S.A. §964(1)(E).

Upon finding that a party has engaged in a prohibited practice, we are instructed by Section 968(5)(C) to order the party "to cease and desist from such prohibited practice and to take such affirmative action . . . as will effectuate the policies of this chapter." A properly designed remedial order also seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice. Caribou School Department v. Caribou Teachers Association, 402 A.2d 1279, 1284 (Me. 1979). We accordingly will order the Town to restore the status quo as it existed prior to its unilateral implementation of the policy on January 7, 2003.

We note that in the absence of a zipper clause, a party may make a midterm request to bargain any issue not raised during negotiations. The parties stipulated that the use-of-tools issue was not raised during negotiations. The Employer is therefore free to request mid-term bargaining over this issue. The existence of the contract clause maintaining previous practices entitles the Union to lawfully refuse to bargain over this issue for the duration of the agreement. In negotiating a successor agreement, the parties' obligation to bargain over the issue is the same as their obligation to negotiate any other mandatory

subject of bargaining.

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. §968(5), it is hereby ORDERED:

1. That the Town of Wiscasset shall restore the status quo as it existed prior to the Town's adoption of the Use of Town Property and Equipment policy on January 7, 2003.

2. If the Town wishes to discontinue the practice of allowing bargaining unit employees to use Town-owned tools and equipment for personal projects, the Town shall bargain over the issue when it negotiates a successor agreement to the same extent it is required to bargain about any mandatory subject of bargaining.

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

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. §968(5)(F) (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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Peter T. Dawson
Chair

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Karl Dornish, Jr.
Employer Representative

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Robert L. Piccone
Alternate Employee Representative