

_____)	
NATIONAL CORRECTIONAL)	
EMPLOYEES UNION,)	
)	
	Complainant,)	
)	
	v.)	INTERIM
)	DECISION
)	
YORK COUNTY,)	
)	
	Respondent.)	
_____)	

The National Correctional Employees Union (NCEU) filed a prohibited practice complaint on November 15, 2010, in which it alleged that York County violated section 964(1)(A), (B), (C) and (E) of the Municipal Public Employees Labor Relations Law, Title 26, §961 et seq. (the "Act"), by making unilateral changes in working conditions and by refusing to process grievances pursuant to the provisions of the collective bargaining agreement entered into with Teamsters Union Local No. 340, the predecessor union. The County submitted an answer to the complaint on December 3, 2011, in which it asserted that the collective bargaining agreement in question became null and void when the Teamsters Union was decertified.

While preparing for the prehearing conference scheduled for February 3, 2011, the parties suggested that much, if not all, of the case could be resolved if the Board were to address one specific issue on the basis of a stipulated record. To that end, the prehearing conference was cancelled and the parties established a schedule for submitting their stipulations and briefs for consideration by the Board.

The stipulated record was received by the Board, with exhibits, on February 16, 2011. The parties' briefs were received on March 18, 2011, and reply briefs were received on April 4, 2011. Throughout this proceeding, the Union was represented by John Connor, Esq., and the County was represented by Gene R. Libby, Esq., and Timothy O'Brien, Esq. The Maine Labor Relations Board met on April 27, 2011, to consider the arguments and deliberate on this matter.

JURISDICTION

The National Correctional Employees Union is the bargaining agent for the employees in the corrections bargaining unit at York County. The Union is the bargaining agent within the meaning of 26 M.R.S.A. §962(2), and York County is the public employer within the meaning of 26 M.R.S.A. § 962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §968(5)(A)-(C).

STIPULATED ISSUE

The Complainant, National Correctional Employees Union, and the Respondent, York County, agree that in light of the stipulated facts below, the legal issue to be decided is whether the contractual grievance and arbitration provision set forth in the collective bargaining agreement between York County and the Teamsters survives the decertification of the Teamsters Union.

STIPULATED FACTS

1. On September 1, 2010, the National Correctional Employees Union ("NCEU") was certified as the new collective bargaining agent for a unit consisting of correctional officers employed by York County and working in the York County Jail.
2. Prior to the NCEU's certification, the unit had been represented for years by Teamsters Local No. 340 ("Teamsters").

York County and the Teamsters had been party to several collective bargaining agreements over the years with the last one expiring on December 31, 2007.

3. A true copy of the last Collective Bargaining Agreement between York County and the Teamsters is attached hereto as Exhibit A.

4. Pursuant to Article 51 of the Agreement, the CBA remained in effect while the parties continued to negotiate over a successor agreement.

5. Negotiations for a successor agreement between the Teamsters and York County commenced at or about the expiration of the last contract in December of 2007 and continued through 2010. These successor negotiations included the use of the procedures set forth in 26 M.R.S.A. §965 which were administered and overseen by the Maine Labor Relations Board.

6. Both this process and York County's negotiations with the Teamsters terminated upon the decertification of the Teamsters as the exclusive collective bargaining agent for the correctional employees unit within York County on September 1, 2010.

7. The certification of the NCEU triggered an obligation on behalf of York County to bargain with the NCEU.

8. The first set of negotiations over a collective bargaining agreement with the NCEU were requested by the Union in late October and began on mutually agreed-upon dates in December and are ongoing.

9. Beginning on September 27, 2010, the NCEU began filing grievances pursuant to the grievance and arbitration provision and procedure set forth in Article 10 of the CBA between York County and the Teamsters.

10. On October 4, 2010, York County informed the NCEU that it was reviewing the issue of whether the contractual grievance and arbitration process remained in place in light of the

decertification. A true copy of that notification is attached as Exhibit B.

11. On October 8, 2010, York County informed the NCEU by letter that it had completed its review of the matter and determined that the prior CBA was void. A true copy of that notification is attached as Exhibit C.

12. Based upon that determination, York County returned the grievances to the NCEU on the basis that the CBA was void as of the date of the decertification of the Teamsters and in the absence of a valid CBA with the NCEU, there wasn't any contractual grievance and arbitration provision or process in place.

13. When the NCEU advanced the grievances to the next stage of the grievance process contained in the CBA with the Teamsters, York County again returned the grievances to the NCEU on October 27, 2010. A true copy of this transmittal letter is attached as Exhibit D.

14. Additional grievances were submitted by the NCEU and returned by York County on the same basis in November and December, 2010, including via letters dated December 2, 2010, December 8, 2010 (two), December 9, 2010, and December 23, 2010. True copies of these letters are attached as Exhibit E.

15. As of this date, the NCEU has not advanced any of the grievances referenced above to arbitration.

The exhibits A-E noted above were submitted by the parties and are considered part of the record. The collective bargaining agreement (exhibit A) was signed on June 15, 2005.

DISCUSSION

The issue that is at the core of this case is whether the Employer is obligated to process grievances filed by the NCEU under the procedures established in the collective bargaining agreement negotiated with the predecessor bargaining agent, the

Teamsters Union Local 340. The NCEU asserts that the "evergreen clause" contained in that agreement operates to keep the entire agreement in effect beyond its December 31, 2007, expiration date, and that the County violated 964(1)(E) by making unilateral changes in various mandatory subjects of bargaining. The County argues that the collective bargaining agreement became null and void on September 1, 2010, when the Teamsters Union was decertified as the bargaining agent for the employees in the unit. We will address each of these arguments in turn.

The most recent collective bargaining agreement for the York County Corrections unit was negotiated by the County and the Teamsters Union, was effective on January 1, 2005, and had a stated expiration date of December 31, 2007. According to stipulation number 4 above, the agreement remained in effect while the County and the Teamsters negotiated over a successor agreement. These negotiations continued through 2010 and included the use of the dispute resolution procedures established in statute, 26 M.R.S.A. §965. These negotiations terminated on September 1, 2010, the date the Teamsters Union was decertified. The certification of NCEU also occurred September 1, 2010, and marked the beginning of the County's obligation to bargain with the successor bargaining agent, as noted in the stipulations. Negotiations between the County and NCEU are ongoing.

Article 51 of the collective bargaining agreement includes what is commonly referred to as an "evergreen clause" providing that the contract "shall remain in full force and effect during the period of negotiations" for a successor agreement. The full text of Article 51, "Duration of Agreement" is:

Except as otherwise herein specifically stated, this Agreement shall be effective as of January 1, 2005, and shall remain in full force and effect until December 31, 2007. It shall be automatically renewed from year to year thereafter, unless either party shall notify

the other, in writing, one hundred twenty (120) days prior to the anniversary date that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than thirty (30) days prior to the anniversary date hereof. This Agreement shall remain in full force and effect during the period of negotiations and until notice of termination of the Agreement is provided to the other party in the following manner. In the event that either party desires to terminate this Agreement, a written notice must be given to the other party not less than ten (10) days prior to the desire termination date, which said date shall not be before December 31, 2007.

Before addressing the arguments of the parties, we must consider the interplay of the Act's limitation on the duration of a collective bargaining agreement and the evergreen clause in the agreement between York County and the Teamsters. Section 965, sub-§ 1 establishes the obligation to bargain and defines that to mean a 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, as long as the parties have not otherwise agreed in a prior written contract. This obligation is suspended during the period between a referendum approving a new regional school unit and the operational date of the regional school unit, as long as the parties meet at reasonable times during that period;

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 may be compelled to agree to a proposal or be required to make a concession and except that public employers of teachers shall meet and consult but not negotiate with respect to educational policies; for the purpose of this paragraph, educational policies may not include wages, hours, working conditions or contract grievance arbitration;

D. To execute in writing any agreements arrived at, the term of any such agreement to be subject to negotiation but may not exceed 3 years; and

E. To participate in good faith in the mediation, fact-finding and arbitration procedures required by this section.

Paragraph D, above, restricting the term of any agreement to three years, has been part of the Act since it was enacted in 1969. (P.L. 1969, ch. 424, §1)¹. In the 1989 Auburn Firefighters case, the Board held that § 965(D) meant that an automatic renewal provision could not operate to extend the life of an agreement beyond three years. Auburn Firefighters Assoc., IAFF, v. City of Auburn, No. 89-01 (March 31, 1989) at p. 20. In that case, the employer claimed the parties had reached a bona fide impasse in their negotiations and it was therefore justified in making unilateral changes in wages. The parties' collective bargaining agreement stated that the contract's terms and provisions would remain in effect after the expiration date if the parties were engaged in interest arbitration. The Board stated,

The parties' contract specifies that its terms and provisions shall remain in effect after the March 31, 1987 expiration date if the parties are engaged in interest arbitration pursuant to the MPELRL. Because the MPELRL contains a limitation on the duration of contracts of three years, see 26 M.R.S.A. § 965(D) (1988), the parties' agreement regarding the level of benefits, including wages, continued in effect until three years from the effective date of April 1, 1985, or until March 31 of 1988. On the basis of the wording of the collective bargaining agreement in this regard we conclude that the City was contractually bound, after the Association's interest arbitration request, filed on February 3, 1988, to continue contractually-established wages and other benefit levels unchanged,

¹The only change to paragraph D since its enactment in 1969 was in 2009 when "shall not" was changed to "may not". This change was made to conform to modern legislative drafting standards. See Maine Revisor of Statutes Legislative Drafting Manual, Ch. 2, section 1 "Legal action verbs: shall, must and may" , pp. 90-92 ("Do not use 'shall not'. Use 'may not' to prohibit an action.")

while that arbitration was pending, until March 31 of 1988.

Auburn Firefighters Assoc., IAFF, v. City of Auburn, No. 89-01 (March 31, 1989) at p. 20.

In light of the limitation of §965(1)(D), we hold that the evergreen clause in the collective bargaining agreement negotiated by York County and Teamsters Union Local 340 cannot operate to extend the agreement beyond the maximum duration of three years. As the contract in question had an effective date of January 1, 2005, the three-year period ended on December 31, 2007, which was the expiration date of the collective bargaining agreement by its terms. The evergreen clause could not operate to extend the contract beyond that date.²

Our conclusion that the evergreen clause could not extend the term of the agreement beyond the three-year statutory limit does not mean that there is no legal significance to the expired collective bargaining agreement. It is well-established law that following the expiration of a collective bargaining agreement, the obligation to bargain precludes the employer from making unilateral changes in the mandatory subjects of bargaining while the parties are negotiating a successor agreement. The Board recently summarized this prohibition against unilateral changes with the following:

The statutory duty to bargain requires the employer and the bargaining agent "to confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." 26 M.R.S.A. §965(1)(C). It is a well-established principle of labor law that the duty to bargain includes a

²We note that the parties could execute a separate agreement at the start of negotiating a successor agreement (or any time, actually) to continue the prior or existing agreement as long as negotiations continue. The three-year limit of §965(1)(D) would run from the date that agreement was effective.

prohibition against making unilateral changes in a mandatory subject of bargaining, as a unilateral change is essentially a refusal to bargain. See, e.g., Teamsters v. Town of Jay, No. 80-02 at 3 (Dec. 26, 1980) (citing NLRB v. Katz, 369 U.S. 736, 743 (1962)), and Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806, 809-10 (Me. 1982). The prohibition against making unilateral changes means that the parties must maintain the status quo following the expiration of a contract. Univ. of Maine System v. COLT, 659 A.2d 842, 843 (May, 1995) citing Lane v. MSAD No. 8, 447 A.2d at 810. In cases involving allegations of unilateral changes after the expiration of an agreement, the terms of the expired agreement are evidence of the status quo that must be maintained. See, e.g., MSEA v. School Committee of City of Lewiston, No. 90-12 (Aug. 21, 1990) at 16.

MSEA v. Lewiston School Dept., No. 09-05 at 6-7 (Jan. 15, 2009), aff'd AP-09-001, Androscoggin Sup. Court, Delahanty, J. (Oct. 7, 2009).

At this point, we can boil down the stipulated facts to the following: When the collective bargaining agreement expired on December 31, 2007, the Teamsters Union and the County were engaged in negotiations for a successor agreement. The terms of the collective bargaining agreement constituted evidence of the status quo that was required to be maintained with respect to the mandatory subjects of bargaining. The obligation to bargain with the Teamsters continued until September 1, 2010, when the Teamsters Union was decertified and the NCEU was certified as the bargaining agent for the Corrections unit. At that point, the County was obligated to deal with NCEU as the bargaining agent, but the status quo the County had to maintain was the same and the expired contract still served of evidence of that status quo.

There is no need to address the County's argument that the agreement became null and void upon the decertification of the Teamsters because we have already concluded that the evergreen clause could not extend the life of the agreement beyond the three-year limit imposed by §965(1)(D). The status quo doctrine

controlled while the County was negotiating for a successor agreement with the Teamsters. The obligation to maintain the status quo continued after the Teamsters' decertification because the County had a continuing obligation to bargain with the NCEU. Had there been no union on the scene at the time of the Teamsters decertification, the status quo would not apply because there would have been no duty to bargain or potential violation of §964(1)(A).

With respect to the continued vitality of the arbitration provision, there is both case law and express statutory law that must be considered. Clearly, contract grievance arbitration is a mandatory subject of bargaining, as it is identified specifically as a mandatory subject along with wages, hours and working conditions. 26 M.R.S.A. §965(C). The two components of this mandatory subject, that is, the grievance procedure generally and an agreement to submit grievances to arbitration, are treated differently as a result of two Law Court decisions issued in 1994 and 1995, and the subsequent enactment of §964-A.

In the 1994 Teamsters v. Portland Water District case, the Law Court held that the obligation to arbitrate grievances is extinguished with the expiration of the collective bargaining agreement:

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} . . . 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."

Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, 651 A.2d 339, at 341-342 (1994).

The Law Court also quoted extensively from the U.S. Supreme Court's decision in Litton Financial Printing Division v. NLRB which held that arbitration cannot be imposed without the parties' consent:

A recent decision of the United State Supreme Court confirms our ruling in Lane. In Litton Fin. Printing Div. v. N.L.R.B., the Court addressed the question of whether a dispute over post-expiration layoffs arose "under the agreement despite its expiration" and was thus subject to arbitration under the expired agreement. 501 U.S. 190, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991). In deciding that there was no obligation to arbitrate the layoff decisions, the 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]." Id.

Teamsters v. Portland Water District, 651 A.2d 339, at 341-342 fn. 5. In the following year, the Law Court decided MSEA v.

BOER, affirming the same principle that arbitration cannot be compelled under the Uniform Arbitration Act because the agreement to arbitrate expired when the collective bargaining agreement expired. MSEA v. Bureau of Employee Relations, 652 A.2d 654, 655 (1995).

Section 964-A of the Act, "Continuation of Grievance Arbitration Provisions," was enacted after, and in direct response to, these Law Court decisions. Our recent decision in Sanford Firefighters was the first instance in which this Board had the opportunity to discuss the genesis and impact of section 964-A. Sanford Professional Firefighters, Local 1624 v. Town of Sanford, No. 11-04 (Jan. 28, 2011). Although the Board's discussion centered around §964-A(2), which applies to collective bargaining agreements signed after October 1, 2005, there was some discussion about §964-A(1) which applies to agreements signed before Oct. 1, 2005, such as the one in this case. The Board described the manner in which 964-A was enacted and then later amended:

. . . 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.³ Consequently, grievances regarding any of those provisions based on conduct occurring after the expiration of the collective bargaining agreement can proceed to arbitration."

Section 964-A, sub-§1 applies because the collective bargaining agreement at issue in the present case was signed on June 15, 2005. Consequently, "the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect until the parties execute a new contract." Under sub-§1, the arbitration provisions do not remain in effect for provisions that do not pertain to disciplinary action.

With respect to the processing of grievances through the steps preceding arbitration, however, the obligation to maintain the status quo applies just like it applies for any other mandatory subject of bargaining. See Teamsters Union Local No. 48 v. Boothbay/Boothbay Harbor Community School Dist., No. 86-02, at 11 (March 18, 1986), Sanford Fire Fighters Ass'n v. Sanford Fire Commission, No. 79-62, at 10-11 (Dec. 5, 1979) and Easton Teachers Ass'n v. Easton School Committee, No. 79-14, at 5 (March 13, 1979) (The duty to maintain the status quo includes the duty to continue the grievance procedure). The County's argument that the obligation was terminated with the decertification of the Teamsters Union is without merit. This Board addressed this argument directly in its recent decision in the Saco Public Works case, holding,

³The 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).

. . . the expired collective bargaining agreement is evidence of the status quo that the City is obligated to maintain while the parties are negotiating a new collective bargaining agreement. The fact that the agreement was negotiated with a different union is irrelevant as the obligation is not a contractual obligation but one based on the duty to bargain and the correlative duty to maintain the status quo.

Saco Public Works Ass'n/Saco Workers Alliance v. City of Saco,
No. 11-02 (March 29, 2011) at 14-15.

The stipulated issue presented to this Board is "whether the contractual grievance and arbitration provision set forth in the collective bargaining agreement between York County and the Teamsters survives the decertification of the Teamsters Union." As the discussion above indicates, it is not possible to provide a simple yes or no answer to that question. We summarize our conclusions by noting the following:

The expired collective bargaining agreement could not be extended beyond its three-year term by the evergreen clause because §965(1)(D) imposes a maximum duration of three years.

The grievance procedure in the expired contract does not survive as a contractual matter, but does serve as evidence of the status quo that must be maintained pursuant to the duty to bargain.

The arbitration provision continues in effect only with respect to grievances pertaining to disciplinary measures pursuant to 26 M.R.S.A. §964-A(1).

In light of these conclusions, the Board suggests that each party reconsider its position and attempt to resolve any outstanding issues amicably. We will hold the prohibited practice complaint in abeyance while the parties attempt to resolve the matter. If any matters remain unresolved, the Union may petition this Board to proceed further with this case.

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

MAINE LABOR RELATIONS BOARD

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

/s/ _____
Peter T. Dawson
Chair

/s/ _____
Karl Dornish, Jr.
Employer Representative

/s/ _____
Carol S. Gilmore
Employee Representative