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SANFORD PROFESSIONAL))	
FIREFIGHTERS, LOCAL 1624,))	
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Complainant,))	
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v.))	DECISION ON MOTION TO
))	DEFER TO ARBITRATION
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TOWN OF SANFORD,))	
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Respondent.))	
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Complainant Sanford Professional Firefighters, Local 1624, ("Union") filed a prohibited practice complaint on September 10, 2010, in which it alleged that the Town of Sanford violated the Municipal Public Employees Labor Relations Law ("Act") by unilaterally changing the methodology used to calculate eligibility for overtime pay for the bargaining unit members. Specifically, the Union alleges that the conduct constituted a refusal to bargain in violation of 26 M.R.S.A. §964(1)(E) as well as an interference with rights guaranteed by the Act in violation of §964(1)(A). The conduct complained of occurred in March of 2010, several months after the expiration of the parties' collective bargaining agreement and while the parties were negotiating a successor agreement. The Union filed a grievance over this matter, which is scheduled for arbitration on February 11, 2011.

The Town of Sanford filed a response to the complaint in which it moved to defer to arbitration. A prehearing conference was held on December 17, 2010, with Board Chair Peter T. Dawson presiding, to discuss this issue and take oral argument on the motion to defer, pursuant to Board Rule Chapter 12, §10(6). The Union was represented by John S. Krupski, Esq., and the Town was represented by Bryan M. Dench, Esq.

This case is the first time we have been asked to consider the effect of section 964-A of the Act regarding the continuation of a grievance arbitration provision following the expiration of a collective bargaining agreement. This section, set forth in its entirety below, was enacted in two stages: The essence of what is now sub-section 1 was enacted in 1997,¹ while sub-section 2 was enacted in 2005.

§964-A. Continuation of grievance arbitration provisions

1. Contract signed before October 1, 2005. If a contract between a public employer and a bargaining agent signed prior to October 1, 2005 expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect until the parties execute a new contract.

2. Contract signed after October 1, 2005. If a contract between a public employer and a bargaining agent signed after October 1, 2005 expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract remain in effect until the parties execute a new contract. In any arbitration that is conducted pursuant to this sub-section, an arbitrator shall apply only those provisions enforceable by virtue of the static status quo doctrine and may not add to, restrict or modify the applicable static status quo following the expiration of the contract unless the parties have otherwise agreed in the collective bargaining agreement. All such grievances that are appealed to arbitration are subject exclusively to the grievance and arbitration process contained in the expired agreement, and the board does not have jurisdiction over such grievances. The arbitrator's determination is subject to appeal, pursuant to the Uniform Arbitration Act. Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board, subject to appeal pursuant to applicable law.

¹As enacted in 1997, §964-A stated "If a contract between a public employer and a bargaining agent expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect until the parties execute a new contract." P.L. 1997, ch. 773, §1.

The grievance arbitration is stayed pending resolution of this issue by the board. The board may adopt rules as necessary to establish a procedure to implement the intent of this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. Nothing in this subsection expands, limits or modifies the scope of any grievance arbitration provisions, including procedural requirements.

The genesis of section 964-A was a decision of the Law Court holding that the obligation to arbitrate grievances is extinguished with the expiration of the collective bargaining agreement. In the 1994 case of Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, the Law Court held:

As a matter of law, no obligation exists to arbitrate a grievance that arises after the expiration of a collective bargaining agreement unless that grievance involves rights that vested or accrued, or facts or occurrences that arose while the collective bargaining agreement was in effect. Lane v. Bd. of Directors of Maine Sch. Admin. Dist. No. 8, 447 A.2d 806 (Me. 1982).^{[fn]5} Here we are dealing with neither vested rights nor an occurrence during the term of the collective bargaining agreement. While an agreement is in effect, the terms and conditions therein are enforceable as a matter of contract and may be subject to arbitration. Once the agreement expires, however, the parties lose their contractual rights and are left with only the statutory duty to bargain in good faith. Lane, 447 A.2d 810. This duty requires the parties to maintain the status quo until either a new contract is ratified, or the negotiations reach a bona fide impasse. The remedy for a breach of the duty is a prohibited practice complaint before the Board, rather than grievance arbitration under the expired contract. Id. at 809-810.

Dobson's grievance did not arise until approximately five months after the agreement had expired and his claim of termination without "just cause" does not involve rights that either vested or accrued under the agreement while it was still in effect. Consequently, the District is under no obligation to arbitrate the grievance and we need go no further.

Teamsters Union Local #340 and Ralph Dobson v. Portland Water

District, 651 A.2d 339, 341-342 (1994).

In analyzing this issue in the Portland Water District case, the Law Court quoted extensively from the United States Supreme Court's decision in Litton Financial Printing Division v. N.L.R.B., in which the Supreme Court held that certain layoffs were not arbitrable under the parties' expired collective bargaining agreement.

. . . In deciding that there was no obligation to arbitrate the layoff decisions, the [U.S. Supreme] Court held that the right to arbitration exists "only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it." . . . "A post expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.* at 205-06. The Court further stated that "arbitration is a matter of consent and that it will not be imposed upon parties beyond the scope of their agreement." *Id.* at 201. Additionally, the Court noted that, "in the absence of a binding method for resolution of post expiration disputes, a party may be relegated to filing an unfair labor practices charge with the [N.L.R.B.]." 501 U.S. 190, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991).

Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, 651 A.2d 341-342 at fn.5. One year later, the Law Court issued a similar decision upholding the trial court's refusal to compel arbitration because,

The trial court could not compel arbitration . . . for the simple reason that the Uniform Arbitration Act requires the existence of a written arbitration agreement. 14 M.R.S.A. §5927-5928 (1980). The only written contract between the parties had previously expired by its terms.

MSEA v. Bureau of Employee Relations, 652 A.2d 654, 655 (1995).

Thus, we can see the clear evolution of the legal status of grievance arbitration after the expiration of a collective bargaining agreement in Maine's public sector: Prior to 1997, once a collective bargaining agreement had expired, the arbitration provision continued only with respect to a grievance that "involves rights that vested or accrued, or facts or occurrences that arose while the collective bargaining agreement was in effect." In 1997, the Legislature enacted §964-A which statutorily continued the arbitration provision beyond the expiration of the collective bargaining agreement for the limited purpose of addressing grievances arising out of disciplinary measures. P.L. 1997 c. 773, §1. As a result, grievances related to disciplinary matters that occurred after the expiration of the collective bargaining agreement could proceed to arbitration.

The 2005 amendment extended the statute so that the grievance arbitration provision continued in effect for all subjects that must remain in effect after the expiration of the collective bargaining agreement "by virtue of the static status quo doctrine". This language refers to the principle first articulated in Lane, cited above, that upon the expiration of a collective bargaining agreement, the statutory duty to bargain "requires the parties to maintain the status quo until either a new contract is ratified, or the negotiations reach a bona fide impasse." Lane v. MSAD #8, 447 A.2d 806 (Me. 1982). Thus, §964-A now dictates that those provisions of the expired agreement that remain in effect by virtue of the static status quo doctrine are enforceable through arbitration.² Consequently, grievances regarding any of those provisions based on conduct occurring after the expiration of the collective bargaining agreement can proceed

²The original bill that led to the 2005 enactment of §964-A would have imposed an "evergreen" clause, thereby keeping the entire contract in effect while a successor agreement was being negotiated. L.D. 1123, H.P. 776 (122nd Legislature).

to arbitration.

It was not until the amendment of 2005 that the statute created a specific role for this Board in post-expiration arbitration issues. P. L. 2005, c. 324, §1. The role assigned to the Board in this new post-expiration arbitration process is to determine which provisions are enforceable:

. . . Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board, subject to appeal pursuant to applicable law. The grievance arbitration is stayed pending resolution of this issue by the board.

There is some logic to this assignment, as the Board is the entity with the most expertise on whether a particular subject is a mandatory subject of bargaining, while arbitrators' area of expertise is interpreting contracts.

The parties do not dispute that the subject of the grievance, that is, the methodology used for calculating eligibility for overtime pay, is subject to the static status quo doctrine. We agree with this conclusion. Consequently, as the grievance involves a provision enforceable by virtue of the static status quo doctrine, §964-A requires the matter to be decided by an arbitrator.

We note that the case before us was not presented as a request to resolve a dispute arising under §964-A over whether a provision of the expired contract is subject to the static status quo doctrine,³ but it clearly raises questions regarding the scope and meaning of §964-A(2) itself. The provision is within the statute that the Board is charged with enforcing and administer-

³The Board has not adopted any procedural rules specific to the issues raised in §964-A.

ing; therefore, it is within the Board's authority to interpret it in the first instance. Our analysis of the intent and effect of §964-A presented above reflects our expertise in the subject area and our understanding of the legislative intent.

Turning to the Motion to Defer to Arbitration, the prohibited practice complaint filed with this Board involves the same conduct as is addressed in the grievance. The Union stated at oral argument that it did not have the luxury of waiting until the arbitration was complete to file a prohibited practice complaint because of the short six-month statute of limitations in the Act. Thus, in this respect, the Board is presented with a very typical Collyer type of deferral question: Should the Board defer to a pending arbitration when the issue presented to the arbitrator is centered on the meaning of the collective bargaining agreement? In Collyer, the NLRB held that pre-arbitral deferral was appropriate if: "(1) the dispute arose within the context of a long and productive collective bargaining relationship, (2) there was no claim that the employer was displaying enmity towards the employees' exercise of their statutory rights, (3) the employer credibly asserted its willingness to resort to arbitration, and (4) the dispute centered on the collective bargaining agreement and its meaning." MSEA v. City of Lewiston School Dept., No. 90-12 at 14, citing Collyer Insulated Wire, 192 NLRB 837 at 842 (1971). The only one of these factors not fully satisfied is the Employer's willingness to resort to arbitration.

The Union noted in its complaint and at oral argument that at each step of the grievance procedure, the Employer has argued that the issue is not arbitrable⁴ because both the alleged breach and the filing of the grievance occurred after the collective

⁴It appears that the Employer has argued that the matter was not only not arbitrable, but that it was not grievable either. These are distinct questions; our concern at this moment is arbitrability.

bargaining agreement had expired. At oral argument, the Employer indicated that although it will participate fully in the arbitration, it does intend to argue to the arbitrator that the grievance is not arbitrable.

The Employer noted in oral argument that it does not want to be forced to deal with simultaneous proceedings addressing the same issue. The Employer stated it is agreeable to have a deferral that preserves the right of the union, subject to the outcome of the arbitration, to come back to the Board to present legal issues that are uniquely within the purview of the Board.

In light of these circumstances, the Board will grant the motion to defer to arbitration in this matter and will hold the prohibited practice complaint in abeyance until the arbitration decision is issued. At that time, the Union may petition this Board for a determination of what, if any, further action is required of this Board.

Dated at Augusta, Maine, this day of January, 2011.

MAINE LABOR RELATIONS BOARD

Peter T. Dawson
Chair

Richard L. Hornbeck
Employer Representative

Wayne W. Whitney
Employee Representative