STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 05-07
Issued: October 12, 2005

MSAD #46 Education Association/ MEA/NEA,

Complainant,

v.

MSAD #46 Board of Directors,

Respondent.

DECISION AND ORDER

On November 24, 2004, the MSAD #46 Education Association ("Association") filed a complaint alleging the MSAD #46 Board of Directors ("Board" or "Employer") refused to bargain in violation of §964(1)(E) and (A) by its conduct in negotiating under a reopener provision. The Board filed its response on December 13, 2004. The questions presented in this case are whether the Employer had a statutory duty to bargain, whether the Employer failed to bargain in good faith, and whether a zipper clause is a mandatory or permissive subject of bargaining.

PROCEDURAL BACKGROUND

In its response to the complaint, the Employer asserted numerous affirmative defenses including estoppel and waiver. On December 16, 2004, the executive director of the Maine Labor Relations Board ("Labor Board") dismissed the complaint on the ground that the Association had waived the statutory right to demand mid-term bargaining and therefore the Employer had no duty to bargain. The Association filed its appeal of the executive director's dismissal on January 14, 2005. The Labor Board considered the Association's appeal on February 3, 2005, and, after considering the briefs of the parties, concluded that the complaint should be reinstated. A prehearing conference was

conducted by Labor Board Chair Peter T. Dawson on March 21, 2005, and the evidentiary hearing was held on May 4, 2005. The MSAD #46 Education Association was represented by Joseph A. Stupak, Jr., and the MSAD #46 Board of Directors was represented by S. Campbell Badger, Esq. Chair Dawson presided over the hearing, with Employer Representative Karl Dornish, Jr., and Employee Representative Robert L. Piccone. The parties were given full opportunity to examine and cross-examine witnesses and to introduce documentary evidence. Briefs were filed by all parties, the last of which was received on July 8, 2005. The Labor Board deliberated this matter on August 3, 2005.

JURISDICTION

The MSAD #46 Board of Directors is a public employer within the meaning of 26 M.R.S.A. §962(7) and the MSAD #46 Education Association is a bargaining agent within the meaning of 26 M.R.S.A. §962(2) at all times relevant to this complaint. The jurisdiction of the Board to render a decision and order lies in 26 M.R.S.A. §968(5).

FINDINGS OF FACT

1. The MSAD #46 Education Association represents the teachers' bargaining unit and has had a bargaining relationship with the Employer, the MSAD #46 Board of Directors, for many years.
2. The complainant's first witness, Mr. Ted Nokes, was a member of the negotiating team during the period in question and became the Association's chief negotiator in the fall of 2004. The Association's second witness, Ms. Sharon Imbert, was formerly the Association's president and was the Association's note taker for the entire period. Both witnesses stated that they would need to rely on the written notes to recall details and dates of the meetings, most of

which were held two to three years prior to the Labor Board hearing.

3. The chief negotiator for the Board of Directors, Mr. Arthur Jette, had been a member of the Board since 1995. Mr. Jette had previously served as an officer and negotiator for the Machinists Union Local Lodge 1696 at White Consolidated Industries and its successor for over 25 years. Mr. Jette also stated that he needed to rely on the negotiating notes to recall details and dates of meetings.

4. In the mid-1990's, the voters in the school district had rejected the school budget referenda seven times. Mr. Jette stated that there was a citizen panel created that gave a list of recommendations to the Board of Directors through its chair which included the dismantling of the entire health and dental insurance plans. The Board chose not to take that route and instead embarked on a cost share so that the Board would not continue to be paying 100 percent of health insurance premiums. The stated target was to have employees pay 20 percent of the premium. This decision was based on actuarial studies showing that when people are asked to contribute 20 percent they start making different choices about what plan they purchase.

5. In the 1996 negotiations, the Board stated its goal of achieving an 80/20 premium cost share. The result of the 1996 negotiations was that the cost share moved to 90/10. Again in 1999, the Board stated its goal of an 80/20 cost share but was unsuccessful. There was a provision in the 1999-2002 collective bargaining agreement that if in any year the increase in cost of health insurance exceeded 10 percent, the parties would meet and decide whether or not to share the amount of the increase exceeding 10 percent. As a result of that provision, when the parties were negotiating

the successor agreement to cover 2002-2005, the Board was paying 87 percent of the premium and the employees were paying 13 percent.

6. The 1999-2002 collective bargaining agreement reflected the fact that employees were offered two choices of health insurance plans. The premium cost share was based on the more expensive of the two plans offered, and that dollar amount was contributed toward the less expensive option for those employees choosing that plan.

7. The Board and the Association successfully completed a round of interest-based negotiations in 1996 and again in 1999. Mr. Jette and the chief negotiator for the union at the time, Mr. Fred Cookson, decided to continue the same process for the 2002 negotiations, and worked together to bring the other team members up to speed on the process through workshops. Interest-based negotiations is a problem-solving approach to negotiations where the parties identify issues and interests and brainstorm possible solutions to those problems. In some respects, interest-based bargaining involves putting all of one's cards on the table at the outset rather than holding them close to the vest for tactical advantage, as is often done in traditional bargaining.

8. Mr. Jette and the superintendent met with the Board of Directors three or four times prior to the start of negotiations to discuss issues like comparative salaries. Mr. Jette testified that he was directed by the Board to hold the combined costs of salaries and health insurance from increasing more than 5 percent. With respect to the sharing of costs for the health insurance premiums, Mr. Jette said the Board's goal was to have an 80/20 cost sharing agreement, as they had with the other bargaining

units. From the start, the Board did not want to consider salaries and health insurance separately, but as two connected items.

NEGOTIATIONS FOR 2002-2005 COLLECTIVE BARGAINING AGREEMENT

9. At the parties' initial meeting on February 8, 2002, they established their negotiating ground rules and standards for negotiations. Each side's notes of this session indicated that one of the ground rules was "In writing as soon as possible." Although not specified in the ground rules, the practice during negotiations was for the superintendent to prepare notes of each meeting and distribute them to both teams for review at the start of the next meeting.

10. After settling on ground rules and standards on February 8, the parties went on to identify issues and the various interests affected by those issues. During the first three or four negotiating sessions in February and March of 2002, the parties brainstormed potential solutions to those issues and problems. As those issues were discussed, some items were "TA'd," others were "OK'd,"[1] and other items were tabled for consideration later. By mid-March, the parties had TA'd or OK'd a large majority of the two dozen or so issues identified.

11. The zipper clause in the preceding collective bargaining agreement is part of Article III, which stated:

ARTICLE III GROUND RULES

A. The Board agrees to begin negotiations with the Association in executive session pursuant to State of

[1]To "TA" means to come to a tentative agreement. To "OK" means that the parties agreed that a provision in the contract was not necessary or appropriate.

Maine Public Law under Chapter 424. Any agreement so negotiated and ratified by both parties shall apply to all teachers, be reduced to writing, be adopted by the Board, and signed by the Board and the Association. The parties hereto agree that the signed agreement shall be accepted as written notice for collective bargaining in the future fiscal years as stipulated under State of Maine Public Law Chapter 9-A, Title 26.

B. This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiations. During the term of the Agreement, neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

12. With respect to the zipper clause, the Association's notes from the March 11, 2002, negotiating session state:

> Article 3B-Zipper Clause. Is this needed?- What purpose does it serve? Interests - 1. Contrary to interest-based bargaining (meetings for understanding & problem solving throughout term of agreement); 2. What are legal ramifications of Article 3A. Hold for legal advice 5:50 pm.
> Article 3A - eliminate? How does this affect the Board's right to bargain with us? If we eliminate, do they need to bargain or just mandate? . . . Does removing zipper clause open up whole contract??

13. The Employer's notes for the March 11, 2002, negotiating session regarding the zipper clause state:

> Is this needed? What purpose does it serve? Interests- Doesn't fit the current practices (i.e. meetings for understanding and problem solving throughout term of agreement). What are legal ramifications of Articles 3A and 3B.
> It was agreed to put issue on hold at 5:45 PM.

14. The Employer's notes for the March 19, 2002, session state:

Association stated that they had researched this item and determined that both 3A and 3B could legally be removed from the contract. Board stated that they were not ready to remove article from contract because the zipper clause in effect closes items negotiated in the contract and that one side can not force the other side to open them before the end of the contract.

15. The Association's notes for the March 19, 2002, session state:

    Fred [Cookson] it's okay to remove 3A - no legal ramification.
    Art [Jette] - "board" not prepared to remove 3B - haven't discussed the ramifications of removal with the rest of the Board.

16. On March 19, 2002, the parties first discussed health insurance, identified as Issue #25. They identified interests and brainstormed options. The options listed on the Association's notes were:

    100% coverage Choice plus up to (& including) family
    Maintain what we have 90% Dist./10% teacher cost share
    80% Dist/20% of current plan
    Different ins. provider and cost share
    Salary in lieu of
    Modify 125 plan to increase benefits
    Cap districts participation

    The Employer's notes of the options listed was essentially the same, but also included "% increase health and salary combined." The parties discussed cost comparisons between Anthem Standard plan, Anthem Choice Plus, and a couple of plans offered by Aetna.

17. At the March 27, 2002, negotiating session, after considering more information on insurance cost comparisons, the Association indicated that Anthem was its carrier of choice. Mr. Jette shared with the Association that he had the Board's authority to negotiate a combined salary and health insurance increase of up to 5 percent. He said the Board

wanted to emphasize salaries more than health insurance, as some other benefits were based on earnings and there is favorable tax treatment of premium contributions. The Employer's proposal of an 80/20 premium cost sharing was presented for consideration. Various cost projections were handed out based on projected insurance increases of 20 percent and 25 percent.

18. At the April 3, 2002, meeting, the Association made a wage proposal to add $1,000 to base salaries in each of the first two years, to increase salaries by 3 percent in the third year, and to add a step to the flat step 13 in the second year and to the flat step 15 in the third year. There are no Association notes for the April 3, 2002, meeting and no indication that this proposal was made in writing. The Employer's notes for the April 3, 2002, meeting indicate that Sharon Imbert, the Association's note taker, was present.

19. At the next meeting on April 17, 2002, Mr. Jette reported that the Association's salary proposal alone resulted in a 4 percent increase. He indicated that to keep within the 5 percent figure, the health insurance would have to be a 75/25 cost share. The Board made a one-year proposal of a 3.5 percent salary increase with a health insurance cost share of 80/20 based on a projected premium increase of 18 percent. After caucusing, the Association responded that while the 3.5 percent increase to salary was possible, they were not comfortable trying to sell the 80/20 cost share to their membership. When the Board stated that they could not go above an aggregate increase of 5 percent, the Association caucused again and said they would present just the salary and health proposal to their members to get some reactions.

20. At the May 2, 2002, meeting, the Association again stated

that they needed to get some feedback from their membership. The Association indicated they could not move from the 87/13 cost share then in effect. Mr. Jette stated that the Board was adamant about staying within the 5 percent aggregate increase.

21. During the June 6, 2002, meeting, the Association's chief negotiator stated that the members were not interested in a 5 percent cap and they viewed insurance and salary separately and did not like them lumped together. After caucusing, Mr. Jette said their offer already went beyond the 5 percent increase set by the Board. The Board's position was that the two items had to be considered together. The parties agreed to switch to traditional bargaining at this point.
22. On June 17, 2002, the Association proposed a two-tiered health insurance plan with an employer contribution of 90, 87 and 85 percent of the Standard plan for current employees over the three years and 90, 87 and 85 percent of the Choice Plus plan (a less expensive plan) for new employees. The proposal called for base salary increases of 3¼ percent, 3 percent and 3 percent over the three years, removing the flat step at step 13 in the second year and removing the flat step at step 15 in the third year by adding the standard step increment at these steps. The Board received the proposal and said they would review it, do some "number crunching," and return with a three-year proposal at the next meeting.
23. On June 20, 2002, the Board said they would not accept the Association's proposal of June 17. The Board presented a two-year proposal with a 2.6 percent salary increase contingent on a 85/15 cost share of the Standard plan in 2002-2003, and a 1.6 percent salary increase contingent on a

80/20 cost share of the Standard plan in 2003-2004. The Association argued in support of its own proposal saying that it represented a substantial savings because one of the tiers was based on Choice Plus. The Association argued that the district is moving from being one of the highest to one of the lowest compared to other school districts. The Board argued that Dexter is the twelfth poorest town in Maine and that the average salary is $26,000. The Association observed that the Board had not moved off its 5 percent increase limit, but had merely shuffled costs around.

24. At the next meeting on July 2, 2002, the Association's negotiators did not present a counterproposal because they had thought the Board was going to bring them a different proposal. The Board presented comparisons with SAD 48, to which the Association responded SAD 64 was a better comparison. The Association asked for a three-year proposal and agreed that the Board should use a 20 percent premium projection for each of two succeeding years.

25. On July 30, 2002, the Board presented a three-year proposal: a 2.6 percent salary increase with an 85/15 insurance cost share the first year; a 2.0 percent salary increase for each of the next two years with the cost share of 82.5/17.5 in the second year and 80/20 in the third year. The insurance figures were all based on the Anthem Standard plan. The Board also provided comparisons with five other SADs and noted that SAD 46 was at or near the top. The Association reiterated its goals of achieving a base salary of $25,000 by the third year and getting rid of flat steps. The Association stated that the 80 percent cost share was do-able but getting there in three years was too fast.

26. On August 14, 2002, the Association presented a counter-proposal of a cost share of 87/13 with a 2.6 percent salary

increase for the first year, then 85/15 and 80/20 of the Standard plan for the second and third years with 3 percent in both of those years. The Association's proposal also added a full step at step 13.

27. The Board countered with an 84/16 cost share in year two and a 2 percent increase to base salaries in years two and three. The Board would change step 22 to a full step and increase the rest of the scale accordingly. The Association caucused and then said 84/16 was acceptable for the second year but the 2 percent was not acceptable. They wanted a base salary of $25,000 by the contract end and to take out one of the lower flat steps. The parties decided they would go to mediation.

28. Following this meeting, the two chief negotiators, Art Jette and Fred Cookson, had informal discussions about signing a three-year agreement with just the first year of the salary and health insurance issues settled. They would continue bargaining on those two issues for the second and third year of the contract as well as two other unsettled issues, the zipper clause and hard-to-fill positions.

29. On August 27, 2002, the parties met to work out an agreement covering all the items that had been tentatively agreed upon and the first year only for salary and health insurance. The suggested language for the reopener was:

> It is the intent of the parties to reopen negotiations in November or December 2002 for the purpose of negotiating salaries, health insurance, zipper clause, and hard to fill teaching positions for the second and third years of the agreement.

The Association wanted to have Joe Stupak, MEA's Director of Research and Collective Bargaining, review the language. At the final meeting on September 3, 2002, that original sentence remained essentially the same and a new sentence

was added, stating, “If agreement is not reached, the normal procedures of impasse by state statute is open to either side.” There was no discussion of the meaning of the reopener or the purpose of this additional sentence nor was there any specific mention of “preserving” statutory rights. The parties both understood that they were agreeing to reopen negotiations to address the four unresolved issues for the second and third years of the agreement, while still having the benefit of having a collective bargaining agreement for all other issues.

30. The full language of the Addendum to the 2002-2005 contract states:

> MSAD #46 Board of Directors and the MSAD #46 Education Association will reopen negotiations of the MSAD #46 2002-2005 Comprehensive Teachers' Contract in November or December of 2002 for the purposes of negotiating salaries, health insurance, zipper clause and hard to fill teaching positions for the second and third years. If agreement is not reached, the normal procedures of impasse by state statute is open to either side.

31. The MSAD #46 2002-2005 collective bargaining agreement, signed on September 12, 2002, established a wage increase of 2.6 percent for that contract year. The Health Insurance Article said, in relevant part:

> The Board shall pay 87% (2002-2003), __% (2003-2004), __% (2004-2005) of the premium for each teacher, up to a full family coverage, for MEA Benefits Trust Standard Plan (Blue Cross/Blue Shield) coverage, including the plus 19 coverage. Any teacher may at the teacher's option, elect to participate in the MEA Benefits Trust Choice Plus Plan, in which case, the teacher's cost shall be limited to the difference between the Board's payment of 87% (2002-2003), __% (2003-2004) __% (2004-2005) of Standard Plan premiums and the cost of the Choice Plus Plan.

32. The 2002-2005 collective bargaining agreement is 36 pages long and contains 18 articles, covering such things as insurance (life, health, dental), payroll deductions, leave (six kinds), teacher year, teacher day, teacher lunch period, travel reimbursement, teacher resignation, job notification, reassignment, school calendar, just cause, a five-page provision on seniority, layoff and recall, a five-page grievance procedure, and various provisions on teacher evaluation, pupil evaluation, and salary issues.

NEGOTIATIONS PURSUANT TO REOPENER PROVISION

33. The parties first met pursuant to the reopener provision on December 19, 2002. At this meeting, they agreed upon ground rules for the negotiations and agreed that they should use an assumption of a 20 percent increase in health insurance premium costs for both years under discussion. The Employer's notes described one of the ground rules agreed upon as, "Any actual proposal made must be made through the chief negotiators and in writing." The Association's notes broke this into two ground rules: "1. Any actual proposal must go through the chief negotiators. 2. Any proposal should be written down."

34. At the next meeting on February 6, 2003, the Association suggested that 18 percent would be a more appropriate projection of the increase in premium costs for the coming year (the second year of the contract) and 20 percent for third year. The Board agreed to that change. The Association presented a proposal and said it was the same as where they left off in the fall: a cost share of 85/15 in year two and 80/20 in year three; a 3 percent salary increase for each of the two years, and eliminating the flat step at step 13 by adding a ½ step in year two and another ½ step to step

13 in year three. The Association's notes of this meeting indicated that they passed out an insurance proposal and a salary proposal at this meeting, but there is no copy of either of these proposals in the record.

35. On March 19, 2003, Mr. Jette stated that the Board was pleased that the teachers were beginning negotiations where they left off in the fall. The Board presented a counter-proposal of a 3 percent wage increase for both years, adding a ½ step to Step 13 in the third year with a 80/20 cost share for both years. When Mr. Jette presented this proposal, he said the Board was "bringing out our best proposal tonight – doesn't mean it is an ultimatum - just wanted to be close to where we need to be." The Board also indicated that they did not want to remove the zipper clause from the current contract and that the hard-to-fill positions were no longer an issue they wanted to pursue. Neither party's notes of this session or the next session contain any express reference to the employer switching from the Standard plan to the Choice Plus plan as the basis for calculating the 80/20 cost sharing. After caucusing, the Association responded that some people would be initially taking a negative increase after factoring in the increased employee contribution to the health insurance.

36. Mr. Jette testified that the employer raised the salary increase to 3 percent and started using Choice Plus as the basis for calculating the cost share at the same time and that this change was first made at the April 14, 2003, session. Mr. Nokes, a member of the Association's negotiating team and later its chief negotiator, testified that the Employer started using Choice Plus on March 19, 2003.

37. The Employer's addition of a ½ step at step 13 in the final

year was not discussed at this meeting. The salary chart distributed as the salary proposal adds the ½ step at step 13, with the result that step 13 is halfway between step 12 and step 14.

38. At the next meeting on March 26, 2003, the Association negotiators stated that they had not had a chance to meet and needed to caucus to discuss the Board's proposal of March 19, 2003. Upon return, they observed that under the Board's proposal, most people would see a pay decrease, then recover somewhat from the initial drop, but it would be a minor increase to most. The Association shared sample cases showing how some employees suffered a decrease in salary when the insurance cost was taken into account. The Association ran the figures based on the Board's proposal and explained how they got them and what effect they had on staff. These sample cases were not part of either party's notes of the meetings and were not otherwise made part of the record.

39. During this March 26 meeting, the Association stated that they did not have a counterproposal, but wanted to think about a two-tiered plan in which current employees stay in the Standard plan and new employees have Choice Plus, or the option of having 100 percent of employee coverage with a greater contribution for dependent coverage. The Employer's notes for this portion of the discussion also indicated the Association wanted to look at "No change in the salary schedule." Their notes described the two-tiered insurance plan the Association was going to look at as "Those hired before June 2003 continue with the Standard Plan (85/15 - 80/20). Those hired after June 2003 Choice Plus Plan (80/20 - 80/20)." There was no discussion of the change to step 13 at this meeting. The Association did not present a

counterproposal at this time.

40. There are no Association notes for April 14, 2003.[2] The Employer's notes for the April 14, 2003, meeting indicate that Sharon Imbert, the Association's note taker, was present. On that date, the Association presented a counter-proposal to the Board's March 19, 2003, proposal. The Association's counterproposal included a 3 percent salary increase in year two, a 3 percent salary increase in year three with a ½ step added to step 13 for year year, and a health insurance cost share of 87/13 of the Choice Plus plan for both years. After caucusing, Mr. Jette stated that the Association's counterproposal of 87 percent of Choice Plus was 7 percent higher than the Board's proposal. The Board then presented a counterproposal with the same wage proposal and the cost share of 87/13 of the Choice Plus plan in the second year and with a cost share of 80/20 of Choice Plus plan for the third year. The Board's counterproposal also included an added ½ step at Step 13. There is no evidence that either of these proposals were made in writing.

41. At the next meeting on April 29, 2003, the Association raised for the first time the subject of how the added ½ step affected the salary scale. The Association's notes indicate that they pointed out that the Employer made the new step 13 halfway between step 12 and 14. The Association had intended that the ½ step amount ($625) that was added to Step 13 also be added to all the steps in the scale above

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[2]The Association's notes for the period between March 26 and June 9, 2003, are all undated. C-33 and C-34 cover the meetings of April 29, 2003, and May 14, 2003. The parties' Joint Memorandum on Exhibits submitted to the Board prior to the hearing indicates, without explanation, that there are no Association notes for the April 14, 2003, meeting.

Step 13 (up to Step 24). Thus, step 14 would be a full step higher than the new step 13, and each step after that would retain its step increment. A substantial majority of the teachers in the unit are experienced teachers at step 13 or higher.

42. At the April 29 meeting, the Association's negotiators also reported back on the direction they had received from their membership. They said that most teachers would reluctantly go to 87/13 of Choice Plus for '03-'04 but they did not want any individual teacher to end up with a net decrease. The Association mentioned the possibility of a one-time adjustment for the six teachers negatively affected. For '04-'05, the teachers did not want to move away from the 87/13 cost share, felt no one should take a decrease, and they wanted the ½ step at step 13 as proposed by the Association.

43. By the April 29 meeting, the parties had learned that the actual insurance premium increase for the year beginning that coming September was 9.9 percent, well below the parties' working assumption of 18 percent. According to the Association's notes of that meeting, this resulted in a cost to the Employer that was $54,800 less than anticipated. The Association was concerned that these reduced costs were not being factored in. There is no evidence in the record that the Association made any proposal to redirect these savings, either at this meeting or the next. The Association also complained about the big change in insurance from what the teachers were used to. Mr. Jette said that the Employer's decision to move to Choice Plus was based on the number of teachers already in it and that they seemed to like the plan.

44. At the next meeting on May 14, 2003, the Board's proposal contained a provision reallocating to salaries any cost

savings in insurance for '04-'05 if the cost increase ended up being lower than the parties' 20 percent assumption. The Board said it would be willing to have the parties agree on how the insurance savings in '04-'05 would be applied to employee salary. The Board's salary proposal was a straight 3 percent increase to base in each year, and did not include any sort of step adjustment.

45. Mr. Jette testified that the Association took the package back to members for a ratification vote but the negotiating committee was not going to speak for or against it.

46. At the June 9, 2003, meeting, the Association reported that the membership rejected the package by an 85 percent to 15 percent vote. After some discussion, it became apparent to the parties that they needed to move to the impasse resolution process. The parties decided that they should submit a joint request for mediation and try to get their differences resolved quickly. The chief negotiator for the Association identified the following issues as "still on the table: 1) Zipper clause, 2) ½ step at 13, 3) 3% to base @yr., 4) 2 yr. Proposal, 5) 87% of Choice Plus 87-13 split, 6) include retroactivity - to beginning of next contract year." The Association's notes of this meeting indicated that Mr. Jette stated, "Any settlement issues would be retroactive including the insurance." "Our last offer was all inclusive . . . Our position is all inclusive to the May 13 proposal as presented to the Association."

47. There were lengthy mediation sessions held on October 6, October 20 and November 20, 2003. The Employer prepared several proposals or concepts for different approaches for the mediator to work with. Mediation was not successful and the parties filed a joint request for fact-finding on November 21, 2003.

48. The fact-finding hearing occurred on May 27, 2004. The parties filed pre-hearing briefs about five days prior to the hearing pursuant to the panel's rules.

49. The Association's pre-hearing brief to the fact-finding panel identified the following issues: the amount and effective date of a salary increase, the elimination of a flat step at step 13, the health insurance cost share percentages and the plan on which that percentage is calculated, and the elimination of the zipper clause.[3] The Association's position was to eliminate the flat step 13 by adding a half step in each of the two years. With respect to the insurance issue, the Association was proposing that the Board continue paying 87 percent based on the more expensive Standard plan until the parties were able to execute an amendment to the collective bargaining agreement pursuant to the reopener provision. At the time the amendment was executed, the 87 percent would be calculated based on the Choice Plus plan.

50. The Association's brief was signed by Laurie Haapanen, an MEA Uniserv Director, and Joseph Stupak, MEA's Director of Collective Bargaining. In addition to laying out the Association's positions on the subjects, they made two assertions about the Board's position: first, that the Board had agreed to pay 87/13 based on the Standard plan for the duration of the second year of the contract and, second, that the Board had agreed to make salary increases retroactive. The wording the Association used in its brief was, "While written tentative agreements have not been executed, the only salary issue about which the parties have

[3]The issue of the zipper clause being a permissive subject of bargaining was not mentioned in the Association's pre-fact-finding brief and was never raised during negotiations.

different positions is the elimination of the 'dead zone'" [i.e., the flat step] and "the Association understands the Board's proposal to be a 3 percent increase to the salary scale retroactive to the beginning of the 2003-2004 contract year." With respect to the insurance issue, the Association wrote, "Although written tentative agreements have not been executed, the only health insurance issue about which the Association understands the parties have different positions relates to the percentages of premiums that the Board will contribute on behalf of each employee for the last year covered by the mid-term bargaining provision" and "the Association understands that the Board has modified [its] position so that [the shift to Choice Plus] would not be retroactive for 2003-2004."

51. The Employer stated in the body of the brief simply that they had not agreed to retroactivity, without further elaboration. In the page detailing the Board's proposal, the salary portion merely said "2003-2004 Salary–Increase the base by 3 percent," without any reference to retro-activity. The Board held to its position that it did not want to remove the zipper clause from the contract and that it had withdrawn the "hard to fill positions" item. The Board's position on the salary and insurance issue was stated as an offer of a 3 percent increase in salaries in each year tied to the 80/20 insurance cost share based on the Choice Plus for both years. The proposal to redirect savings that might occur with a lower-than-projected insurance increase in '04-'05 was not included. The Board stated, "It is the desire of the Board to move teachers, by the 2004-2005 contract year, to the same cost share percentage (80% employer/20% employee of the Choice Plus Plan) as is reflected for other employees in the district."

52. The Employer's pre-hearing brief was written and submitted by the superintendent of schools, as the Board did not want to engage outside assistance at that time. The Employer's brief makes no representations as to the Association's position on any issue.

53. About five minutes before the start of the fact-finding hearing, Laurie Haapanen and Joseph Stupak handed Mr. Jette a letter in an envelope. They asserted in the letter that the zipper clause was a permissive subject of bargaining and asked the Employer to remove it as an issue to present to the fact-finding panel. Up until this point, the Association had never mentioned or alluded to any concern that a zipper clause was a permissive subject of bargaining. There was no testimony about any discussion between the parties concerning this letter. The zipper clause was presented to the fact-finding panel as one of the outstanding issues.

54. There was little or no testimony on what transpired at the fact-finding hearing, other than testimony that the Association presented an argument on why it viewed a failure to make wage increases retroactive a punitive measure. When the fact-finding panel asked Mr. Jette about the Employer's position on retroactivity, Mr. Jette stated that he could not give a blanket offer of retroactivity but considered it negotiable. He testified that he did not want to "tie my hands by agreeing in advance that retroactivity would be a given when it would only serve to protract the process by guaranteeing that no matter how long the process took there would always be retroactive pay." Mr. Jette's testified that in his experience in the private sector retroactivity was unusual.

55. Mr. Jette testified concerning why the Board's prior offer of May 14, 2003, was not the same as the offer made as part

of fact-finding process. The May 14, 2003, proposal included a provision to redirect savings to salaries if premiums ended up being less than the projected 20 percent increase for 2004-2005. Mr. Jette testified that this proposal was offered as an incentive to get the Association to modify its position on health care costs and settle the reopener bargaining before the end of the first year of the contract. The Employer's objective was to reduce its cost increases by encouraging the employees to choose the less expensive Choice Plus plan by having employees assume a greater share of insurance costs in the second and third year of the agreement. This reasoning had been provided to the Association during negotiations. By the time the parties went to fact-finding in May of 2004, a year of potential cost savings had been lost. During this bargaining process, the Board continued to maintain the status quo of the 87/13 cost share based on the more expensive Standard plan after the first year of the contract had passed. Mr. Jette was also not certain that the resolution of the outstanding issues would occur prior to the health insurance plans' group enrollment deadline.

56. Other than the information in the preceding paragraphs, the only other evidence presented concerning the fact-finding hearing were the two pre-hearing briefs and the report of the fact-finding panel. None of the exhibits that were provided to the fact-finding panel were offered as evidence in this proceeding, nor was there any testimony about what information was presented or what questions were asked, except as already noted. In describing the Employer's reaction to the fact-finders' report, Mr. Jette testified that he felt that the Employer's exhibits and testimony were "virtually ignored." In particular, he questioned the fact-

finders' assertion that the parties were in total agreement on salaries, even though the Employer's position was that the salary offer was tied to the health insurance issue. Mr. Jette went on to say (without elaboration), "there just seemed to be bias against the board for a variety of reasons that was exhibited throughout the hearing."

57. There was no testimony to explain the basis for the Association's assertions in its pre-hearing brief regarding the Employer's positions, nor was there any explanation offered as to why the Association had changed its position on the flat step 13 from its prior proposal of adding a ½ step in the final year to adding a ½ step in each of the two years.

58. The fact-finders' report was dated June 18, 2004. The fact-finders stated, "The parties quite clearly agreed in principle to a three (3%) percent increase in salary for each of the two years" and noted that the Board tied that increase to its proposed change to the insurance contribution. The panel decided that the Association's demand for the elimination of two flat steps at step 13 and step 15 was not justified. There is no explanation of how the Association's position as stated in its brief of removing the flat step 13 in two ½ step increments transformed into adding step increases at two different flat steps. The fact-finders concluded there was no need for additional steps. With respect to the health insurance question, the fact-finders said the Employer contribution should be reduced to 80 percent of the Standard plan, rather than to 80 percent of Choice Plus. They recommended that the change become effective at the beginning of the next contract year (September 2004) since employees can change plans only at that time. Finally, the fact-finding panel suggested a change to the zipper clause so that it only

applies to permissive subjects.

59. After the fact-finding report was issued by the fact-finders, the Board received it and discussed it in executive session.

60. On July 22, 2004, the Association presented a proposal to the Board, which was essentially the recommendation made by the fact-finders. The Association proposed that the Employer pay 87 percent of the Standard plan through '03-'04, then 80 percent of Standard (or 86.4 percent of Choice) for the '04-'05 year (i.e., effective September 1, 2004). The proposal included the change to the zipper clause found in the fact-finders' report that made it apply to permissive subjects only. With respect to wages, the proposal included retroactivity for the change in base salaries and in the hourly rate used in the "Extra Pay for Extra Work" section of the salaries article in the collective bargaining agreement. Upon receiving this proposal, the Board said it needed to assess it before responding, and asked if teachers supported the move to 80/20 cost share.

61. Mr. Nokes testified that the Association's position from April 14, 2003, through fact-finding was to adhere to the 87 percent figure based on the Choice Plus plan (nearly the same as 80 percent of the Standard plan). After fact-finding, the Association's proposal was maintaining 87/13 of Standard for '03-'04, and going to 80/20 of Standard for '04-'05, which is equivalent to 86.4 percent of Choice.

62. On August 12, 2004, the Board reported that they had considered the Association's proposal and rejected it. Mr. Jette testified that the Board's primary reason for rejecting the fact-finders' recommendations was that the fact-finders did not consider the Board's position that the 3 percent wage increase was dependent upon lesser costs for

health insurance. He felt that the fact-finders ignored the Board's position and arguments. Following the Board's rejection of the Association's proposal, the Association caucused, then said they would take it back to their membership on September 9, 2004.

63. There were post-fact-finding mediation sessions held in the fall of 2004.

64. Mr. Nokes wrote a "Negotiations Update" dated 10/08/04 and had it distributed to Association members. This memo touched on the first mediation session and Mr. Nokes' conclusion that the Employer was not going to budge on the insurance issue. The memo was primarily focused on actions the Association members could take to try to increase pressure on the Board.

65. In a letter dated October 29, 2004, the Association's chief negotiator, Mr. Nokes, wrote to Mr. Jette requesting that the Board agree to binding arbitration on all issues.

66. On November 19, 2004, Mr. Jette wrote a letter to Mr. Nokes in which he stated the Board had decided to not agree to binding arbitration on insurance and salary, as requested on October 29, 2004. Mr. Jette suggested statutory interest arbitration. He notified the Association that the Board had retained the law firm of Drummond Woodsum & MacMahon at that point to represent the Board in the negotiations.

DISCUSSION

The question presented is whether the conduct of the Board in negotiating pursuant to a reopener provision violated its statutory duty to negotiate in good faith. Before addressing that issue, we will first discuss the Employer's claim that evidence presented at the hearing compels a conclusion that the Association had waived its statutory right to demand mid-term

bargaining by agreeing to include a zipper clause in the collective bargaining agreement.

The duty to bargain is established in Section 965(1) of the Municipal Public Employees Labor Relations Law which states, in relevant part:

> **1. Negotiations.** It shall be the obligation of the public employer and the bargaining agent to bargain collectively. "Collective bargaining" means, for the purposes of this chapter, their mutual obligation:
>
> > A. To meet at reasonable times;
> >
> > B. To meet within 10 days after receipt of written notice from the other party requesting a meeting for collective bargaining purposes, provided the parties have not otherwise agreed in a prior written contract;
> >
> > C. To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, 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. §965(1).

The proviso in paragraph B means that the duty to bargain over mandatory subjects of bargaining continues with respect to new issues which arise while a collective bargaining agreement is in effect "when those new issues are neither contained in the terms of the contract nor negotiated away during bargaining for that contract or a successor agreement." East Millinocket Teachers Ass'n v. East Millinocket School Committee, No. 79-24, at 4-5 (Apr. 9, 1979) (quoting Cape Elizabeth Teachers Association v. Cape Elizabeth School Board, No. 75-24 (1975) at page 4.) See also Local 2303 IAFF v. City of Gardiner, No. 05-03 (March 22,

2005). The statutory right to demand bargaining may be waived, but that waiver must be clear and unmistakable. State of Maine v. MSEA, 499 A.2d 1228, 1230 (Me. 1985). A zipper clause is a fairly common provision included in a collective bargaining agreement as a means of waiving the statutory right to bargain. The purpose of a zipper clause is to foreclose or "zip up" bargaining for the duration of the contract, thus promoting stability in labor relations for that period. The effect of a zipper clause is that a party may lawfully refuse to bargain over issues not covered by the contract when requested by the other party.

Here, the collective bargaining agreement contains a very broad zipper clause. The Employer argues that the Labor Board is without jurisdiction to hear this matter because the Association waived its statutory right to demand bargaining by agreeing to the zipper clause in the collective bargaining agreement. The Employer also claims that the collective bargaining agreement's reopener provision (the "Addendum" to the agreement) merely creates a contractual right, but does nothing to limit the effect of the zipper clause.[4]

The Employer's argument is based on its strained reading of the Law Court's decision in State of Maine v. MSEA, 499 A.2d 1228 (1985). In that case, the employer had refused MSEA's request to bargain over the impact of three departmental reorganizations. The zipper clause in that case stated:

> Each party agrees that it shall not attempt to compel

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[4]This argument was the basis for the executive director's dismissal of the complaint, which was subsequently reversed by the Board. The Board's analysis in the Interim Order of February 3, 2005, was that the Addendum made it impossible to consider the waiver contained in the zipper clause to be clear and unambiguous. The employer has not really addressed any failing in that logic.

> negotiations during the term of this Agreement on matters that could have been raised during the negotiations that preceded this Agreement, matters that were raised during the negotiations that preceded this Agreement or matters that are specifically addressed in the Agreement.

Even though the management rights clause of the agreement authorized the employer to reorganize the departments,[5] both the Labor Board and the Law Court recognized that the duty to bargain over the impact was a separate question. After reviewing the specific terms of the collective bargaining agreement, the Law Court held:

> the State's unilateral action was specifically permitted under the contract. The statutory duty to negotiate over the impact of such decisions could have been preserved in the contract. That statutory obligation was waived.

State of Maine v. MSEA, 499 A.2d at 1232.

The Employer relies on the Law Court's statement that the right to demand bargaining over impact "could have been preserved." The Employer claims that, in this case, the parties' express agreement to "reopen negotiations" did not preserve the right to demand bargaining. The Employer admits in its brief (at 16, fn. 5) that the Labor Board "reasonably inferred from the

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[5]The management rights article expressly reserved to the State the exclusive right to manage its operations, including but not limited to:

> [T]he right to determine the mission, location and size of all its agencies and facilities; the right to direct its work force; . . . to establish specifications for each class of positions and to classify or reclassify and to allocate or reallocate new or existing positions in accordance with the law; . . . to determine the size and composition of the work force; . . . [and] to install new, changed or improved methods of operations.

Id. at 1229, fn. 3.

language of the Addendum that the parties had intended to preserve their statutory right to bargain," but the Employer also says "nothing contained in the Addendum reserves the Association's statutory right to bargain."

We disagree. The Addendum, which stands on equal footing with the other provisions of the contract, states, in full:

> MSAD #46 Board of Directors and the MSAD #46 Education Association will reopen negotiations of the MSAD #46 2002-2005 Comprehensive Teachers' Contract in November or December of 2002 for the purposes of negotiating salaries, health insurance, zipper clause and hard to fill teaching positions for the second and third years. If agreement is not reached, the normal procedures of impasse by state statute is open to either side.

The language of the Addendum is abundantly clear: when the parties agree to "reopen negotiations" . . . "in November or December of 2002 for the purposes of negotiating" the specified subjects, they are doing just that. Reopener provisions have been around longer than Maine's collective bargaining laws. They promote labor stability by allowing the parties to agree to long-term contracts while retaining the ability to return to the table for specified subjects within the time frames or under the circumstances agreed upon. The fact that the parties in this case decided to include the reopener provision without expressly stating that they were "preserving their statutory right to bargain" simply reflects the fact that they did not need to say anything. In common parlance in the world of collective bargaining, agreeing to a reopener means that they are preserving the statutory right to demand bargaining. The duty to bargain resumes in accordance with the conditions of the reopener provision. See, e.g., C.J. Holdings Inc., 315 NLRB 813 (1994), enforced, 97 F.3d 114 (5th Cir. 1996).

As Mr. Jette testified, the parties were anxious to execute an agreement covering all of the issues they had agreed on,

including the salaries and health insurance costs for the first year, and to take up the identified issues for the second and third year of the contract later. Mr. Jette testified that there was an open discussion at the bargaining table on having a three-year agreement and including a reopener clause for the second and third year of the contract for the purpose of negotiating the salary, health insurance, zipper clause and hard-to-fill positions. The fact that neither Mr. Jette nor Mr. Nokes recollected any mention of "preserving their statutory right to bargain" is quite simply just a reflection of their understanding that a reopener provision preserves the right to demand bargaining. The very purpose of a reopener provision is to require mid-term bargaining even if the subjects covered by the reopener are already covered by the contract. We hold that the reopener provision of the parties' collective bargaining agreement was sufficient to preserve the statutory right to bargain and creates an exception to the broad waiver in the zipper clause.

The Employer's claim that Bureau of Employee Relations v. AFSCME creates an "unambiguous" standard that applies here is difficult to follow. Bureau of Employee Relations v. AFSCME, 614 A.2d 74 (Me. 1992). In that case, the dispute was whether the employer could change the pay periods, an issue not covered by the collective bargaining agreement. The parties had negotiated a broad zipper clause and a maintenance of benefits article in which the State agreed to consult and negotiate with AFSCME before changing any benefit "presently provided pursuant to law." The Law Court held that by agreeing to the zipper clause, AFSCME had waived its statutory right to demand bargaining over the change. The Law Court noted that the maintenance of benefits provision created only a contractual right but did not preserve the statutory right to bargain, even though in that provision,

the employer agreed to negotiate with AFSCME before making changes. The Employer claims that in AFSCME the Law Court held that even an "express reference to an agreement to bargain" is insufficient to preserve the right to demand bargaining during the term of the agreement. Thus, the argument goes, the express reopener provision in this case is insufficient as well and, like the maintenance of benefits article in AFSCME, only creates a contractual right. At this point, we must observe that if the parties had not preserved the statutory right to bargain in this case, it is difficult to imagine how they ever could, if one were to apply the "unambiguous" standard the Employer has created here. The Employer's argument fails because it extracts a few words out of the context of the larger environment of collective bargaining and ignores both the intent of the parties and the realities of collective bargaining.

The purpose of a maintenance of benefits provision is fundamentally different than the purpose of a reopener provision. The purpose of a reopener is to reopen negotiations in accordance with the limitations or contingencies specified. It enables the parties to enter into an agreement for a longer period than they might be comfortable with absent the reopener. The purpose of a maintenance of benefits provision, however, is to preserve the status quo with respect to benefits or practices not covered by the agreement. Some maintenance of benefits provisions simply prohibit changes to existing benefits or practices (See IAM District Lodge #4 v. Wiscasset, No. 03-14 (Feb. 23, 2004) at 3); others require the parties to bargain before making the change. (See BOER v. AFSCME, 614 A.2d 74). In some respects, the purpose of a maintenance of benefits provisions is to limit the authority granted in a management rights clause with respect to existing practices affecting mandatory subjects that are not covered by the agreement.

In summary, we hold that even though the parties included a broad zipper clause in the collective bargaining agreement, the reopener provision preserved the statutory right to bargain over the issues specified. The testimony on this matter supports, not undercuts, our conclusion. The Labor Board consequently has jurisdiction to decide the question of whether the MSAD #46 Board failed to bargain in good faith in negotiations held pursuant to the reopener provision.

THE FAILURE TO BARGAIN IN GOOD FAITH CHARGE

The standard this Labor Board applies in evaluating alleged violations of the duty to bargain in good faith is not in dispute. It has been described 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); 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). See also MSEA v. York County, 04-04, at 28-29 (Oct. 8, 2004).

At the same time the statute imposes the obligation to bargain in good faith on both parties, section 965(1)(C) also states that, ". . . neither party shall be compelled to agree to a proposal or be required to make a concession . . . ." Thus, a refusal to agree to a particular proposal is not, in itself, a refusal to bargain in good faith.

The established standards of good faith bargaining apply to the parties whether they are negotiating a new contract, a successor contract, or pursuant to a reopener provision. See, NLRB v. Lion Oil, 352 U.S. 282 at 290-291 (1957) ("Congress recognized a duty to bargain over modifications when the contract itself contemplates such bargaining."); Speedtrack, 293 NLRB No. 128 at 9-10 (holding that a contract reopener provision permits the parties "to respond to disputes over reopened subjects by resort to the courses of action normally allowed them when a contract has expired"); see generally, e.g., Maine Teachers Assoc. v. Sanford School Committee, No. 77-18 (June 13, 1977) (applying same standards of good faith bargaining to negotiations occurring pursuant to a reopener provision) and Auburn Support Personnel v. Auburn School Committee, No. 91-12 (July 11, 1991) (same).

There are two aspects of this case that make it particularly difficult to assess the Employer's actions. The first is that the negotiations were pursuant to a reopener provision which by its terms was limited to four issues: salaries for the second and third years of the contract, health insurance cost sharing for those two years, the zipper clause and the issue of hard-to-fill positions. The fewer the issues on the table, the less opportunity there is to witness the give and take that often indicates sincere bargaining. The other complicating factor in

this case is the fact that the economics underlying the proposals were affected once the negotiations moved into the time frame being negotiated.

We also note that there is a lot that was not said about the negotiations in this case: The notes from a key negotiating session are missing from the Association's exhibits, neither party provided copies of certain documents that had been distributed at negotiating sessions, very little effort was made by either party to explain the sometimes cryptic notes of negotiating sessions, and what transpired at the fact-finding hearing remains largely a mystery. Presumably, the parties either individually or jointly decided they have issues they did not want raised at this proceeding, for whatever reason.

In essence, the case is about whether the Employer engaged in hard bargaining or bad faith bargaining. The Board of Directors gave its negotiators authority to negotiate a combined salary and health insurance increase of 5 percent and the negotiators were bargaining with that objective in mind.[6] The Association had one of the better insurance benefits in the area and did not want the district's relative standing to slip. Neither party wanted to give in. The Association alleges that, by it overall conduct since the start of the reopener negotiations, the Employer failed to bargain in good faith as required by §965(1).

The Association's case relies on two primary points: a factual assertion, which we conclude is not supported by the record, and what appears to be the Association's position in this case that negative movement in the Employer's proposals was regressive, and their regressive proposals demonstrate bad faith

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[6] See Local 1650 IAFF v. City of Augusta, No. 04-14 at 15 (holding to negotiating parameters set by City Council is hard bargaining, not bad faith bargaining.)

bargaining. This, too, is incorrect. The Association also asserts that the Employer's conduct regarding retroactivity and the zipper clause are further indications of bad faith bargaining.

Much of the complainant's case depends on its assertion that when the Employer proposed a 3 percent salary increase and a 80/20 insurance cost share at the March 19, 2003, negotiating session, the basis for defining the contribution level was the higher cost Standard plan, not the less expensive Cost Plus plan. Although the complainant recognizes that the exhibits are not clear on this point, the complainant relies on Mr. Jette's testimony that they did not start using the lower cost plan as the basis for the cost share until April. Mr. Jette did indeed say that, but we conclude that he was simply mistaken about the dates. Looking at all of the evidence as a whole (and Mr. Jette's repeated assertion that he was not strong on details), we conclude that the March 19 proposal was based on the Choice Plus plan.

The most compelling evidence about this issue is the specifics of the first counterproposal to the March 19 offer that the Association made on April 14, 2003.[7] At that meeting, the Association proposed a 3 percent salary increase in year two, a 3 percent salary increase in year three with ½ step added to step 13 for year three, and a health insurance cost share of 87/13 of the Choice Plus plan for both years. If the Employer's March 19 proposal had indeed been based on the Standard plan as the Association now asserts, the Association's counterproposal on

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[7]In its brief, the Association claims that this proposal was not made until April 29, 2003, but cited no evidence that supports this assertion and offered no evidence disputing the Employer's detailed notes of the April 14, 2003, session which unequivocally state that the Association made this counterproposal. The Association did not offer their notes of the April 14 negotiating session in evidence.

April 14 would have been the same for insurance because 87 percent of the Choice Plus plan is equivalent to 80 percent of the Standard plan. Furthermore, since both the Employer's proposal and the Association's counterproposal included a 3 percent salary increase for both years, the only difference in the two packages would have been the adjustment to step 13. There is no indication in the record that the step issue was discussed or analyzed at all prior to the April 29 meeting. All of the discussions on March 19, March 29 and April 14 related to the impact of the insurance costs. The step issue never even came up. It does not make sense that the parties could have been so close to settlement but never even mentioned the only issue that separated them.

The Association contends that Mr. Jette was correct in saying the Employer did not propose using Choice Plus for calculating the cost share until April but that he was wrong in saying that April was the first time they proposed a 3 percent increase. Based on these two assertions, the Association argues that the only change presented on April 14 was a reduction in the proposed insurance contribution. We conclude that Mr. Jette was correct that this increase in salary occurred in tandem with the move to Choice Plus. He was incorrect to state (in response to a leading question from the Employer's attorney) that these changes occurred on April 14, 2003. Both sets of negotiating notes show the 3 percent increase was presented on March 19, 2003. These notes are more reliable than a witness's recollection of dates and details of events two years old.[8]

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[8]We do not think Mr. Jette's testimony that the Board was taking advantage of a "window of opportunity" presented by the Association's reference to Choice Plus as the basis for calculating the cost share is particularly important. The previous June, the Association had used Choice Plus as part of its proposal for a two-tiered insurance plan and Mr. Jette might have had that in mind. The Board's decision to start using Choice Plus in their March 19 proposal may be connected

Furthermore, the Board's notes of the April negotiating session support the conclusion that the March 19 cost-share offer was based on Choice Plus. After the Association made its April 14 counterproposal, in which it proposed a 87/13 cost share based on Choice Plus for both years, Mr. Jette remarked that the Association's proposal was 7 percent higher than the Board's proposal. Had the Board's proposal been 80 percent of the Standard plan, this comment would not have made sense--80 percent of the Standard plan is equivalent to 87 percent of the Choice Plus plan. His comment makes perfect sense if the Board's March proposal were based on Choice Plus.

By concluding that the Board's March 19 proposal used Choice Plus as the basis for the cost share, the Association's argument that subsequent actions by the Employer were regressive is weakened substantially. The Association asserts that the Board's proposal on April 14 differed from its prior proposal only by a reduction in the insurance contribution, i.e. that it was the first time the Employer based the cost share on the Choice Plus plan. The facts simply do not support this. Not only was there no reduction in the insurance contribution from the March 19 proposal, the Board's counterproposal of April 14 included an increase from 80 percent to 87 percent of Choice Plus for the first of the two years.

The Association also contends that the Employer made significantly regressive proposals on salaries. Presumably this refers to the Employer's failure to include in the May 2004 fact-finding position statement the proposal made on May 14, 2003, to redirect to salaries the savings that might occur if the insurance rates for 2004-05 ended up being less than the

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to that proposal or his statement may have been an after-the-fact explanation.

projected 20 percent. The Association may also be referring to removal of the proposal to improve step 13 between April 29 and May 14, 2003. In either case, the Association's argument seems to be that the backward movement on these issues is by definition regressive and a regressive proposal is by definition an indication of bad faith bargaining. This is not the case.

A claim that a regressive proposal is evidence of bad faith requires an examination of the proposal and the surrounding circumstances. We note that even if the parties had reached a tentative agreement on a proposal, a subsequent withdrawal of that proposal would not necessarily result in a finding of bad faith bargaining. We held in Lewiston Police that it was evidence of bad faith for a party to unilaterally withdraw prior tentative agreements without good cause. Lewiston Police Dept. IBPO v. City of Lewiston, No. 79-64 (Dec. 18, 1979) at 8. In this case, there were no tentative agreements on these two issues and there is no evidence that the Employer ever refused to provide an explanation for no longer including the proposals.

As with any allegation of bad faith bargaining, we must consider all the evidence to determine whether any single action or the entire course of conduct was made with the intent to avoid an agreement or an intent to frustrate the bargaining process. See generally Kittery Employees Assoc. v. Strahl, No. 86-23, at 10-11, and Teamsters v. City of Westbrook, No. 89-05, at 10-11 (Oct. 25, 1988) (Failure to submit the final tentative agreement for ratification for an unreasonable length of time evidences a lack of intention to reach a final binding agreement and frustrates the bargaining process). With respect to the Employer's proposed change to step 13, the evidence shows that this proposal was rejected by the Association, as their counter-proposal reiterated the point made in discussion that they wanted the improvement to step 13 to push up all of the higher steps by

a corresponding amount. With respect to the offer to redirect the potential savings from smaller premium increases in 2004-2005, Mr. Jette explained that it had been presented as an incentive to reach settlement early enough for the Employer to realize some savings from employees selecting Choice Plus. By the time the fact-finding hearing occurred one year later, the opportunity to achieve those savings had been lost because the Employer had been required by law to continue paying 87 percent of the cost of the Standard plan.[9] There is no allegation in the complaint that the Employer refused to provide an explanation of its changed position at the fact-finding hearing nor is there any evidence that this issue was discussed at all in fact-finding. The Association has offered no evidence to suggest that these proposals were made with the intent to avoid reaching an agreement.

The Association makes various other contentions about the Employer's conduct that it considers indicative of bad faith bargaining, most of which are not supported by the record. The Association claims that the Employer's "initial" proposal on March 19, 2003, was its best offer, but it was neither the initial proposal nor its best proposal. It was not an initial proposal because both parties viewed the reopener as a continuation of the prior bargaining. Even if it were the initial proposal, the March 19 proposal was not the Employer's best offer because the April 14 counterproposal had increased the cost share to 87 percent for the first of the two years.

The Association claims the Employer never made a proposal on the zipper clause issue, though the record is clear the

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[9]The 87/13 cost share for the Standard plan was the status quo that the Employer was required to maintain during the collective bargaining process and through the impasse resolution procedures established by statute.

Employer’s proposal was to retain the clause in the existing agreement. Perhaps the Association is suggesting that the proposal to keep the zipper clause in the existing agreement was never actually made because it was not presented in written form. The Association has not argued this point and, even if it had, it would fail in this case. It is true that the parties’ notes on ground rules indicate that a proposal must be in writing. Not only was there no testimony interpreting this ground rule, there are numerous instances of proposals made by both sides without any evidence that those proposals were made in writing.

The Association also claims the Employer “artfully evaded” making a proposal on retroactivity, but this issue had not been on the bargaining table during the negotiating sessions. The Employer’s position at the time of fact-finding was that it had not agreed to retroactivity, but considered it negotiable.[10] The Association claims that the Employer made no lasting compromises, a claim the record does not support. Finally, the Association claims the Employer “summarily rejected” the fact-finders’ recommendations, when the evidence indicates that they considered it in executive session and had a reasoned basis for rejecting it.

A final argument presented by the Association is that the Employer committed a *per se* violation of the duty to bargain by insisting on a permissive subject of bargaining at fact-finding. It is well established that a party commits a *per se* violation by insisting to impasse on a non-mandatory subject of bargaining. See NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342

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[10]Retroactivity is clearly a mandatory subject of bargaining. See Caribou School Dept. v. City of Caribou, 402 A.2d 1279, at 1284 (Me. 1979); Auburn Firefighters, IAFF v. City of Auburn, No. 83-10 at 8 (March 9, 1983). Retroactive changes, however, must always be agreed upon before they can be implemented; otherwise they are simply unilateral changes in the status quo made retroactively.

(1958); MSAD No. 24 v. Van Buren Custodian Assoc., No. 79-16 (1979). The Association asserts in its brief that a zipper clause is a permissive subject of bargaining, not a mandatory subject. The Association argues: "A bargaining agent cannot be forced to bargain over a provision which constitutes a waiver of bargaining rights on all subjects." The case the Association relies upon is MSAD #22 Non-Teachers Assoc. v. MSAD #22, No. 79-32 (July 30, 1979). In that case, the employer had proposed a provision which would have given management the unrestricted power to make changes to mandatory subjects. The Board described it as "an all-inclusive management rights provision which sweeps over all subjects of mandatory bargaining" and was "ultimate management control over all subjects." The Board concluded:

> Thus, while we agree that a management rights clause covering only a few mandatory subjects of bargaining would not be a per se violation but rather only possible evidence of bad faith, we conclude that a bargaining agent cannot be forced to bargain over a provision which constitutes a waiver of bargaining rights on all subjects.

MSAD #22, No. 79-32 at 6.

We think it appropriate that the Association has cited MSAD #22 on this issue because we conclude that the same analysis that applies to management rights clauses should apply to zipper clauses as well. Both zipper clauses and management rights clauses are forms of waiver. A zipper clause waives the parties' right to demand mid-term bargaining on subjects not covered by the agreement or raised in negotiations. Management rights clauses authorize the employer to make the changes specified in the clause without bargaining first. In MSAD #22, the Labor Board agreed with the holding of the U.S. Supreme Court in American National Insurance that insisting on a provision reserving sole control over certain mandatory subjects

(promotions, discipline, and work scheduling) may be evidence of bad faith bargaining, but it should not be considered a *per se* violation. MSAD #22, No. 79-32, at 7, citing NLRB v. American National Insurance, 343 U.S. 395 (1952). Thus, while management rights clauses are a mandatory subject of bargaining, that does not mean all management rights clauses can be insisted upon with impunity in all circumstances. Similarly, a zipper clause is a mandatory subject but insisting upon a broad zipper clause in some circumstances, such as when negotiations covered only a minimal number of subjects, may be evidence of bad faith bargaining. See Bangor Firefighters Assoc. v. City of Bangor, No. 94-45 (Feb. 15, 1995) at 15 ("the number of mandatory subjects on which a waiver is demanded [and] the nature of the waiver" is relevant.)

The Association attempts to draw a parallel between the effect of the provision in MSAD #22 and the effect of the zipper clause in the present case. In MSAD #22, the Labor Board was examining a clause that would go into effect if the voters failed to approve the contract.[11] No. 79-32 at 7. As noted above, the effect of the clause at issue was to give the employer unrestricted power to make changes in any subject, and had the effect of nullifying the agreement entirely. In this case, the effect of the zipper clause bears no resemblance to either provision in MSAD #22. We agree that the zipper clause here is very broad. The effect of it, however, can only be assessed in light of the contract as a whole. The more comprehensive a collective bargaining agreement is, the less effect a zipper clause has in limiting the right of a party to demand mid-term

[11] In addition to the clause giving the employer unfettered power, the Labor Board also found that the employer committed a *per se* violation of the duty to bargain by insisting on a provision that "shunted ratification" to the voters. Id.

bargaining. Given the comprehensive coverage of the parties' collective bargaining agreement in the present case, we cannot see how the holding in MSAD #22 has any application.

Our conclusion that a zipper clause is a mandatory subject of bargaining is supported by observations made by the Law Court in State of Maine v. MSEA. In discussing the zipper clause issue in that case, the Court noted that "Section 979-D(1)(B) of the act specifically provides that the parties may alter the statutory duty to engage in collective bargaining" and "[u]nquestionably, the parties may contractually waive the right to any mid-term negotiations." In rejecting the Labor Board's analysis of the effect of the zipper clause in that case, the Law Court stated:

> If there is a sound policy basis for restricting or eliminating the right to bargain for a waiver of mid-term negotiations over the impact of agreed upon unilateral employer actions, then that policy should be reflected in legislation.

State of Maine v. MSEA, 499 A.2d at 1232.

We think that part of the problem in the present dispute may stem from a misunderstanding of the purpose and effect of a zipper clause. The purpose of a zipper clause is to limit a party's right to demand mid-term negotiations on mandatory subjects of bargaining to the extent specified in the zipper clause.[12] A zipper clause does not authorize the employer to make unilateral changes. It simply makes it legal for one party to refuse the other party's request for mid-term bargaining over a mandatory subject. The employer's specific authority to make a

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[12]The fact-finders' insertion of a clause making the zipper clause applicable only to permissive subjects of bargaining had the effect of transforming it into a meaningless provision because there is no duty to bargain over permissive subjects.

change must be found in the collective bargaining agreement or in established past practice. For example, in State of Maine v. MSEA, the Law Court found that "the State's unilateral action was specifically permitted under the contract," a conclusion that was independent of its conclusion that the right to demand bargaining over the impact of such an action was waived. 499 A.2d at 1232. Similarly, in Auburn Firefighters Ass'n v. City of Auburn, the Labor Board found that a general management rights clause did not authorize the employer to implement a new, light-duty work program and was not a waiver by the union of its right to compel bargaining about the program before it was implemented. No. 83-10 at 6 (March 9, 1983). See also, Local 2303, IAFF v. City of Gardiner, No. 05-03 (Management rights clause was not specific enough to authorize new call-back policy nor was it sufficient to be a waiver of Union's right to bargain about the policy).[13]

Furthermore, the Association's statement that the zipper clause constitutes a waiver of bargaining rights on all subjects ignores the principle stated in Cape Elizabeth that there is no right to mid-term bargaining when the issue is already covered by the terms of the contract. No. 75-24 at 4. To the extent that either party is concerned about the overly broad effect of a zipper clause on the right to demand mid-term bargaining, those concerns should be expressed at fact-finding or interest arbitration in support of no zipper clause or a less expansive one.

In summary, we conclude that the Association has failed to demonstrate that the Employer has not bargained in good faith as required by §965(1)(C) or failed to participate in good faith in

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[13]When it comes to determining whether an employer is authorized to take unilateral action, it is important to remember that, unlike under the National Labor Relations Act, Maine's acts do not contain any inherent managerial rights. State v. MLRB, 413 A.2d 510, 514 (1980) and Bath Firefighters v. City of Bath, 80-44 at 3 (Oct. 17, 1980). Even educational policy changes are subject to the meet-and-consult requirement under MPELRL. 26 M.R.S.A. §965(1)(C).

mediation or fact-finding as required by §965(1)(E). As there was no independent basis for a violation of §964(1)(A) alleged, there is no basis for finding a violation of that section.

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. §968(5), it is hereby ORDERED:

1. That portion of the complaint charging the MSAD #46 Board of Directors with violating 26 M.R.S.A §965(1)(C) and §965(1)(E) by refusing to bargain in good faith and refusing to participate in mediation and fact-finding in good faith is dismissed.

2. That portion of the complaint charging the MSAD #46 Board of Directors with violating 26 M.R.S.A. §965(1)(A) by interference, restraint or coercion is dismissed.

Dated at Augusta, Maine, this day of October, 2005.

MAINE LABOR RELATIONS BOARD

/s/
Peter T. Dawson
Chair

/s/
Karl Dornish, Jr.
Employer Representative

/s/
Robert L. Piccone
Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. §968(5)(F) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.