



The Board's Rules and Procedures state the standard to be used in an appeal of a dismissal of a complaint. Once a motion for review is filed, "the Board shall examine the complaint as it existed when summarily dismissed in light of the assertions contained in the motion." MLRB Rule Ch. 12, §8(3). Thus, the Board makes its own determination on the sufficiency of the complaint, rather than merely reviewing the decision of the Executive Director. In doing so, the Board must treat all facts alleged as true and must construe the complaint in the light most favorable to the complainant. Buzzell, Wasson and MSEA v. State of Maine, No. 96-14 at 2 (Sept. 22, 1997).

#### THE FACTS AS ALLEGED

Ms. Tiffany Norton was employed as an Identification Specialist II in the State Bureau of Identification (SBI) and was covered by the collective bargaining agreement for the Professional and Technical Services bargaining unit. In April 2008, Tiffany Norton's young son died. Subsequently, Ms. Norton was out of work on bereavement and related medical leave, both paid and unpaid.

At some point prior to September 2, 2008, the Department sent a letter to Ms. Norton stating its intent to terminate her for job abandonment if she did not return to work. On Sept. 2, there was a meeting between MSEA Field Representative C.J. Betit, Human Resources Representative Michaela Loisel, and three Department representatives: Lt. Col. Bob Williams, SBI Manager Anthony Winslow, and SBI Director Matthew Ruel. The subject of this meeting was Ms. Norton's continued leave.<sup>1</sup> The meeting adjourned with the understanding that the State would not take

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<sup>1</sup>It is not clear from the complaint whether Ms. Norton attended this meeting. It makes no difference either way.

action for two more weeks. The Union's position was that the collective bargaining agreement provides that an employee can remain on unpaid leave for up to a year and it is unreasonable to deny leave when there is a doctor's note.

Article 66 of the collective bargaining agreement between the State and MSEA for the Professional and Technical Services Bargaining Unit, states, in relevant part:

ARTICLE 66

1. Any employee may apply for an unpaid personal leave of absence for good and sufficient reason. Leave pursuant to this provision may be for a period not exceeding twelve (12) months in any fourteen (14) consecutive months. Such leave may be granted at the discretion of the appointing authority and shall not be unreasonably denied. Employees are encouraged to consult with their agency/department Personnel Officer to determine if they are eligible for benefits available under the Federal Family and Medical Leave Act. All requests for such leave and responses shall be in writing. The application for leave must specifically state the reasons for such application and the length of time requested. After completion of a period of personal leave of absence, the employee shall be entitled to return to the organizational unit, status and position held immediately prior to the beginning of the leave of absence. If the employee's position is abolished during any such leave, he/she shall be notified and allowed to exercise his/her rights under the Seniority Article of this Agreement.<sup>2</sup>

On September 9, 2008, (one week later) Ms. Norton provided a note from her doctor saying that she could return to work on Sept. 16, 2008. Ms. Norton asked for and received ADA paperwork.

Although the complaint does not state so specifically, apparently Ms. Norton did resume work on September 16, 2008.

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<sup>2</sup>Sections 2 to 4 of Article 66 cover leaves to take another position with the State that is excluded from bargaining. Section 5 provides that any leave granted pursuant to the article may be canceled by the employer at any time for good reason upon prior written notice.

Sometime following her return, Ms. Norton had "turned in ADA paperwork that said she could only work 40 hours . . . and would have absences as needed." Her position in the Department had a mandatory overtime requirement.

In early October,<sup>3</sup> Ms. Norton was "called into a meeting" in Human Resources with SBI Director Ruel, SBI Manager Winslow, and two Human Resources Representatives. The meeting was "in regard to attendance issues related to ongoing and continuing medical issues." At this meeting, the State presented Ms. Norton with a written proposal. The proposal would allow Ms. Norton to take a leave until December 1, 2008, "with the caveat that she return without encumbrances, with no restrictions or accommodations." Ms. Norton refused to sign the document. No union representative was present at this meeting and neither MSEA Field Representative Betit nor any other union representative was given notice of this meeting.

On October 20, 2008, Ms. Norton received a letter from SBI Director Ruel stating that the State had received a note from her doctor that she would be out of work until further notice for medical reasons. Mr. Ruel's letter stated that the State was granting two weeks of unpaid medical leave through October 31, 2008. The letter also stated that Ms. Norton had declined the previous offer made by the State for time to be out of work. About two and a half weeks later, on November 6, 2008, the State sent a letter stating that Ms. Norton was absent without leave and that under Civil Service Rules that constituted a voluntary resignation.

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<sup>3</sup>The complaint states this meeting occurred in "early October;" however, in subsequent submissions, both the State and the Union indicate this meeting occurred on September 30, 2008. The exact date is not relevant to this ruling.

## DISCUSSION

The question presented in this case is whether the discussions that occurred during the meeting in early October between Ms. Norton and various representatives of the State Bureau of Identification constituted direct dealing. There is no question that the Union was not present at this meeting and was not notified of it. When an employer bypasses the bargaining agent and deals directly with an employee over a mandatory subject of bargaining, it is considered a failure to bargain in violation of §979-C(1)(E) because it is equivalent to refusing to bargain with the bargaining agent. Maine State Employees Assoc. v. Maine Maritime Academy, No. 05-04 (Jan. 31, 2006) at 15. Thus, if the employer deals directly with an employee to modify the terms of a collective bargaining agreement, that circumvention of the bargaining agent is a refusal to bargain with the agent and a violation of §979-C(1)(E). Id. at 15. Likewise, an employer's direct solicitation of employee input on working conditions is generally viewed as eroding the union's position as exclusive representative, thereby violating §979-C(1)(A). Maine State Employees Assoc. v. Bangor Mental Health Institute (BMHI) and State of Maine, 84-01 (Dec. 5, 1983) at 7. See also Allied Signal, Inc. 307 NLRB 752, 753 (1992) ("Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions . . . plainly erodes the position of the designated representative.")

In analyzing direct dealing charges, there are two components that must be addressed: The nature of the subject matter involved and the nature of the conversation or interaction between the employer and the employee. If the subject under discussion is not a mandatory subject of bargaining, there is no

violation.<sup>4</sup> With respect to the first issue, there is no dispute that unpaid leave is a mandatory subject of bargaining. The second issue, the nature of the discussion with Ms. Norton about unpaid leave, requires further analysis.

This Board's prior direct-dealing cases demonstrate that not all discussions about mandatory subjects of bargaining that an employer has directly with employees will be considered dealing with those employees. In Orono Fire Fighters, the town made changes to an employee's work week and discussed these changes with the employee on a couple of occasions. Although the Board ultimately concluded that the change was an unlawful unilateral change in working conditions, the Board did not consider the discussions with the employee to be direct dealing because the employer was merely informing the employee of the change, not negotiating or "dealing" with him. As the Board noted,

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. Similarly, in the more recent case involving the Jay School Department, the employer was charged with direct dealing with an employee about a reduction in hours and change in work schedules. The Board concluded that various conversations a supervisor had with the union steward about proposed reduction in hours constituted direct dealing because the steward was not

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<sup>4</sup>This Board has held that the employer did not engage in direct dealing when it negotiated with a unit employee over the wages and working conditions of a position the employee was considering taking that was outside of the bargaining unit. This was because those matters did not materially affect the working conditions of bargaining unit employees. AFSCME v. Lincoln County Commissioners and Sheriff's Dept., 06-24 (June 1, 2007) at 14.

authorized to negotiate on behalf of the unit employees. Teamsters v. Jay School Dept., No. 06-22 at 8 (Nov. 21, 2006). A memo sent to employees announcing the change, however, was not considered direct dealing because the memo did not make a proposal or solicit a response from employees, it merely reminded the employees of the opportunity to transfer. Id. at 11.

On the other hand, the Board has concluded that the employer engaged in direct dealing where written materials to unit employees were clearly intended to solicit employee input. In the City of Portland case, 15 out of 19 survey questions related to current or alternative pension benefits, an issue on the bargaining table at the time. AFSCME v. City of Portland, No. 90-14 at 18 (Oct. 18, 1990). In Aroostook County, the employer engaged in direct dealing when it sent a questionnaire asking employees to choose from the alternatives presented for scheduling furlough dates. Teamsters v. Aroostook County, No. 92-28 (Nov. 5, 1992). Similarly, the Board concluded that a statement made by the Nurse Manager to a group of nurses that they needed to come up with a solution to a staff scheduling problem was intended to solicit their input. MSEA v. BMHI, No. 84-01 at 8.

The question in this case is whether the communication between management and Ms. Norton regarding unpaid leave issues was direct dealing or simply the type of conversation necessary for the normal application of the collective bargaining agreement's provision on unpaid leaves of absence. Clearly, Article 66 of the collective bargaining agreement is the outcome of negotiations between the State and MSEA over the subject of unpaid leave. The State notes that Article 66 establishes both the unpaid leave benefit and the negotiated constraints on the implementation of that benefit. The State argues that the managers' discussions with Ms. Norton were merely discussions

necessary in the application of that provision of the collective bargaining agreement. We agree.

Article 66 of the collective bargaining agreement requires a number of things from the employee requesting an unpaid leave. An employee may apply for leave "for good and sufficient reason," the application for leave must be in writing and must specifically state the reasons for the application and the length of time requested. Leave may be for a period of up to 12 months in any 14 consecutive months. With respect to the employer's response, Article 66 states "such leave may be granted at the discretion of the appointing authority and shall not be unreasonably denied." After completing the leave, the employee is "entitled to return to the organizational unit, status and position held immediately prior to" the leave and is assured contractual rights in the event of layoff. Article 66 does not grant the Union any particular authority or entitlement to assist in processing an unpaid leave request.

The most important aspect of Article 66 is the fact that the decision to grant or deny an unpaid personal leave request is left to the discretion of management. The dictionary definition of discretion is "Freedom to act or judge on one's own." American Heritage Dictionary, 2<sup>nd</sup> Coll. Ed. (1982). If the term discretion is to have any meaning, management must be able to make the decision without having to consult with the union before doing so.<sup>5</sup> The Union recognizes this in its written brief, when it acknowledged that the Employer was entitled to grant or deny the leave request without involving the Union. Reply Brief to State's Motion to Dismiss at p. 6.

The crux of the Union's complaint is that the Employer attempted to negotiate a condition placed on the approval of the

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<sup>5</sup>Whether a leave request was unreasonably denied could presumably be the subject of a grievance.

leave request that was not contained in the terms of the agreement. Thus, the Union contends that while the employer could have granted or denied the request, adding the condition that Ms. Norton return to work without restrictions was unlawful direct dealing because such a condition was not contained in the collective bargaining agreement and the Union was not present for the discussion.

The Union acknowledges that discussion between management and employees regarding mandatory subjects is a daily occurrence:

Throughout the collective bargaining agreement and in practice, employees are directed or encouraged to consult with supervisors and management over a variety of work arrangements. Indeed, as the State argues, vacation time, training, overtime assignments, personnel file review, use of sick leave, and withdrawal of resignation are all areas in which employees and managers communicate, applying the contract, without the presence of the Union.

Union Brief at 6. The Union's position is that the allegations in the complaint do not describe employees and managers applying the contract but describe the employer attempting to negotiate different working conditions for Ms. Norton.

The framework of Article 66, that is, the need for the employee to provide a "good and sufficient reason" for the leave, the factors related to the appropriate length of the leave, and the reasonableness of the employer's decision on the request, all presume that the employer and the employee can engage freely in a discussion to gather a complete understanding of the circumstances of each individual employee's request. If the complaint included allegations suggesting that the discussions between the employer and the employee were an attempt to alter or modify the terms of the contract, we would likely conclude that the complaint alleges a direct dealing violation. What is presented in the complaint before us, however, can only be described as

routine discussions necessary for the application of the terms of the contract already negotiated with the Union.

Prior to the October meeting at issue, management had received Ms. Norton's ADA paperwork indicating that she wanted reduced hours and the latitude to miss time as needed. The meeting in early October was called due to attendance issues arising from on-going medical issues. In the meeting in question, the employer laid out what it considered to be a reasonable answer to Ms. Norton's need for time off. In other words, the employer was indicating to her what it considered to be reasonable for an unpaid personal leave. The discussion was contemplated by the terms of Article 66 and did not include any attempt to alter the terms of the agreement.

The Union argues that putting a condition on Ms. Norton's return after the unpaid leave was like granting a vacation request on the condition that the employee work extra overtime upon return. The problem with this argument is that the language of the agreement on vacation time is markedly different than the provision on unpaid personal leave. The vacation provision entitles employees to use vacation leave credits at times of their choice, subject to operational needs and based on seniority when necessary.<sup>6</sup> It is a much more formulaic analysis for the employer than consideration of the myriad of factors that could conceivably come into play in assessing a request for unpaid leave. Furthermore, the hypothetical presented by the Union presumes that an employee has a contractual right to return from unpaid leave to a less than full-time status, a presumption that is belied by the language of Article 66.

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<sup>6</sup>Article 68, section 2 states, in part, "Except where operational needs require otherwise, employees shall be entitled to use vacation leave credits at times of their choice. Requests for use of vacation leave credits shall not be unreasonably denied. In scheduling vacations, choice of time shall be governed by seniority."

The Union also argues that the presence of the language in Article 66 encouraging employees to consult with the Department's Personnel Officer concerning eligibility for benefits under the Family and Medical Leave Act by implication prohibits discussing with management any other matter. The employer argues just the opposite: Because Article 66 encourages employees to consult with management about FMLA leave requests, it also authorizes such discussions about all leave issues. Both of these positions ignore the fact that the exact same language is contained in section 2 of Article 63, the provision of the collective bargaining agreement covering sick leave. The Family and Medical Leave Act provides very specific statutory benefits that are not contained in the collective bargaining agreement so it makes sense to refer an employee to an authority familiar with this subject--the agency's Personnel Officer. We conclude that the reference to the FMLA does not affect the scope of discussions permitted under Article 66.

In summary, the parties have negotiated a contractual provision governing unpaid personal leave requests. Article 66 reflects the reality that there are a myriad of reasons an employee may request such a leave and many factors that go into a decision granting or denying the request. For the employer to fully understand the circumstances of each individual request, the employer must be able to discuss these issues with the employee and such discussions are within the scope of the contractual provision. We conclude that the meetings and communications alleged in the complaint do not constitute direct dealing because they are routine discussions necessary for the application of the terms of the contract already negotiated with the Union.

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 that the prohibited practices complaint filed by the Maine State Employees Association is dismissed.

Dated at Augusta, Maine, this 21<sup>st</sup> day of August, 2009.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. § 979-H(7) 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.

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Peter T. Dawson  
Chair

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Karl Dornish, Jr.  
Employer Representative

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Carol Gilmore  
Employee Representative