STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 06-22
Issued: November 21, 2006

TEAMSTERS UNION LOCAL 340, Complainant, v. JAY SCHOOL DEPARTMENT, Respondent.	DECISION AND ORDER

Teamsters Union Local 340 (the "Union") filed this prohibited practice complaint with the Board alleging that the Jay School Department (the "Employer") violated the Municipal Public Employees Labor Relations Act by directly dealing with an employee regarding a mandatory subject of bargaining and distributing a memo to unit employees outlining the proposed changes. The Teamster's complaint alleges that this conduct by the Jay School Department violated section 964(1)(A) and (E). The Employer argues that its conduct was not a violation of the law.

The complaint was filed on April 21, 2006, and the response was filed on May 18, 2006. Peter T. Dawson, Esq., served as the presiding officer at the prehearing conference held on June 20, 2006. The Union was represented by Teamsters' Business Agent Carl Guignard and the Employer was represented by Daniel Stockford, Esq. The evidentiary hearing was held on September 12, 2006, at which time the parties were able to examine and cross-examine witnesses and to offer documentary evidence. At the evidentiary hearing, Chair Dawson presided, with Employer Representative Karl Dornish, Jr., and Employee Representative Wayne Whitney serving as the other two Board members. The parties' briefs were all filed by October 3, 2006,

and the Board deliberated this matter on October 18, 2006.

JURISDICTION

The Jay School Department is a public employer within the meaning of 26 M.R.S.A. §962(7) and the Teamsters Union Local 340 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. Teamsters Union Local 340 is the recognized bargaining agent for a bargaining unit composed of school bus drivers, custodians and bus driver/custodians at the Jay School Department. Mr. Carl Guignard is the Teamsters' business agent responsible for this unit.
2. Mr. Shink, a union steward and current member of the bargaining committee, has been employed by the Jay School Committee for 23 years. He has worked in various capacities as bus driver and mechanic, and is currently the maintenance person for all three of the school buildings.
3. At the time of the events at issue, the parties were in the process of negotiating a successor agreement to a 3-year collective bargaining agreement that had expired on June 30, 2005.
4. The Union's chief spokesman, Carl Guignard, and the School Department's chief spokesman, Superintendent Robert Wall, signed a document titled "Jay Bus Driver/Custodian Negotiations Ground Rules" on May 31, 2005. The first of the four items listed states "Representatives of both parties agree that each has the authority to make proposals, counter proposals, and to enter into tentative agreements

subject to ratification by the School Committee and the Union."

5. Article 12 of the collective bargaining agreement that expired on June 30, 2005, is entitled "Hours of Work" and states in full:

> A. Based on present practice the number of hours of work are:
>
> 1. Bus drivers and custodians: nine (9) hours per day
>
> 2. Part-time bus drivers: Hours of work vary as to nature of work. The work day will be determined by the Superintendent of Schools and/or supervisor.
>
> B. Any hours worked in excess of forty (40) hours per week will be paid at a rate of one and one-half (1½) times the employee's regular hourly rate. Holidays off, vacation days, and bereavement days shall not count as hours to be used in the computation of overtime. Overtime shall be computed based only upon time worked.
>
> C. After January 18, 1994, full-time employees hired may be scheduled to work as determined by the School Committee. Any full-time employee hired prior to January 18, 1994 shall be grandfathered under the provision contained in Section A(1), which shall be interpreted to mean a standard work week of five (5) nine (9) hour days per week.
>
> D. Employees called in to work while off duty shall be paid for a minimum of two hours.

6. There are currently about 15 employees in the bargaining unit, two of whom have been employed since before 1994. Those two employees (one of which is Mr. Shink) are grandfathered by Article 12 C and work five 9-hour days during the school year. In the summer, they work four

10-hour days plus 5 hours on Fridays.

7. Mr. Shink testified that paragraph C of Article 12 allowed the School to hire people to work on nights for an 8-hour shift rather than 9 hours. Day shift bus driver/custodians continued to work a 9-hour day during the school year regardless of their date of hire because it was easier than trying to schedule around the morning and afternoon bus runs. A 9-hour day enabled the drivers to be there at 6:30 and stay until the last run was done shortly before 4 pm. Those employees worked four 10-hour days during the summer. Mr. Shink testified that the intent of instituting the change was to reduce the number of overtime hours that were being paid.

8. In a document dated June 15, 2005, entitled "School Committee Proposal," the Employer proposed eliminating the grandfathering of 9-hour schedules.

9. In January, 2006, the Jay School Board decided that for the following school year they would eliminate 2 portable buildings housing a total of 4 classrooms. This decision was based on declining enrollment and state funding formula issues. The Board decided to eliminate 3 teachers at the Middle School, 1 at the High School, reassign a kindergarten teacher to the 4-year old program, and eliminate one half of a custodian position.

10. Sometime between January and April, 2006, Mr. Shink approached Sue Weston, the Maintenance and Transportation Director, because he did not agree with the decision to reduce custodial staff. He met with Ms. Weston in his capacity as union steward. Mr. Shink testified that he told her that he thought the cut was too big of a hit because it did not take four hours to clean the four classrooms. He thought it was unfair for the high school to bear the entire

burden of the cut. Mr. Shink said he discussed the issue on several occasions with Ms. Weston and eventually realized that she would not budge on the staff cut. Mr. Shink described their conversations with:

> In the beginning a lot of it was just going back and forth on the four hours, and then, you know, once I figured we couldn't get anywhere with it and she said this was the bottom line and then they were going to create two four-hour positions and take some hours from people, and more I thought of it, it was still not a good idea but it was keeping everybody working. No one was going to lose their job, everyone was still working, they weren't going to lose anything in insurance or anything.

11. Mr. Shink was led to believe that the Employer had the authority to reduce employees' work hours.

12. Ms. Weston thought the school had the authority to make changes in hours for some employees in the department, based on her reading of Article 12 of the collective bargaining agreement. She testified that at some point in the past, the Employer had changed a four-hour position to an eight-hour position without any bargaining.

13. Ms. Weston wrote the memo dated April 4, 2006, and entitled "Tentative Job hours for Fall of 2006." She discussed the memo with Mr. Shink the day before or the morning of April 4th before distributing it. His response was that it would keep people in their jobs, with insurance, and was a doable answer to the budget crisis.

14. The Memo indicated it was "From the Maintenance & Transportation Office" and stated in its entirety:

> To: Bus Drivers and Custodians
> From: Susan Weston
> Date: April 4, 2006
> Re: Tentative Job hours for Fall of 2006

> Please let me know if anyone wants to make any transfers....
>
> The tentative plan as I see it is: (subject to change)
>
> H S Kitchen will be a 7 hour day job (35 hrs week) with insurance to stay the same. There will be one hour extra on freight days. The Foster Tech am run will be part of this job and it will be on the rotating trip list.
>
> H S 8 hour days (what Mike Tibbetts is currently doing but 8-hours on non-schools days) will have a daily bus run (HS/MS & Elem).
>
> H S nights office/shop (what Annette is doing now with no portables) will be a 7 hour night job. Insurance will stay the same.
>
> M S nights downstairs w/library and stairways will be a 7 hour night job. Insurance will stay the same.
>
> Two 4-hour night jobs: (Insurance to be determined in negotiations)
> (1) M S gym/café/locker rooms (up & down stairs)/ downstairs bathrooms/t v room/town part
> (1) H S Gym/locker rooms/weight room/kitchen
> The 20 hour workers will be expected to fill in doing custodial work and bus driving as needed.
>
> Elementary School has an 8 hour night job opening (the job Rob Donald was doing before moving to the high school)
>
> AGAIN, anyone wanting to transfer should come and see me.

15. Mr. Shink also spoke to the Superintendent about this issue, testifying that:

> I went in because this was all being done during negotiations and my question to him

> was did any of these people that were losing an hour every day have anything to do with the people that were working nine hours, cutting these people to make up the time. And he stated no.

16. When the unit members received the April 4th memo, they were upset about the changes. One of them, Annette Welch, did not want a seven hour job so she put in for a transfer to the elementary school. She is no longer employed. Another employee, Mike Tibbetts, hoped to retire from the school and then be hired for the four-hour job. He retired but took a job somewhere else.
17. The Employer never implemented the changes outlined in the April 4th memo in full, but when one employee in an 8-hour position left employment, he was replaced with a 4-hour employee. The School Department posted three job openings on June 13, 2006, for 8-hour night custodial positions. One of the positions would have been a 7-hour position if the tentative plan described in the April 4th memo had been implemented.
18. Mr. Shink never indicated to Ms. Weston or Mr. Wall that he thought the school department had an obligation to bargain over these issues. Mr. Shink testified that at the time, he did not fully understand the bargaining obligations of the parties.

DISCUSSION

The legal issue presented in this case is whether the employer engaged in direct dealing by having a number of discussions with a union steward about reducing hours of work and then distributing a memo to unit employees describing the tentative plan for changing employees' scheduled work hours. These events occurred after the parties' collective bargaining agreement had

expired and while negotiations for a successor agreement were underway.

The statute is clear that once a union is certified as the bargaining agent, the law requires the employer to bargain solely with that union over the terms and conditions of employment for employees in the unit. 26 M.R.S.A. §967(2)(the certified union is "the sole and exclusive bargaining agent for all of the employees in the bargaining unit"). This principle of exclusivity prohibits the employer from dealing with anyone other than the bargaining agent concerning mandatory subjects of bargaining. See MSEA v. Maine Maritime Academy, No. 05-04 (Jan. 31, 2006), at 15-16 (discussing direct dealing generally and holding that Employer's discussions with new hire about salary and housing benefit violated the Act). In the present case, the Employer first argues that because the discussions were with a union steward, they cannot be considered dealing with someone other than the bargaining agent.

Mr. Shink approached Ms. Weston in his capacity as union steward to discuss the staff cut. There is no evidence in the record, however, even suggesting that Mr. Shink was authorized to bargain on behalf of the unit members. On the contrary, the evidence shows that the parties explicitly agreed in the negotiating groundrules that Mr. Guignard, the Teamsters' business agent, and Superintendent Wall were the only representatives authorized to bargain. Without that authority, it was improper for the employer to bargain with Mr. Shink, regardless of who initiated the discussion.

The Employer relies on the holding in AFSCME v. City of Portland and Robert Ganley, et al. in which the Board concluded that the local union president's assent to the employer's use of a survey was a waiver of the right to later object even though AFSCME was the bargaining agent for the local union. No. 90-14

(Oct. 18, 1990) at 14. In that case, the Board held that it "was not the City's responsibility to make sure that the lines of authority within AFSCME were clear to AFSCME locals." 90-14 at 14. In the AFSCME case, the union president in question had the apparent authority to act on behalf of the local because he had signed a number of side agreements that affected the terms of the collective bargaining agreement with the employer. In this case, there is nothing in the record to suggest that Mr. Shink had real or apparent authority to bargain side agreements with the employer. Consequently, Ms. Weston's dealings with Mr. Shink on this matter violated §964(1)(E).

We recognize that Mr. Shink's confusion about his own authority may have contributed to the problem and this incident might have been avoided if the Union had done a more thorough job in instructing the stewards on the limits of their authority. The fact remains, though, that the director of transportation bargained directly with Mr. Shink over a mandatory subject that should have been brought to the bargaining table.[1] Ms. Weston's acts were performed by her in the course of her official duties so the Employer is liable whether or not she actively consulted with the superintendent on these matters. See Auburn Fire-fighters Assoc. IAFF v. Paula Valente & City of Auburn, No. 87-19 (Sept. 11, 1987) at 2, and Teamsters Local Union No. 48 v. Eastport School Dept. and Brian Smith No. 85-18 (Oct. 10, 1985) at 2. Thus, we need not consider whether or to what extent the superintendent was involved.

The Employer's second argument is that because neither the union steward nor the transportation manager believed that there was any obligation to bargain, their discussions did not

[1]There is a noticeable hole in the record concerning whether the staff cut was ever brought up at the bargaining table during the winter of 2006.

constitute bargaining. The Employer claims it was not bargaining because the discussions related to the administration of the existing collective bargaining agreement, relying on the testimony of Ms. Weston that she thought the employer had the authority to change work schedules under Article 12. The problem with this argument is that the collective bargaining agreement had expired on June 30, 2005. Consequently, there was no contract to administer. As this Board has held,

> During the interval between the expiration of a collective bargaining agreement and the execution of a successor agreement, the "static status quo" must be maintained. Upon the expiration of a collective bargaining agreement, the wages, hours, working conditions, and contract grievance procedure established in the expired agreement must remain in effect until they are superseded by the successor agreement. Teamsters Local Union No. 48 v. Boothbay/ Boothbay Harbor Community School District, No. 86-02, slip op. at 11, 9 NPER ME-17009 (Me.L.R.B. Mar. 18, 1986), citing Sanford Fire Fighters Association v. Sanford Fire Commission, No. 79-62, slip op. at 10 (Me.L.R.B. Dec. 5, 1979); Easton Teachers Association v. Easton School Committee, No. 79-14, slip op. at 5, 1 NPER 20-10004 (Me.L.R.B. Mar. 13, 1979).

MSEA v. School Committee of the City of Lewiston, 90-12 (Aug. 21, 1990) at 16. Thus, the hours and schedule in effect at the time of the expiration, in this case June 30, 2005, must remain in effect while the parties negotiate a new agreement. There simply is no contract to administer. There is therefore no need to consider what the employer could have done under Article 12 of the agreement because it was no longer in effect.

The Employer also argues that the April 4th memo itself cannot be construed as direct dealing because it simply provided notice to employees of the schedule adjustments but was not a proposal or otherwise invited a response from employees. The Employer cites Orono Fire Fighters Ass'n, in which this Board stated,

> . . . It is the employer's conduct that is key to a finding of direct dealing, and the distinction between notice to an employee regarding a change in working conditions, and a proposal for such a change, is determinative.

Orono Fire Fighters Ass'n v. Town of Orono, No. 89-18 (Sept. 21, 1989), at 10-11. In the Orono case, the Board did not find a direct dealing violation because the manager's communication with the employee was to inform the employee of a change, not propose it to him. In the present case, the April 4th memo does not on its face appear to make a proposal to employees or solicit their opinion or response. In other cases where this Board has found written materials to unit employees to be direct dealing, those documents were clearly intended to solicit employee input. In AFSCME v. City of Portland, 15 of the 19 survey questions related to current or alternative pension benefits, an issue on the bargaining table at the time. No. 90-14 at 18. In Teamsters v. Aroostook County, the employer sent a questionnaire asking employees to choose from the alternatives presented for scheduling furlough dates. No. 92-28 (Nov. 5, 1992). Here, the memo does not explicitly or even implicitly solicit employee responses; it merely reminds employees of the opportunity to transfer. There is no evidence in the record to explain why the memo says that it is a "tentative plan," "subject to change." Without more evidence on this issue, we are unwilling to view the memo alone as soliciting employee response or attempting to undermine the status of the union. We therefore conclude that the memo did not itself constitute direct dealing in violation of §964(1)(E). We consider the memo to be additional evidence of the employer's direct dealing with Mr. Shink, as the memo is essentially the product of that violation.

As a final matter, we agree that the Employer's direct dealing also violated §964(1)(A). When the Employer engages in

conduct which is likely to erode the Union's position as exclusive representative, it is a (1)(A) violation because it interferes with employees' exercise of rights guaranteed by the Act. MSEA v. Maine Maritime Academy, No. 05-04 at 15, citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944). It is unnecessary to prove there was an intent to undermine the status of the Union in distributing the memo, as the standard the Board applies is whether the action "reasonably tended to interfere with" protected activities. See, e.g., Teamsters Local 340 v. Aroostook County, No. 03-09, at 28 (Feb. 2, 2004). The events in this case would clearly tend to make the employees believe that the Union was without power or authority to negotiate work hours.

ORDER

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 979-H(2), it is ORDERED:

1. That the Jay School Department cease and desist from engaging in direct dealing with employees in the unit regarding the mandatory subject of scheduling of work. Changes in scheduled hours may occur only through the collective bargaining process with the bargaining agent.

2. That the Jay School Department shall post for thirty (30) consecutive days copies of the attached notice to employees which states that the School Department will cease and desist direct dealing with employees.[2] The notice must be posted in conspicuous places where notices to members of the Bus Drivers and Custodians bargaining unit are customarily posted, and at all times when such employees customarily perform

[2]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."

work at those places. Copies of the notice shall be signed by the Superintendent prior to posting and shall be posted immediately upon receipt. The Superintendent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by other materials.

Dated at Augusta, Maine, this day of November, 2006.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. § 968(5)(F) (Supp. 2005) 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.

_____
Peter T. Dawson
Chair

_____
Karl Dornish, Jr.
Employer Representative

_____
Wayne W. Whitney
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 employee in any classification in the bargaining unit represented by Teamsters Union Local 340 over any mandatory subject of bargaining. We will comply with our statutory obligation to bargain with the Teamsters Union as the exclusive representative of employees in the Bus Driver & Custodian bargaining unit at the Jay School Department.

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

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

_____ _____

Date

Robert Wall, Superintendent
Jay School Department

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
90 STATE HOUSE STATION
AUGUSTA, ME 04333-0090 (207) 287-2015

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