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In re:)	
MAINE STATE TROOPERS ASSOCIATION)	INTERPRETIVE
PETITION FOR)	RULING
INTERPRETIVE RULING)	
)	
_____)		

On November 28, 2011, the Maine State Troopers Association filed a petition for an interpretive ruling on whether the State of Maine, Department of Public Safety, has an obligation to bargain the issue of replacement savings for the return of merit increases which were suspended in the budget enacted by the 125th Maine Legislature. Through this petition, the Board is asked to interpret the scope of the obligation to bargain in 26 M.R.S.A. §965(1)(C), the effect of the terms of section E-1 of the budget, and the impact of various provisions in the collective bargaining agreement, particularly the zipper clause and a reopener provision.

The Maine State Troopers Association (MSTA) is represented by William K. McKinley, Esq., who submitted a Memorandum of Law with the Petition. A Memorandum of Law in Opposition to the Petition was submitted by Cynthia L. Montgomery, Esq. on behalf of the State of Maine. The Board, with Peter T. Dawson, Chair; Karl Dornish, Jr., Employer Representative; and Carol B. Gilmore, Employee Representative, met on January 18, 2012, to deliberate on this matter.

The basic facts underlying this petition are as follows:
The MSTA and the State of Maine, Department of Public Safety, had

a collective bargaining agreement that was due to expire on June 30, 2011. For some period prior to the expiration, the parties were in negotiations for a successor agreement. The parties were aware that the Legislature was likely to enact legislation similar to what was enacted in the previous budget which had the effect of freezing merit increases during the two-year budget period. These negotiations for a successor agreement led to a Memorandum of Agreement executed by the parties on June 8, 2011. The Memorandum described the agreed-upon changes to various articles of the expiring agreement and included the following "reopener" language:

If during the term of the 2011-2013 collective bargaining agreement, the Director of the State Budget Office determines that there is a surplus of funds in personal services, the State will notify MSTA and notwithstanding any other provisions of the collective bargaining agreement, upon request by either party, the agreement will be reopened for the limited purpose of bargaining over merits and/or longevity, if these benefits are reduced by legislative action.

The budget bill was enacted as emergency legislation and signed by the Governor On June 20, 2011. P.L. 2011, ch. 380. Section E-1 prohibited the payment of merit increases¹:

Sec. E-1. Merit increases. Notwithstanding the Maine Revised Statutes, Title 26, section 979-D or 1285 or any other provision of law, any merit increases, regardless of funding source, scheduled to be awarded or paid between July 1, 2011 and June 30, 2013 to any person employed by the departments and agencies within the executive branch, including the constitutional officers and the Department of Audit, the legislative branch and the judicial branch may not be awarded, authorized or implemented. These savings may be replaced by other Personal Services savings by

¹Section E-2 imposed a similar restriction on longevity payments for many employees.

agreement of the State and the bargaining agents representing state employees.

At some point after the Memorandum of Agreement was executed on June 8, 2011, the MSTA made a proposal to replace the merit-pay savings. The State responded by asserting that both the reopener language in the Memorandum and the zipper clause in the contract precluded such discussions. The zipper clause states, in full:

Article 12. EMBODIMENT OF AGREEMENT

Except as herein provided, neither party shall demand any modification to this Agreement nor shall either party be obligated to bargain collectively with the other with respect to any subject or matter specifically referred to or covered herein.

The Petition for Interpretive Ruling includes a number of factual assertions that the Association made proposals for replacement savings before and after ratification of the collective bargaining agreement. The State disputes some of these facts and disputes the Association's characterization of the State's response to the proposals.

The Petition for Interpretive Ruling essentially seeks a ruling from the Board that §979-D of SELRA and §E-1 of the budget bill impose an obligation to bargain over replacement savings and that the obligation is not affected by the zipper clause or the reopener language. The MSTA also seeks various declarations regarding the extent of the State's obligation to provide information to the MSTA to support its rejection of the proposals.

Section 41 of the MLRB rules on prohibited practices deals specifically with requests for an interpretive ruling. See MLRB

Rule Ch. 12, §41. The initial portion of that section states the appropriate circumstances for an interpretive ruling:

§ 41. Interpretive Rulings. An interpretive ruling is a means for determining specific questions as to the prospective rights, obligations, or liabilities of a party when controversy or doubt has arisen regarding the applicability of a specific statute, Board order or rule. A petition for an interpretive ruling may not be used to resolve factual disputes between adversaries and may not be used as a substitute for other remedies provided by the collective bargaining laws.

Interpretive Rulings are not appropriate for all questions. The classic example of an appropriate request for an interpretive ruling is when the parties are bargaining and there is a disagreement on whether a particular subject is a mandatory subject of bargaining. In these kinds of cases, the only available alternative for the petitioner would be to take the action being contemplated and risk being the subject of a prohibited practice complaint. See, e.g., City of Portland, Petition for Interpretive Ruling, No. 01-IR-01 (June 27, 2001) (Petition inquiring whether the establishment of a Police Civilian Review Subcommittee would be a mandatory subject of bargaining was appropriate); Lewiston Education Association and Lewiston School Committee, No. 08-IR-01 (Jan. 15, 2009) (Petition inquiring whether particular provisions were educational policy and therefor not mandatory subjects of bargaining was appropriate). Similarly, a request for an interpretive ruling is inappropriate if it seeks an opinion on the legality of past actions, rather than "prospective rights, obligations, or liabilities". See Lewiston School Committee Petition for Interpretive Ruling, No. 08-IR-01 (April 20, 2006) (Petition inappropriate because it sought a ruling on whether past conduct violated fact-finding rules). Finally, Rule 41 states that a

petition for interpretive ruling is not appropriate when there are factual issues in dispute or as a substitute for other remedies available.

In this case, the question presented is really whether the State has violated and is continuing to violate SELRA by refusing to bargain over the Association's proposals for replacement savings. The facts presented describe past action and the Petition is clearly seeking a ruling on whether the State's conduct is in violation of the law, not whether some planned conduct by the petitioner would be a violation. Couching the issue in terms of prospective rights and obligations does not alter the fact that there are factual matters in dispute and the issue should be resolved through filing a prohibited practice complaint. For these reasons, we will not consider the the Petition for Interpretive Ruling as presented.

The Petition does raise a valid question for this Board that can be addressed through an interpretive ruling. That question is limited to how section E-1 of P.L. 2011, ch. 380 affects the statutory obligation to bargain imposed by §979-D of SELRA. We offer the following interpretation of section E-1, rather than rejecting the Petition in its entirety.

Section E-1 consists of only two sentences. The first sentence prohibits the payment of any merit increases for the two fiscal years of the budget. If section E-1 only contained that first sentence, it would have the effect of prohibiting negotiation of merit increases because SELRA removes from the mandatory subjects of bargaining those matters that are "prescribed and controlled by public law". 26 M.R.S.A. §979-D(1)(E)(1). Clearly, section E-1 controls the payment of merit increases.

The second sentence, “[t]hese savings may be replaced by other Personal Services savings by agreement of the State and the bargaining agents representing state employees”, preserves the scope of the statutory duty to bargain by allowing the parties to implement merit increases by agreement if the cost is offset by replacement savings. Without the second sentence, only an amendment to section E-1 of the public law could restore merit increases.

The second sentence does not expand the scope of bargaining beyond the obligations contained in the duty to bargain imposed by §979-D of SELRA. Thus, whether a party has waived its right to bargain while a collective bargaining agreement is in effect involves the same waiver analysis that existed prior to the enactment of section E-1.

Issued this 19th day of January, 2012.

MAINE LABOR RELATIONS BOARD

S/ _____
Peter T. Dawson
Chair

S/ _____
Karl Dornish, Jr.
Employer Representative

S/ _____
Carol B. Gilmore
Employee Representative