STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 05-04
Issued: January 31, 2006

| | |
|---|---|
| MAINE STATE EMPLOYEES ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>MAINE MARITIME ACADEMY,<br><br>Respondent. | DECISION AND ORDER |

This prohibited practice complaint alleges that the Maine Maritime Academy ("Employer" or "MMA") bypassed the Maine State Employees Association ("MSEA" or "Union") and negotiated directly with an applicant over terms and conditions of employment. Specifically, the complaint alleges that the Employer failed to bargain in good faith with the Union in violation of 26 M.R.S.A. §1027(1)(E) by dealing directly with an applicant for the position as director of athletics over salary and a housing benefit. The complaint further alleges that the Employer's action interfered with, restrained or coerced employees in the exercise of their rights protected by 26 M.R.S.A. §1023 in violation of §1027(1)(A).

The complaint was filed on August 18, 2004, and the response was filed on September 3, 2004. Peter T. Dawson, Esq., served as the prehearing officer at the prehearing conference held on October 10, 2004. The evidentiary hearing had to be postponed on two occasions and was not held until August 31, 2005. Timothy L. Belcher, Esq., represented Complainant MSEA[1] and Thomas C. Johnston, Esq., and M. Katherine Lynch, Esq., represented Respondent Maine Maritime Academy. At the evidentiary

[1]Roberta L. de Araujo, Esq., later assumed this responsibility.

hearing, Chair Jared S. des Rosiers presided, with Employer Representative Karl Dornish, Jr., and Employee Representative Robert L. Piccone serving as the other two Board members. The parties were able to examine and cross-examine witnesses and to offer documentary evidence. Briefs and responsive briefs were all filed by December 5, 2005. The Board deliberated on December 15, 2005.

## JURISDICTION

The Board's jurisdiction to hear this case and issue a decision lies in 26 M.R.S.A. §1029. Respondent Maine Maritime Academy is an employer subject to the University of Maine System Labor Relations Act pursuant to 26 M.R.S.A. §1022(1-A) and §1029. The Maine State Employees Association is a bargaining agent within the meaning of 26 M.R.S.A. §1029(2).

## FINDINGS OF FACT

1. Maine Maritime Academy, an institution of higher education, is located in the coastal community of Castine, Maine. Most of the employees at Maine Maritime Academy are represented by the Maine State Employees Association in one of three bargaining units. At the time of the events at issue in this case, these three bargaining units were the administrative staff bargaining unit, the faculty bargaining unit and the classified bargaining unit.
2. For many years, physical education was an academic program chaired by William Mottola, a full professor. Mr. Mottola also performed the duties of an athletic director, and received a stipend to compensate for the year-round responsibilities. Other faculty members in the Physical Education Department had both coaching and teaching responsibilities. As these faculty members retired, however, they were replaced with coaches who had no teaching

responsibilities. By 2002, there was only one other professor left in the Physical Education Department, other than Professor Mottola.

3. In 2002, the Physical Education Department was merged into the Department of Arts and Sciences and a separate non-academic Athletic Department was created. Dean John Barlow, the provost and vice president of academic affairs, is responsible for the Athletic Department as well as all academic programs.

4. Sometime in the first part of 2002, Mr. Mottola announced his intent to retire. With input from Mr. Mottola, Dean Barlow created a job description of director of athletics. The Human Resources Department made the position a pay grade 26, based on the modified Hay System analysis that the Academy had used for many years. The job was posted internally in the spring of 2002 as an "anticipated opening." Before any interviews were scheduled, Mr. Mottola changed his mind about retiring and nothing further was done about the job at that time.

5. Professor Mottola continued as the athletic director and a full-time faculty member throughout the 2002-2003 academic year. In the fall of 2003, Mr. Mottola took an unexpected leave of absence for medical reasons and Maine Maritime Academy's football coach, Chris Murphy, was appointed as acting athletic director.

6. Near the end of the 2003-2004 academic year, Mr. Mottola notified the Academy that he would not be able to return to work and would be retiring.

7. The Academy posted the director of athletics position internally and advertised it on the basis of the job description that had been created in April of 2002. Both notices indicated the job was pay range 26 with an annual salary of $48,452.89. The position was posted internally

from April 30, 2004, through May 13, 2004.

8. The job description for the director of athletics position created in 2002 states:

STATEMENT OF THE JOB

Employee reports directly to the Dean of Academic Affairs. Supervises subordinate classified, coaching and student personnel assigned to the department of Athletics.

DUTIES OF THE JOB

1. Responsible for the development and operation of the varsity and intramural athletic programs in the context of the mission of the Academy.
2. Responsible for recruitment, selection and supervision of personnel assigned to the athletic department.
3. Manages budget administration related to the athletic programs.
4. Works with the Public Relations department for promoting athletic department activities to the college and the general public.
5. Responsible for compliance with NCAA and Conference(s) rules, regulations and procedures.
6. In coordination with the Development Office, responsible for the initiation of successful fund raising activities to supplement the department budget and individual sports.
7. Responsible for overseeing the maintenance and operation of the athletic facilities.
8. Responsible for assisting and supporting the Arts and Science Department in offering of credit and non-credit physical education courses.
9. Performs other related duties as assigned.
10. May be assigned teaching or coaching responsibilities by a supervisor.

*This job description reflects the general duties of the job but is not a detailed description of all duties, which may be inherent to the position. The Academy may assign reasonably related additional duties to individual employees consistent with policy and collective bargaining agreements.*

9. Following MMA's customary practice, the president and the dean appointed a selection committee to screen applicants and conduct interviews. In this case, the committee members were the director of admissions, a faculty member, an alumnus, another faculty member who was new to the Academy who served as chair, and (as a non-voting member) the acting athletic director. The mandate of the selection committee was not to make the actual selection, but to make a recommendation on the top candidates so that the hiring authority, in this case Dean Barlow, could make the final decision.
10. Dean Barlow testified that given President Leonard Tyler's experience and interest in athletics, he would not make a final decision on hiring an athletic director without consulting the president.
11. The Academy received 10 applications for the position and interviewed six people, four of whom were internal candidates. The selection committee conducted interviews of the six candidates in early June. Prior to the interviews, the Human Resources Department reviewed and approved the specific questions the selection committee would ask the candidates. The committee did not ask any questions that had not been authorized.
12. Mr. James Dyer was one of the candidates interviewed. For the previous eleven years he had been the assistant director of athletics for operations at the University of Maine in Orono. He had a substantial amount of coaching experience prior to that. The subject of Mr. Dyer's current or expected salary did not come up, nor was there any discussion about housing at this time. After the interview, Mr. Murphy, the acting athletic director, showed Mr. Dyer around the campus. During this tour, Mr. Murphy shared with Mr. Dyer his concerns about the insufficient funding of the

Athletic Department.

13. On June 9, 2004, the selection committee sent a memo to President Tyler, Dean Barlow, and Mr. Gene Moyers (the human resources director at the time) with its unanimous recommendation that Mr. Dyer be hired. The memo went on to say:

> 2. During the course of interviewing candidates, the committee noted the following concerns shared by many members of the athletic department which we would like to bring to your attention:
>
> > a. The job description posted for the position of athletic director does not adequately describe the duties required of the job. Specifically, it does not delineate that the Athletic Director will be required to coach and teach, but simply says that those duties "may be assigned."
> >
> > b. The salary listed does not appear to be adequate, as it will place the new Athletic Director 3rd among all Athletic Department personnel, when the position would, by definition, command that he or she be paid the highest salary within the department.
> >
> > c. To amplify "a" and "b" above, it would appear to the committee that additional compensation is warranted for the position, since it will definitely require the Athletic Director to coach and teach, as well as manage the Athletic Department. If the administration expects the Athletic Director to coach, then additional financial compensation should be offered.
>
> 3. While Maine Maritime Academy's Athletic Department is undergoing a period of transition, it is by no means "broken." The committee interviewed a majority of the athletic department staff, all of whom voiced their earnest desire to support the new Athletic Director and do whatever it takes to make Maine Maritime athletics successful. Nonetheless, it is apparent to the committee that the Athletic Department is in need of additional financial resources. The committee recommends that the school administration do

> whatever it can to preserve, if not enhance, funding for the Athletic Department.

14. It was very unusual for a selection committee to offer opinions on management or funding issues. The practice had always been for the committee simply to make a recommendation for hire and identify its second choice.

15. On June 10, 2004, President Tyler sent an e-mail to Dean Barlow stating:

> Gene [Moyers] will be talking to you about meeting with the candidate for the AD's job. The issues that should be discussed include salary (our initial offer to him will be considerably less than he currently makes), you should also talk about a coaching responsibility for him (his background is in soccer, but he might be able to assist in that or another sport, or take on the head coaching responsibility of lacrosse, or golf, or possibly women's soccer, which then might free up Craig to help out in some other area, possibly fund raising). Keep me informed by e-mail. Thanks, Len

16. A short time later, Mr. Moyers sent an e-mail to Dean Barlow setting up a meeting with Mr. Dyer for the following Thursday. He indicated that Dean Barlow should discuss the athletic program with him and that he would review the salary and benefits information with him.

17. Mr. Dyer's first contact with the Academy following his initial interview was a telephone message from the chair of the selection committee saying that he was the top choice of the committee and that he would be contacted by the Human Resources Department to set up another interview. Later, he received a call from Ms. Grindle in the Human Resources Department and they set up a meeting for June 17, 2004.

18. On Thursday, June 17, 2004, Mr. Dyer returned to the campus for a meeting with Richard Ericson, MMA's vice president for administration and finance, Dean Barlow and Mr. Moyers. It was at this meeting that Mr. Dyer first learned that the

Academy never hired anyone at a rate above the initial step of the pay grade, regardless of the years of experience the candidate possessed. Mr. Dyer was quite surprised by this information, and informed the others that the pay was considerably less than his current salary at the University of Maine. He did not provide any other details concerning his salary nor did they ask about it. At some point after Mr. Dyer indicated that the starting salary of pay range 26 was "considerably less" than his current salary, one of the three Academy managers at the interview indicated that they were going to be reviewing the job to see if a change in pay grade was warranted. Although no one who testified could remember what was said specifically, there is no doubt that the managers indicated to Mr. Dyer that his concerns would be taken into account.

19. At this same meeting, Mr. Dyer raised some concerns he had regarding the athletic program at the Academy, including a need to improve the amount of athletic training provided, to increase the administrative support for women's athletics, and to improve funding through greater development efforts. He indicated that he felt it was important for the athletic director to be present at athletic events both to provide oversight for the department and to show support for the coaches and teams. He asked if there were any place he could stay in times of inclement weather or on particularly late nights, as the commute to his home in Bangor was long. It is not clear if any of the Academy managers responded specifically to the concern about housing.

20. Housing is an important issue at Maine Maritime Academy, as the price of housing in and around the coastal community of Castine is quite high. The Academy has a number of rental housing units that are available to certain Academy employees. The Academy adopted a "Rental Housing Policy"

effective July 1, 2000. The policy requires the future incumbents of certain specified positions to live within 25 miles of Castine due to the nature of the responsibilities of those particular jobs. The positions listed include, for example, the commandant of midshipmen, the director of public works, the training vessel master, and the director of safety and security, but does not include the director of athletics. The listed positions are given top priority for use of MMA-owned rental housing. If not all of the units are taken by the listed positions, the units are available to other new Academy employees for a maximum of two years. The Academy sets the rental rate at the low end of the market rate and requires each employee-tenant to sign a lease. The rental amount is deducted from the employee's paycheck.

21. Not long after the policy was issued, the Union filed a prohibited practice complaint in which it alleged that the Academy hired an individual for the commandant of midshipmen position and provided him free housing. At the time, that position was in a bargaining unit. The complaint was withdrawn and the parties were able to negotiate a resolution. In 2003 this Board issued a decision that the commandant was essentially a vice president and therefore excluded from the bargaining unit.

22. An additional type of accommodation available at the Academy is rooms on the third floor of Leavitt Hall. These rooms are used for various purposes, such as for trustees on campus to attend meetings, visiting prospective students, and sometimes for housekeeping or food service workers when a major storm is forecast. Arrangements for the use of these rooms are made during the day at one of the administrative offices.

23. Immediately after meeting with Mr. Dyer, the three Academy

managers (Moyers, Barlow, and Ericson) pulled out the 2002 director of athletics job description and reviewed it. They altered the job description by changing the statement "May be assigned teaching or coaching responsibilities by a supervisor" to "Performs teaching and coaching responsibilities as assigned by a supervisor." The intent was to make it clear that coaching was an expectation of the job, not merely a possibility. Other than switching the order of the final two items,[2] they made no other revisions to the job description.

24. The Academy uses what they refer to as a modified Hay System for analyzing various factors for any given job in order to determine the appropriate pay scale. This system has been used for many years by the Human Resources Department for positions in both the administrative staff unit and the classified bargaining unit. The specific factors and their relative weight are: knowledge and skills (36%); mental and visual effort (8%); physical effort (8%); responsibility for cost control (8%); responsibility for others: injury (8%), supervision (8%), and sensitive information/records (8%); working conditions (8%); responsibility for external and internal relations (8%). A matrix is used to determine the number of points for each factor based on the degree that factor comes into play for the job being evaluated. The points are totaled and a higher total corresponds to a higher pay grade.

25. The three managers considered the change in the job description making coaching a requirement or expectation of the job rather than just a possibility to be a significant change.

---

[2]There was also a change in the wording of the fund-raising duty, adding the word "oversight" to the responsibility. There was no testimony offered regarding this change.

Mr. Ericson testified that it "would change perhaps the background and previous experience of any person selected for the position." Consequently, they increased the "knowledge and skill" factor from the seventh degree to the eighth degree. This resulted in an additional 36 points. In addition, they increased the "responsibility for cost control" factor from a fourth degree to a fifth degree. They did this after looking at other positions in the Athletic Department and at the Academy as a whole. They concluded that because the athletic director had responsibility for a budget of close to a million dollars, this factor was underrated. The change in the cost control factor resulted in an additional 10 points. As a result of this reevaluation, the total number of points for the director of athletics position increased from 554 to 598, which moved it from range 26 to range 29.

26. The meeting of Mr. Moyers, Dean Barlow and Mr. Ericson to review the job descriptions and the Hay System factors did not last very long, perhaps an hour or an hour and a half. Dean Barlow and Mr. Ericson left the meeting knowing that the total points for the job had increased and understanding that it would result in a higher pay grade for the position, although they did not know which pay grade.

27. Immediately following the meeting, Mr. Moyers determined that the revised director of athletics job belonged in pay grade 29 based on the increased points. This decision was a straightforward application of a chart translating points directly to pay grade. Mr. Moyers initiated the paperwork necessary to finalize an offer of employment to Mr. Dyer. The "Human Resource Action Notice" was signed by Mr. Moyers, Mr. Ericson and Dean Barlow on that same day, June 17, 2004. It indicated the annual compensation was $55,458.29 and at

pay grade 29, step A.

28. During the same meeting in which the three managers discussed the job description, they also discussed the housing issue. After Mr. Dyer left the meeting on the 17th, the managers decided to provide an apartment in the Capstan building for his use at no cost to him.

29. The Capstan building has three apartments. The first floor has two apartments: one in the back and a larger one at the front of the building. There was no evidence presented on the previous use of either the front apartment or the back apartment. The apartment on the second floor housed the Athletic Department interns. The interns are recent college graduates interested in gaining some coaching experience. The Academy provides room and board and very low pay in exchange for this experience. The rent for this apartment is charged to the Athletic Department's budget.

30. The interns were something of a problem. The Academy had discovered that some interns continued to stay in the apartment beyond their period of employment. In addition, there had been a number complaints of drinking, noise and general rowdiness. The managers thought that the presence of a responsible adult in the building would bring some order to the situation. They viewed the use of one of the apartments by Mr. Dyer as a convenient solution to the problem.

31. The Human Resources Action Notice completed on June 17, 2004, indicated that Academy housing in the Capstan building front apartment was being provided at no charge to Mr. Dyer.

32. At this time, President Tyler was aboard the training vessel for part of the annual cruise, but he was able to receive e-mails. On June 18, 2004, his secretary sent him an e-mail in which she wrote "Gene Moyers had a very good meeting with the Athletic Director candidate yesterday. He made as high

an offer as he could and expects to hear back from the candidate next week."

33. Sometime after the meeting on the 17th, Dean Barlow left a voice message for Mr. Dyer asking him to delay a decision until after he had a chance to meet with President Tyler when he returned from the cruise. Dean Barlow testified that Mr. Dyer's concerns were not just the commute and the salary, but also included the resources that were necessary in the Athletic Department. Dean Barlow thought it was important for Mr. Dyer to have a chance to discuss these concerns with the president.

34. Mr. Dyer responded to Dean Barlow's voice-mail message with an e-mail message saying:

> I must admit that I have conflicting emotions as I think about the job offer. On the one hand, I would welcome the challenge and am excited about the possibilities to make a positive contribution to MMA. On the other, I wonder about the logistics of the commute and the decline in compensation.
> As you requested, I am willing to delay a final decision until President Tyler returns from the cruise. I will be in Connecticut for a wedding this weekend, returning late in the day on Monday. You may contact me on Tuesday so that we can attempt to reach a resolution.

35. Dean Barlow responded to Mr. Dyer by e-mail setting up an appointment with himself and President Tyler for the following Tuesday morning, June 29, 2004.

36. Mr. Dyer testified that he did not learn that the salary had been increased until his meeting with President Tyler on June 29, 2004. At that meeting, President Tyler explained that the job had been adjusted and that the offer was as high as he could go due to the agreement with the Union. They also discussed the concerns about the Athletic Department that Mr. Dyer had first raised in the meeting on

the 17th of June.

37. President Tyler and the Academy's director of operations showed Mr. Dyer the Capstan building. Mr. Dyer testified that the interns' apartment looked like something out of "Animal House" or a sloppy fraternity room. For some reason, they were unable to look at the front apartment in Capstan, but looked at the back apartment instead. Mr. Dyer said that the back apartment was rather shabby and in need of some maintenance.

38. Mr. Dyer returned to the campus for a third time a couple of days later with his wife. They met with President Tyler and were shown the front apartment, which had newer appliances, and was in better condition and larger than the back apartment.

39. Mr. Dyer called President Tyler on July 4, 2004, to accept the job. On July 13, 2004, Mr. Dyer signed the formal acceptance letter which specified an annual salary of $55,458.29 and stated,

> . . . In that the MMA Athletic Director is responsible for overseeing the Athletic Interns, (who are housed in the Capstan apartment house) the Department will be provided with an additional apartment (Capstan/Front) in that building for your use in that capacity.

40. John Floyd, as the chief Union steward, received a copy of the new job description of the director of athletics sometime in mid- to late July. This was the first notice the Union had that the job had been reevaluated and assigned a new pay range. Mr. Floyd learned that Mr. Dyer had been hired when someone called him to tell him they had seen it reported on the television news.

41. The Employer had never reevaluated or reclassified a job after it had been advertised or after candidates had been interviewed.

42. Mr. Moyers' employment with the Academy ended in August of 2004.

DISCUSSION

The issue presented is whether the Employer's conduct in changing the starting salary for the director of athletics position and providing the Capstan apartment to the new athletic director amounted to a failure to bargain in good faith in violation of 26 M.R.S.A §1027(1)(E) and whether that conduct further violated §1027(1)(A). There is no dispute that the Employer changed the starting salary for the position and provided an apartment as part of the offer of employment to the new athletic director. There is also no dispute that the Employer did not notify the Union of these changes and provide it with an opportunity to bargain. The dispute centers on whether the Employer's actions violated the Act.

Once a union becomes certified or recognized as the bargaining agent, the employer is obligated to bargain solely with that union over the terms and conditions of employment for employees in that unit. 26 M.R.S.A. §1025(2)(B) (the certified union is "the sole and exclusive bargaining agent for all of the employees in the bargaining unit"). This principle of exclusivity, found in all of Maine's collective bargaining statutes as well as the National Labor Relations Act, "exacts the negative duty to treat with no other." Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944), quoted in MSEA v. Bangor Mental Health Inst. (BMHI) and State of Maine, No. 84-01, at 7 (Dec. 5, 1983). Bypassing the bargaining agent, either by making a unilateral change in a mandatory subject or by direct dealing, is a failure to bargain in good faith in violation of §1027(1)(E) because it is equivalent to an outright refusal to bargain. MSEA v. State of Maine, Bureau of Alcoholic Beverages, No. 78-23 (July 15, 1978) ("a public employer's unilateral change in a

mandatory subject of bargaining undermines negotiations just as effectively as if the public employer altogether refused to bargain over the subject"), aff'd State of Maine, Bureau of Alcoholic Beverages v. MLRB and MSEA, 413 A.2d 510 (Me. 1980) and MSEA v. BMHI, No. 84-01, at 6, citing Farm Crest Bakeries, 241 N.L.R.B. 1191, 1196-97 (1979) (It is a "venerable principle of labor law" that an employer acts in bad faith and violates the Act by dealing directly with its represented employees concerning their working conditions). Furthermore, negotiating with anyone other than the bargaining agent is "subversive of the mode of collective bargaining which the statute has ordained . . . [and] is therefore an interference with the rights guaranteed by Section 7 and a violation of Section 8(1) of the Act." Medo Photo Supply Corp. v. NLRB, 321 U.S. at 684, quoted in MSEA v. BMHI, No. 84-01, at 7; see also Allied Signal, Inc., 307 NLRB 752, 753 (May 29, 1992) ("an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1)"). Accord, Teamsters v. Town of Fairfield, No. 94-01, at 54 (Oct. 1, 1993) and Teamsters v. Aroostook County Sheriff's Dept., No. 92-28, at 24 (Nov. 5, 1992).

In the present case, the Employer's arguments are numerous and varied: It argues that its conduct was not improper because it was consistent with past practice; that the changes it made were prompted by the memo from the selection committee and not by any discussions with Mr. Dyer; that it did not bargain with Mr. Dyer; and that because Mr. Dyer was not an employee at the time of the complained-of conduct, the Union was not his bargaining agent. The first and last of these arguments can be dispensed with in short order because they concern legal arguments not relevant to this case; the other two will be dealt

with in light of the evidence presented.

The Academy argues that it has not violated the law because its action in changing the salary was consistent with the established practice for creating new positions, or, alternatively, for revising vacant positions. Whether it was creating a new job or revising an existing job in accordance with past practice misses the point: The question is not whether the change was consistent with past practice but whether the change was made unilaterally. If the change was not unilateral and the individual or organization that the Employer was negotiating with was not the bargaining agent, then the law was violated. Past practice may be relevant when the charge is a unilateral change,[3] but it is not relevant when the action complained of is dealing with an individual or an entity other than the bargaining agent. To decide this case on the basis of consistency with past practice would skirt the central question of the case--that is, whether the Employer violated the law by bargaining with someone other than the bargaining agent.

The Academy argues that there can be no violation because Mr. Dyer was not an employee when the job was reevaluated. Again, this misses the point that the complaint alleges a failure to bargain with the Union about wages and benefits of a new hire. Mr. Dyer's status is irrelevant to the question of whether the Employer had a duty to bargain with the Union about those subjects. The Employer has an obligation to bargain about issues concerning applicants if those matters "vitally affect" the terms

[3]Consistency with past practice is an exception to the rule that a unilateral change in a mandatory subject of bargaining constitutes a refusal to bargain. See MSEA v. State of Maine, No. 78-23, at 4, (July 15, 1978); and AFUM, UMPSA, and MTA v. University of Maine, Nos. 82-15, -16 & -22, at 7 (Sept. 27, 1982). The record shows that the Employer had never reevaluated a position or revised and reclassified a vacant position after the job had been posted and candidates interviewed, such as occurred in this case. The Employer's argument based on past practice therefore would fail even if it were relevant.

and conditions of unit employees. Star Tribune, 295 NLRB 543, 546-7 (1989)[4] (pre-employment drug and alcohol testing is not a mandatory subject of bargaining because testing of applicants does not "vitally affect" unit employees). The wages offered to applicants are the wages paid to newly hired employees and are thus mandatory subjects. Monterey Newspapers, Inc., 334 NLRB 1019, 1020 (2001); St. Vincent Hospital, NLRB Div. of Judges, Aug. 4, 2004 (Cracraft, ALJ) (signing and relocation bonuses paid to applicants is a mandatory subject of bargaining).

We now turn to the question of whether the conduct of the Employer in communicating with the applicant constituted bargaining with someone other than the bargaining agent over the terms and conditions of bargaining unit employees. The Employer first argues that it did not bargain directly with Mr. Dyer, but that it was responding to the recommendations of the selection committee when it revised the job and reassigned it to pay range 29. The Employer points out that the issues were brought to the attention of the selection committee by the four internal candidates who were interviewed, not by Mr. Dyer. The Employer claims that the decision to reexamine the position was underway on June 10, when President Tyler sent an e-mail to Dean Barlow. We find that e-mail to be ambiguous, at best. The statement that "our initial offer to him will be considerably less than he currently makes" is hardly the expression of Tyler's "immediate resolve to address the [Committee's] recommendations" that the Employer contends. (MMA brief at 10). In spite of the Employer's assertions, there is no evidence in the record to indicate that the president's e-mail was intended or interpreted

[4]See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 179 (1971) (adopting the NLRB's "vitally affects" test but holding that health insurance plan for retirees was not a mandatory subject of bargaining because any effect on unit employees was "speculative and insubstantial at best").

as a direction to reexamine the position.

The record provides ample support for our conclusion that the Employer's communication with Mr. Dyer prompted it to change the wage for the athletic director position. On June 17, the Employer presented the offer at range 26, step A and explained that they could not go above step A, regardless of his extensive experience. When he expressed his dismay, they indicated that they were going to be looking at the job again. The inference is clear: If Mr. Dyer had been satisfied with the salary as initially presented, the Academy would not have proceeded with the reevaluation. There is no other rational explanation for the Employer's action: They made a verbal offer at range 26, step A, Mr. Dyer was surprised and dismayed, and he stated that it was "considerably less" than his current salary. It was not until that point that the Employer responded by stating that they would be taking another look at the job description and pay range.

If the decision to reexamine the position "was underway on June 10" as the Employer argues, one would expect to see some evidence in the record to support this. There are a number of things that the Employer could have done that would give some credence to their argument that they were acting unilaterally in response to the selection committee's recommendation. Clearly, if they had reevaluated the job before meeting with Mr. Dyer, the Employer's argument would be more credible.[5] Similarly, even if the Employer had not reevaluated the job before the June 17 meeting with Mr. Dyer, they could have told him that they were planning a reevaluation, but had not had the chance to do so.

[5]If, in fact, the revised job description would conceivably change the type of candidate selected, as Mr. Ericson testified, then a different job description would also probably attract other candidates as well, particularly with such a significant change in starting salary. The Academy did not, however, re-advertise the position after making the changes.

If it really was their plan to reevaluate, no purpose would be served by making an initial offer Mr. Dyer at the lower pay grade. The purpose of making the offer was to solicit a reaction.

The Employer claims in its brief that the managers involved simply did not have the chance to meet with each other to look at the job before they met with Mr. Dyer on the afternoon of June 17, 2004.[6] Again, the question should be why the Employer failed to notify the Union, not why the Employer was not able to reevaluate the position before meeting with Mr. Dyer. There is no evidence that the Employer notified the Union that a change was being contemplated prior to the change being made on June 17. As the Law Court noted in City of Bangor v. AFSCME, affirming the Board's decision interpreting the Municipal Public Employee Labor Relations Law:

> . . . Concomitant with the characterization of a subject as within the duty to negotiate is a duty of the employer to notify the union to provide it with an opportunity to bargain over it. The failure to do so violates §964(1)(E).

City of Bangor v. AFSCME, 449 A.2d 1129 (Me. 1982) (citation omitted). The same principle applies under the University Act.

The Employer also argues that the discussions with Mr. Dyer were not bargaining and therefore no violation occurred. In support of this argument, the Employer points out that the parties never discussed a salary increase, in either specific or general terms. While it is true that Mr. Dyer never informed the Academy of his salary at the University of Maine, that is not the same thing as saying that the managers involved had no idea how much money Mr. Dyer made. He was employed at another public higher education institution located only an hour or so from Maine Maritime Academy. President Tyler, who had a strong

[6]We note there is very little evidence supporting this argument.

connection to athletics, gave some indication that he knew about the market for athletic directors when he noted in his June 10 e-mail that the initial offer would be much less than Dyer's current salary. The fact that salary needs or expectations were not discussed directly does not negate the evidence that the Employer negotiated with Mr. Dyer.

Similarly, the Employer argues that because there were no express give-and-take negotiations before Mr. Dyer accepted the job, the Employer's simple discussions with the applicant were not "bargaining." We have previously observed that the fact that an employer "did not 'bargain' with the [employees] in the traditional sense of exchanging proposals and making compromises back and forth is of no consequence." MSEA v. BMHI, No. 84-01, at 8 (meeting with shift nurses to resolve a shift coverage problem was direct dealing regarding hours of work). In many situations, communications between the parties are as subtle as facial expressions and body language. In this case, we conclude that the Employer was bargaining with Mr. Dyer: It solicited a response from him by making the low offer, then responded to his dismay by changing the starting salary for the position. All of this occurred without notice to the Union and an opportunity to bargain.

We also find that the subsequent exchanges demonstrate continued bargaining. Dean Barlow called Mr. Dyer and left a message asking him to delay his decision until after he had a chance to speak with President Tyler. Mr. Dyer responds by e-mail that he would hold off on his decision on the job offer. He again mentioned his concern about "the logistics of the commute and the decline in compensation." He said he would be available the following week "so that we can attempt to reach a resolution." Clearly, these words indicate an expectation that his concerns would be addressed by an improved offer. When they

next met, the Employer offered him a higher salary as well as the apartment. In light of these exchanges and actions on the part of the Employer, we conclude that the Employer did not act unilaterally in changing the job description and pay range for the director of athletics position. On the contrary, the Employer negotiated directly with Mr. Dyer regarding the terms and conditions of his employment in violation of 26 M.R.S.A. §1027(1)(E) and (1)(A).

With respect to the housing issue, the Employer argues that the Capstan apartment was not a benefit because it was not provided to Mr. Dyer as an individual, but was provided to the Athletic Department. The Employer's stated goal was to provide some supervision of the athletic interns and to have the apartment available for others to use, such as visiting coaches and prospective students. The Employer also claims that there was never an intent that Mr. Dyer would use the apartment as a permanent place of residence. There was no testimony, however, that the apartment had ever been used to house visiting coaches, or visiting applicants, or that anyone else in the department had ever stayed there in order to provide a moderating influence on the behavior of the interns. The appointment letter, the only document describing this benefit, gives no indication that anyone other than Mr. Dyer would be using the apartment. Similarly, there was no evidence to suggest that Mr. Dyer was precluded from using the apartment as a permanent residence. Given the absence of restrictions on its use, we fail to see how the provision of the apartment to the Athletic Department for the director's use is any different than providing it directly to Mr. Dyer.[7] Similarly, we do not consider the free and unrestricted use of

[7]This arrangement could simply be an accounting convenience, enabling the Athletic Department to be charged for the rent, as it is charged for the rent of the interns' apartment.

the Capstan apartment to be comparable to the occasional and temporary use of the rooms in Leavitt Hall that are available to all employees, as the Employer contends.

In the present case, it is clear that the provision of Employer-owned housing at reduced rents is a mandatory subject of bargaining as it "materially and significantly affects" a term or condition of employment, especially for those whose proximity to the campus is a requirement of the job. See AFUM, UMPSA and MTA v. Univ. of Maine, Nos. 82-15, 82-16 and 82-22, at 10 (Sept. 27, 1982) (holding that parking fees was a mandatory subject but fees for athletic lockers available to employees and the public was not). See also IAM District Lodge #4 v. Town of Wiscasset, No. 03-14, at 6-7 (Feb. 23, 2004) (holding that established practice of allowing employees to work on their vehicles in the town garage after work was a mandatory subject of bargaining). The Employer admits in its brief that "Housing can be a sensitive issue on campus when faculty desire to live near campus in reduced rent houses" (Brief at 14), because "affordable housing in the Castine area is scarce." (Reply Brief at 9).[8] The Employer has negotiated with the Union over problems concerning available housing and has a policy on Employer-provided rental units. The policy gives preference for housing at reduced rent to certain jobs whose duties necessitate living near the campus. Providing a free apartment to Mr. Dyer was a change in benefits and the Employer had a duty to notify the Union and provide an opportunity to bargain. Failure to do so constituted a failure to bargain in good faith in violation of section 1027(1)(E) and (A).

The evidence supports our conclusion that the Employer

[8]The Employer's own Human Resources Action Form, which is used to establish the pay and benefits of an individual new employee, lists housing along with other benefits like health insurance and life insurance. Comp. Ex. #13.

decided to offer this housing benefit to Mr. Dyer in direct response to his request for such an accommodation. There is no evidence that the Employer had considered offering this type of benefit prior to that discussion. Once Mr. Dyer raised the subject, the Employer was able to come up with an offer of free housing in the Capstan apartment that satisfied his request. The fact that this arrangement provided a benefit to the Employer as well does not affect our analysis, as it does not diminish the value of the benefit to Mr. Dyer. In taking this action, the Employer bargained directly with Mr. Dyer in violation of the Act.

Having concluded that the Employer violated section 1027(1)(E) and (A) of the Act, we must now consider the appropriate remedy. The Union requests a cease and desist order, an order to post notices in the Employer's work sites, and an order that the Employer rescind the changes made to the athletic director position and bargain with the Union over any proposal to change the existing terms and conditions of bargaining unit employees. The Union also requests attorneys' fees, which we must deny because we have no statutory authority to award attorneys' fees.

We conclude that the most appropriate remedy in the circumstances of this case is to issue a cease and desist order and to require the parties to bargain over the change to the pay of the director of athletics and the provision of the Capstan apartment while maintaining the status quo for a finite time. We conclude that the maximum time in which to allow bargaining over these issues should extend only to the beginning of the next academic year. If the parties are unable to come to an agreement on the pay issue by the beginning of the next academic year (that is, the start of the school year in August, 2006), the pay for the director of athletics must be changed to the level he would

be earning had he started his employment at pay grade 26, step A and received normal progression in pay. If the parties are unable to come to an agreement on the Capstan apartment or some other housing accommodation for the director of athletics, the housing available to him must be comparable to that available to other unit employees. We will require the Employer to post the attached notice for 30 days.

Thus, we deny the Union's request that we order the Employer to immediately rescind the changes made to the director of athletic's pay range. We think such an order would have the effect of penalizing the athletic director for the wrong committed by the Employer. The Employer has committed a serious violation of the law in bypassing the Union on these matters. It is essential that the Employer comply with its statutory obligations and respect the statutory rights of its employees. We have fashioned this order to remedy the Employer's violation of the Act, not to penalize the director of athletics.

## ORDER

On the basis of the foregoing findings of facts and discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §1029, it is hereby ORDERED:

Respondent Maine Maritime Academy and its representatives and agents shall:

1. Cease and desist from negotiating directly with any applicant or employee in any classification in a bargaining unit represented by the Maine State Employees Association over any mandatory subject of bargaining.

2. Cease and desist from interfering with employees in the free exercise of their rights to voluntarily join, form and participate in the activities of organizations

of their own choosing for the purposes of representation and collective bargaining.

3. Take the affirmative action designed to effectuate the purposes of the Act of meeting with the Maine State Employees Association for the purposes of negotiating the salary of and any housing provided to the director of athletics within ten days of receipt of this order. The parties may meet beyond the ten-day period if mutually agreeable.

4. Maine Maritime Academy shall post for thirty (30) consecutive days copies of the attached notice to employees which states that the Academy will cease and desist from the actions set forth in paragraphs one and two and will take the affirmative action set forth in paragraphs three, four, five and six.[9] The notice must be posted in conspicuous places where notices to Academy employees are customarily posted, and at all times when such employees customarily perform work at those places. Copies of the notice must be signed by the Academy president prior to posting and must be posted immediately upon receipt. The president must take reasonable steps to ensure that the notices are not altered, defaced, or covered by other materials.

5. If Maine Maritime Academy and the Maine State Employees Association are unable to come to an agreement on the pay for the director of athletics position by the beginning of the 2006-2007 academic year, it is hereby ORDERED that the pay for the incumbent should revert to what it would have been had he been hired at pay range 26, step A and experienced normal progression in pay. This change must be effective at the start of the 2006-2007 academic year. If Maine Maritime Academy and the Maine State Employees Association are unable to come to an agreement on the housing, if any, provided to the director of athletics by the beginning of the 2006-2007 academic year, it is hereby ORDERED that the housing available to him must be comparable to that available to other unit employees.

---

[9]In the event that the Board's Decision and Order is appealed and is affirmed by the Maine Superior Court, the words in the Notice "Posted by Order of the Maine Labor Relations Board" shall be altered to read "Posted by Order of the Maine Labor Relations Board, affirmed by the Maine Superior Court."

6. The Academy president or the Academy's vice president of administration and finance must notify the Board by affidavit or other proof of the date of posting and of final compliance with this order.

Dated at Augusta, Maine, this 31st day of January, 2006.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. §1029(7) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

/s/_____
Jared S. des Rosiers
Alternate Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Robert L. Piccone
Alternate Employee Representative

# NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE MAINE LABOR RELATIONS BOARD

AFTER HEARING THE PARTIES' EVIDENCE, THE MAINE LABOR RELATIONS BOARD CONCLUDED THAT WE HAVE VIOLATED THE LAW AND ORDERED US TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE MAINE LABOR RELATIONS BOARD AND ABIDE BY THE FOLLOWING:

WE WILL CEASE AND DESIST from negotiating directly with any applicant or employee in any classification in a bargaining unit represented by the Maine State Employees Association over any mandatory subject of bargaining. We will comply with our statutory obligation to bargain with the Maine State Employees Association as the exclusive representative of employees in the bargaining units at the Academy.

WE WILL TAKE THE AFFIRMATIVE ACTION of meeting with the Maine State Employees Association within ten days of receipt of the Board's ORDER for the purposes of negotiating the salary of and any housing provided to the director of athletics. We may meet beyond the ten-day period if mutually agreeable. If we are unable to come to an agreement on the pay issue by the beginning of the 2006-2007 academic year, the director of athletics pay will be changed to the level he would be receiving had his salary started at pay range 26, step A and he experienced normal progression in pay. If we are unable to come to an agreement on the housing issue by the beginning of the 2006-2007 academic year, the housing available to the athletic director must be comparable to that available to other unit employees.

WE WILL post this notice of the Board's Order for 30 consecutive days in conspicuous places where notices to Academy employees are customarily posted, and at all times when Academy employees customarily perform work at those places.

WE WILL notify the Board of the date of posting and final compliance with its Order.

_____ _____

Date Leonard Tyler, President, Maine Maritime Academy

This Notice must remain posted for 30 consecutive days as required by Order of the Maine Labor Relations Board and must not be altered,

defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to:

STATE OF MAINE
MAINE LABOR RELATIONS BOARD
STATE HOUSE STATION 90
AUGUSTA, MAINE 04333 (207) 287-2015

---

THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.

---