

STATE OF MAINE

MAINE LABOR RELATIONS BOARD  
Case No. 12-17  
Issued: August 6, 2012

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MAINE STATE EMPLOYEES )	
ASSOCIATION, SEIU, Local 1989, )	
)	
Complainant, )	
)	
v. )	INTERIM ORDER ON
)	APPEAL OF EXECUTIVE
)	DIRECTOR'S DISMISSAL
STATE OF MAINE, )	
)	
Respondent. )	
_____ )	

The question before this Board is whether to affirm, deny, or modify the Executive Director's dismissal of the prohibited practice complaint filed on February 22, 2012 by the Maine State Employees Association, SEIU Local 1989 (MSEA). The complaint alleges that, after the expiration of the parties' collective bargaining agreement and while the parties were negotiating a successor agreement, the State implemented various unilateral changes by contracting out and reorganizing bargaining unit work without giving MSEA prior notice and an opportunity to bargain. The complaint also alleges the State failed to provide relevant and necessary information requested by MSEA regarding these issues. The Board's Executive Director dismissed the complaint for failure to state a violation of the law, rejecting as unsupported by Maine law the Union's argument that the status quo does not include any authority to contract out or reorganize unit work.

The legal theory underlying the complaint as it stands is based on the premise that the State's authority to reorganize and contract out unit work was based solely on a waiver of the Union's right to bargain. The Union contends that because waivers do not survive the expiration of the collective

bargaining agreement, the State's authority to reorganize and contract out unit work expired when the contract expired. After rejecting the Union's legal theory, the Board's Executive Director concluded that the terms of the expired agreement authorized the conduct at issue and dismissed the complaint.

The MSEA appealed the Executive Director's dismissal in a formal motion filed on April 20, 2012, which included extensive legal argument. The parties presented oral argument to the Board on May 18, 2012, and filed additional written submissions on June 8, 2012.

On appeal, MSEA presents to the Board the same argument that the Executive Director rejected as unsupported by Maine law. The MSEA contends that the Management Rights provision and the Contracting Out provision of the expired collective bargaining agreement are simply waivers of the Union's right to bargain that expired when the contract expired and, as such, cannot be considered part of the status quo that must be maintained while the parties are negotiating a successor agreement. In support of this argument, the Union relies on case law from the National Labor Relations Board, particularly the recent case of E.I. Dupont De Nemours, Louisville Works, 355 NLRB No. 176 (2010). In that case, a particular piece of the contractual provision on health benefits authorized the employer to make certain unilateral changes on an annual basis. The NLRB viewed that provision as a waiver, comparable to a management-rights clause, which did not continue in effect after the expiration of the agreement. Id. at 2. Consequently, the NLRB held that the only past practice relevant to the exercise of authority under such a "waiver" was past practice (that is, acquiescence to the change) occurring after the expiration of the agreement. Id. The NLRB did not consider evidence of the practice established while the

agreement was in effect because to do so would have the effect of nullifying its holding that waivers do not survive the expiration of the agreement. Id. The NLRB held that the employer's post-expiration change to the health benefit was an illegal unilateral change because the employer's authority to make the change expired with the expiration of the collective bargaining agreement. Id. at 3.

#### DISCUSSION

We agree with the basic premise that a waiver of a right to demand bargaining such as that found in a zipper clause does not survive the expiration of the collective bargaining agreement unless there is clear and unambiguous language of that intent. We do not agree with the Union that this principle has any bearing on this case, which is about the status quo that must be maintained after the expiration of the agreement.

A fundamental principle of labor law is that the duty to bargain includes a prohibition against making unilateral changes in a mandatory subject of bargaining, as a unilateral change is essentially a refusal to bargain. See, e.g., MSEA v. City of Lewiston School Dept., No. 09-05 (Jan. 15, 2009), aff'd, AP-09-001 (Oct. 7, 2009, Androscoggin Sup. Ct., Delahanty, J.); 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. MSAD No. 8, 447 A.2d 806, 809-10 (Me. 1982). The prohibition against making unilateral changes requires that the parties 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. While the terms of the expired agreement are evidence of the status quo that must be maintained, this Board has also held that "[e]stablished practice must be maintained pending negotiations for a new contract, whether that

practice is reflected in the . . . contract or not.” Thomas Blake and South Portland Prof’l Firefighters Assoc. v. City of South Portland, No. 94-12 (June 2, 1994) at 12, n.4, citing Lincoln Fire Fighters' Assoc. v. Town of Lincoln, No. 93-18 (Apr. 21, 1993).

The impact of adopting the Union’s argument would result in a major reformulation of the status quo doctrine in Maine. The Employer would no longer be able to take actions consistent with established practice and with the terms of the expired agreement. The Union’s legal theory cannot be adopted without overturning the Board’s long-established law regarding the duty to maintain the status quo while negotiating a successor agreement. This Board’s case law has repeatedly demonstrated that when an expired agreement authorized the employer to make a particular change, it would not be an illegal unilateral change for the employer to make a post-expiration change consistent with that practice. See MSEA v. Lewiston School/City, No. 90-12 (Aug. 21, 1990) (the expired agreement authorized employer to reclassify employees after ‘consultation’ with union, therefore the status quo authorized reclassifications consistent with that practice); Teamsters v. Boothbay/Boothbay Harbor CSD, No. 86-02 (March 18, 1986) (expired agreement authorizing employer to subcontract bargaining unit work under specified conditions established the status quo); and MSEA v. City of Lewiston School Dept., No. 09-05 (Jan. 15, 2009) (employer’s unilateral increase of employees’ share of health insurance premium was unlawful as it was inconsistent with practice of maintaining a proportional share established under the terms of the expired agreement). Consistent with this Board’s precedent, the relevant legal question in this case is whether the conduct of the State maintained the status quo or changed it.

Adoption of the Union's waiver theory would supplant the established analysis of determining the status quo that the parties must maintain. In its stead, the Board would have to grapple with whether a particular provision in an expired agreement should be viewed as a grant of authority to the employer or a waiver of the union's right to bargain. As the Employer pointed out at oral argument, every provision giving the employer some authority to take some action relative to a mandatory subject can be viewed to some extent as a waiver of the union's right to bargain over that issue. In many respects, the grant-of-authority or waiver issue is aptly described as being two sides of the same coin. As such, the Union's legal theory presents a nearly impossible challenge of framing the issue so that this Board, or Maine's public sector community more generally, can discern the answer in any given case.

For the foregoing reasons, we expressly reject the Union's request that we adopt the same waiver analysis used by the NLRB in E.I. DuPont De Nemours. To do so would be inconsistent with our settled case law on the statutory obligation to maintain the status quo while negotiating a successor agreement. We are also concerned that the lack of any discernible framework for applying such a theory would create an enormous amount of uncertainty for the public sector labor relations community in Maine.

While we emphasize that the Union's argument has no support in Maine law,<sup>1</sup> we also note that the federal law is not as

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<sup>1</sup>The cases from other state jurisdictions offered in support of the Union's theory do little to help their case and, to the extent that the cases actually addressed the question before us, the analysis used varied depending on factors such as statutory or judicially recognized concepts of managerial prerogatives, the legal status of evergreen clauses, and the specific language of the management rights provision and past practices with respect to that language.

clearly established as the Union asserts. A few days after the oral argument in this case, the U.S. Court of Appeals for the District of Columbia issued its decision on the appeal of the NLRB decision in the E.I. DuPont case. E.I. Du Pont De Nemours and Company v. NLRB, 682 F.3d 65 (D.C. Cir., June 8, 2012), 2012 U.S. App. LEXIS 11604. The D.C. Court of Appeals held that the employer's unilateral changes to the benefits plan were consistent with the status quo "expressed in the Company's past practice" and refused to enforce the NLRB's decision.<sup>2</sup> Id., 2012 U.S. App. LEXIS 11604 at 8. Quoting the 6<sup>th</sup> Circuit Court, the D.C. Court of Appeals noted:

[I]t is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.

Id., 2012 U.S. App. LEXIS 11604 at 10, citing Beverly Health and Rehabilitation Services, Inc. v. NLRB, 297 F.3d 468, 481 (6<sup>th</sup> Cir. 2002). We consider this description to be an accurate reflection of our prior holdings on the issue of post-expiration unilateral changes.

We expressly reject the Union's argument that any action taken by the State to reorganize or contract out unit work without bargaining is an unlawful unilateral change based on the theory that the authority to do so expired with the termination of the agreement. However, we conclude that the Executive Director erred by dismissing the complaint for failure to state a claim. The Executive Director failed to cite any legal basis for his conclusion that the mere existence of the Management Rights

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<sup>2</sup>The D.C. Circuit Court of Appeals remanded the case to the NLRB because the Board "failed to give a reasoned justification for departing from its precedent" regarding unilateral changes pursuant to past practices. 2012 U.S. App. LEXIS 11604 at 12.

and Contracting Out provisions authorized the State's actions post expiration.

There are three elements necessary to state a viable complaint of a unlawful unilateral change. The Employer action must be unilateral, it must be a departure from a well-established practice, and it must involve a mandatory subject of bargaining. See, e.g., Local 3771, IAFF v. Town of Ogunquit, No. 03-11 at 6 (Aug. 6, 2003), citing Monmouth School Bus Drivers & Custodians/Maintenance Assn. v. Monmouth School Committee, No. 91-09 at 55 (Feb. 27, 1992). The primary deficiency of the complaint before us is that it does not contain any allegations that the conduct complained of was a change from established practice. As provided by MLRB Rule Ch. 12 §8(2), the Complainant will have the opportunity to amend the complaint to allege facts demonstrating that the alleged unilateral changes are inconsistent with established practice.

There are additional deficiencies in the complaint that will result in its dismissal if not properly addressed in an amendment. First of all, the complaint does not include sufficient detail about the conduct at issue to identify it to the extent necessary to allow the State to respond. As the State noted in its Memorandum filed on March 13, 2012, "[t]he complaint does not inform Respondent exactly what it is alleged to have done, when it is alleged to have done it, and more significantly, whether it has already taken the alleged action or merely planned or contemplated it." Memorandum in Support of State's Motion for a Ruling on Sufficiency, at p. 9-10 (March 13, 2012).

The Board's Rules require a complaint to include a clear and concise statement of the facts so that the respondent is on notice of the complaint against it and can respond to the

specific allegations. MLRB Rule Ch. 12, §5, detailing the required contents of the complaint, states “[t]he complaint must contain, insofar as is known, the information specified in this rule.” Subsection 4, requiring a concise statement of facts, states in its entirety:

**4. Concise Statement of Facts.** A clear and concise statement of the facts constituting the complaint, including the date and place of occurrence of each particular act alleged, names of persons who allegedly participated in or witnessed the act, and the sections, including subsection(s), of the labor relations statutes alleged to have been violated. The complaint must consist of separate numbered paragraphs with each paragraph setting out a separate factual allegation.

While recognizing that the Union might not know all of the details identified in subsection 4 about every action complained of, we conclude that it is necessary for the Complainant to amend the complaint to include enough specifics to enable the Respondent to identify the conduct at issue. In its Memorandum of March 13, 2012, the State describes the difficulty in responding to the complaint as drafted on pages 9 through 12. For example, the Respondent notes, “MSEA alleges that the State contracted with outside vendors to maintain roads formerly maintained by employees of DOT, but does not allege what roads or even what areas, what vendors, or when” or whether the work has actually been performed. State Memorandum at 10. The allegations such as that found in ¶8(d) of contracting out “for various other functions within Maine Revenue Services, the Departments of Transportation, Health and Human Services, Inland Fisheries and Wildlife, and Labor, among others” are similarly lacking in specifics. In addition, the allegations in ¶13 regarding the “numerous” reorganizations in five departments are insufficient because there are no specifics beyond the name of the department.

The final insufficiency of the complaint relates to the allegation that the State violated the statute by failing to provide relevant and necessary information to MSEA as requested. The complaint includes at least ten statements (¶17 to ¶22e) that make no allegation of fact but merely refer to various attachments to the complaint. As we have previously noted, "the Board's rules do not contemplate the submission of documentary evidence as part of the complaint. Such submissions should be discouraged." Aline Dupont v. MSEA, No. 11-05 at 5 n. 3 (March 27, 2012), citing MLRB Rule Ch. 12, §5. Unless the complaint is amended to include allegations of fact constituting a failure to provide relevant information needed by MSEA for the performance of its duties as bargaining agent, this aspect of the complaint will be dismissed as well.

#### ORDER

We hereby ORDER that the complaint be reinstated in order to allow the Complainant the opportunity to amend the complaint as provided by MLRB Rules Ch. 12, §8(2). With respect to the charge of a unilateral change in the terms and conditions of employment in violation of 26 M.R.S.A. §979-C(1)(A) and (E), the complaint must be amended to:

- 1) include allegations of an established practice and that the conduct complained of was a change from established practice, and
- 2) include allegations of specific facts sufficient to enable the Respondent to identify the conduct being complained of.

With respect to the charge that the State failed to provide relevant information needed by the Union for the performance of its duties as bargaining agent, thereby violating 26 M.R.S.A. §979-C(1)(A) and (E), the complaint must be amended to:

1) include allegations of conduct constituting a failure to provide relevant and necessary information without reliance on any attachments to the complaint.

In accordance with MLRB Rules Ch. 12, §8(2), if the Complainant desires to file an amended complaint to cure the deficiencies identified in this Order, the amended complaint must be filed within 15 calendar days of the service of this Order. Due to the length and complexity of this complaint, the amendment should be presented as a self-standing substitute for the original complaint, rather than amending the original complaint on a paragraph by paragraph basis. If the complaint is not amended, it will be dismissed.

Dated at Augusta, Maine, this 6th day of August, 2012.

MAINE LABOR RELATIONS BOARD

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Katherine I. Rand, Esq.  
Chair

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Robert L. Piccone  
Employee Representative

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Karl Dornish, Jr.  
Employer Representative