

June 28, 2013, and included two documents: an arbitration decision dated October 15, 2012, regarding Complainant McLaughlin's grievance over discipline imposed on January 13, 2011, and the Commissioner's letter, dated December 17, 2012, terminating McLaughlin's employment.

On July 26, 2013, the Executive Director issued a detailed ruling on the sufficiency of the Complaint in which he made a preliminary determination that the facts as alleged would not constitute a violation of the Act. The Executive Director offered the Complainants the opportunity to amend the complaint to cure the specified insufficiencies. The Complainants responded on August 6, 2013, stating that they would not provide any amendments to the allegations because "there were no deficiencies to be cured." The Complainants requested that the Executive Director issue his final ruling so that the matter could be appealed to the Board. The Executive Director issued his final ruling on August 8, 2013, and the Complainants filed a timely appeal on August 22, 2013.

DISCUSSION

MLRB Rule Chapter 12, §8(3) establishes the procedure for appeal to the Board when the Executive Director dismisses a complaint because the factual allegations in the complaint do not, as a matter of law, constitute a violation of the Act. The rule states, in relevant part:

The motion [of appeal to the Board] must clearly and concisely set forth the points of fact and law claimed to be sufficient to establish a prima facie violation of the applicable prohibited act provision(s). Upon the filing of a timely motion for review, the Board shall examine the complaint as it existed when summarily dismissed in light of the assertions contained in the motion. If upon such examination the Board finds the com-

plaint insufficient, it shall affirm the summary dismissal of the charge and shall notify the parties in writing of the determination. If the Board finds the complaint to be sufficient, it shall reinstate the complaint and shall so notify the parties.

The requirement that "the Board shall examine the complaint as it existed when summarily dismissed" means that the Board cannot consider any new factual assertions made in written argument to the Board on appeal. See William D. Neily v. State of Maine, No. 06-13 at 6, n. 3 (May 11, 2006) (Board precluded from considering facts first alleged in appeal of dismissal to Board) and MSAD #46 Educ. Assoc/MEA v. MSAD #46 Board of Dir., [No. 02-13](#) at 5, n. 3 (Nov. 27, 2002) (same). Similarly, the rule's statement that the motion of appeal to the Board "must clearly and concisely set forth the points of fact and law claimed to be sufficient" is not license to present new facts, but merely an opportunity to describe how the facts alleged in the complaint would be a violation of the law. See, e.g., Portland Prof'l and Technical City Employees Assoc./MTA v. City of Portland, [No. 93-36](#) at 4 (Nov. 3, 1993) (reviewing alleged facts in light of argument employing a continuing violation theory). Finally, the rule's directive that the Board "examine the complaint as it existed when summarily dismissed" also means that the Board must make its own determination on the sufficiency of the complaint, rather than simply reviewing the Executive Director's decision. MSEA v. State of Maine, Dept. of Public Safety, [No. 09-13](#) at 2 (Aug. 21, 2009).

Whether it is the Executive Director ruling on the sufficiency of a complaint or the Board deciding the matter on appeal, the standard employed is the same. The Act requires the dismissal of a prohibited practice complaint if the facts as alleged "do not, as a matter of law, constitute a violation." 26

M.R.S.A. §979-H(2). Both the Executive Director and the Board must treat the material allegations of the complaint as true and must consider the complaint in the light most favorable to the complainant to determine whether the alleged facts may constitute a violation of the Act. MSAD #46 Educ. Assoc. No. 02-13 at 5 (interpreting 26 M.R.S.A. §968(5)(B), the comparable provision of the Municipal Public Employees Labor Relations Law). When the allegations in the complaint are more than simply factual allegations but are legal conclusions, however, the Board is not bound to accept those legal conclusions as true. Id. at 5, citing Bowen v. Eastman, 645 A.2d 5, 6 (Me. 1994). See also Neily v. State of Maine, No. 06-13 at 6.

1. The Factual Allegations And Charges In The Complaint

The Complaint alleges that Mr. McLaughlin was suspended for 30 work days in January of 2011; that the Union took his grievance to arbitration; that the arbitration decision of October 15, 2012, upheld his suspension; and that the Employer's termination of his employment on December 17, 2012, was retaliation for exercising his right to participate in arbitration. The Complaint also alleges, "The facts and circumstances which form the basis for Commissioner Ponte's decision to terminate McLaughlin on December 17, 2012 are identical to facts and circumstances which form the basis of the Arbitration Decision to uphold the thirty work day suspension dated October 15, 2012."² The Complaint alleges that the termination decision was "not based upon a new fact" and that the "Giglio" issue had been known since the suspension in 2011. The Complaint also alleges that the "Giglio" issue was a pretext for imposing additional discipline for the same conduct that resulted in the suspension, which the Complaint

²The "facts and circumstances" that are identical are not identified.

alleges is a unilateral change in working conditions.

Neither the arbitration decision of October 15, 2012, nor the termination letter of December 17, 2012, were submitted with the Complaint. The Complainants later attached both documents as exhibits to their Response to the State's Motion to Dismiss. The Executive Director relied on these documents in concluding that the Complaint was insufficient. On appeal, the Complainants argue that the Executive Director improperly relied on facts and information "not in the record at this point" when concluding that the Complaint did not allege a violation of the Act.

Under normal circumstances, a motion to dismiss for failure to state a claim must be evaluated on the basis of the complaint alone. The Board's rules require that the complaint include a "concise statement of the facts constituting the complaint" and a copy of the collective bargaining agreement. See MLRB Rules, Ch. 12 §5.³ When a complainant has attached an additional document to the complaint, such an attachment will generally be considered if it aids in understanding the allegations in the complaint.⁴ Attachments may not be used as a substitute for the specific allegations of fact required in the complaint. See MSEA v. State of Maine, [No. 12-17](#) at 9, Interim Order on Appeal of Executive

³ Sub-§ 3 requires a copy of any existing bargaining agreement related to the unit involved in the complaint and sub-§ 4 requires:

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.

⁴ Similarly, the requirement of providing a copy of the collective bargaining agreement with the complaint enables the Board to identify the bargaining unit and determine certain potential issues such as standing and waiver.

Director's Dismissal, (Aug. 6, 2012) (statements in complaint that did not allege any facts but merely referred to attached affidavits were improper), citing Aline Dupont v. MSEA, No. 11-05 at 5 n.3 (March 27, 2012). In Geroux v. City of Old Town, however, the Board held that exhibits attached to a complaint were "an integral part of the complaint" where several of the allegations referred to and were based on the exhibits. Bruce J. Geroux v. City of Old Town, No. 84-24 at 4 (June 18, 1984). In that case, the Board dismissed the case after concluding the complaint had not been properly served because the exhibits were not included with the copy of the complaint served on the respondent. Id.

In this case, the two documents were not supplied with the Complaint but were provided as exhibits to Complainants' response to the motion to dismiss. The State did not object to the submission or contest the authenticity of the documents. Not only do several of the allegations in the Complaint refer to the documents, specifically ¶9, ¶11, ¶13, ¶14, ¶15 and ¶16, the substance of the two documents is central to the Complaint.

In light of the Board precedent, the relevance of the two documents, and the specific circumstances of this case, we conclude that it is appropriate to consider the two documents in ruling on the motion to dismiss. We hold that during consideration of a motion to dismiss, the Board and the Executive Director may consider documents supplied by either party that are not part of the complaint if the authenticity of the documents is not challenged and the documents are central to the complaint or are referred to in the complaint. We note that this approach is consistent with the Law Court's analysis of whether materials outside the pleadings can be considered on a motion to dismiss. See Moody v. State Liquor and Lottery Commission, 2004 ME 20, ¶11, 843 A.2d 43, 47. Moody was a case involving an alleged

breach of contract based on the terms on the front of a scratch lottery ticket. The Law Court ruled that the Superior Court properly considered the front and back portions of the un-scratched lottery ticket supplied by the State with its motion to dismiss because "documents that contain the terms of the contract are central to Moody's [breach of contract] claim." 2004 ME 20, ¶12, citing Alternative Energy Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.3d. 30, 33 (1st Cir. 2001) (finding it was appropriate for court to review settlement agreement attached to the motion to dismiss, as complaint's allegations referred to and were dependent on terms of the settlement agreement.) The Law Court adopted the rationale of the Third Circuit Court of Appeals "that if courts could not consider these documents, 'a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.'" Moody, 2004 ME 20 at ¶10, quoting Pension Benefit Guar. Corp. v. White Consol. Indus. Inc., 998 F.2d 1192, 1196 (3rd Cir. 1993) (holding that purchase and sale agreement could be reviewed on motion to dismiss when complaint was based on and referred to the agreement.) For these reasons, we will consider the October 15, 2012, arbitration decision and December 17, 2012, letter of termination as they relate to the Complaint and the motion to dismiss.

The Complainants assert that the allegations of fact constitute four distinct violations of the Act. Count I is an interference, restraint and coercion charge in violation of §979-C(1)(A); Counts II and III are discrimination charges, one in violation of §979-C(1)(B) and the other in violation of §979-C(1)(D); and Count IV is a unilateral change charge in violation of §979-C(1)(E). The interference, restraint and coercion charge is best addressed after we have considered the other charges.

§979-C(1) (B): Discrimination to discourage union membership.

Section 979-C(1) (B) prohibits an employer from "encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment." Count II of the Complaint charges that the Employer violated §979-C(1) (B) by discriminating against McLaughlin "in regards to his terms and conditions of employment because he engaged in activities protected by the Agreement and the State Employees Labor Relations Act with the purposes of discouraging membership in the union."

To survive a motion to dismiss, the Complainant must allege facts which set forth the three elements necessary to show a (1) (B) violation. A discrimination claim requires an allegation that the complainant (1) engaged in protected activity; (2) the decision-makers knew of complainant's participation in the protected activity; and (3) there is a causal connection between the protected activity and the employer's adverse employment action. See, e.g., MSEA v. Maine Turnpike Authority, 12-08 at 19, (Feb. 12, 2013); Litchfield Educational Support Personnel Assoc. v. Litchfield School Committee, No. 97-09 at 22 (July 13, 1998); and Casey v. Mountain Valley Educ. Assoc. and School Admin. Dist. #43, Nos. 96-26 & 97-03, at 27-28 (Oct. 30, 1997).

With respect to the first two elements, the facts allege that Mr. McLaughlin and his Union submitted a grievance contesting his suspension and pursued that grievance through arbitration. Participation in the grievance procedure is generally considered protected activity. See Alfred Hendsbee and Maine State Troopers Assoc. v. Dept. of Public Safety, Maine State Police, No. 89-11 (Jan. 16, 1990) (State's referral of grievances to internal affairs for investigation is inconsistent with Act's

guarantee of the free exercise of the right to participate in union activities.) The allegation that McLaughlin's grievance proceeded through arbitration indicates that the second element was properly alleged, that is, that the Employer knew that McLaughlin engaged in the protected activity. The third element, a causal connection between the protected activity and the adverse employment action (in this case, the discharge), requires more scrutiny.

Paragraph 15 of the Complaint alleges that the termination decision was "not based upon a new fact." Paragraph 11 further alleges that the "facts and circumstances which form the basis of [the] decision to terminate McLaughlin on December 17, 2012 are identical to the facts and circumstances which form the basis of the Arbitration decision to uphold the thirty work day suspension on October 15, 2012." In written argument to the Executive Director on the State's motion to dismiss, Complainants argue, "The only new fact that could form the basis of the termination is McLaughlin's participation in the arbitration process." (Brief to Ex. Dir. at 5).

On its face, the Complaint alleges facts which, when read in a light most favorable to the Complainants, allege a causal connection. While a coincidence in time between the protected activity and the adverse employment action is generally not sufficient on its own to prove causation, it may be enough to survive a motion to dismiss. MSEA v. State Development Office, No. 84-21 at 11, (July 6, 1984), aff'd, 499 A.2d-165 (Me. 1985) (the fact that the adverse action happened to coincide with the employee's protected activity does not, without more, establish a prima facie case of discrimination). Causal connection can be proved through direct evidence, such as comments threatening adverse action. See Susan Ouellette v. City of Caribou, No. 99-

[17](#) at 13 (Nov. 22, 1999) (Police Chief agreed to terminate employee because she had gone to the "wrong people" and got "bad advice" after he warned her not to). More typically, however, a causal connection is proved through circumstantial evidence, such as evidence of anti-union animus, disparate treatment, or inconsistent or less-than-credible explanations for the action. See Teamsters v. Baker Bus Service, Inc., [No. 79-70](#) (March 3, 1980), aff'd Baker Bus Service v. Edward H. Keith, et al., 428 A2d. 55 (Me. 1980) (finding causal connection based on general anti-union animus, post-discharge comments, the unreasonableness of discharge as penalty for minor infraction, and inconsistent or spurious explanations for discharge); and Dana Duff v. Town of Houlton and Houlton Police Dept., [No. 97-20](#) & 97-21 at 38 (February 24, 1998) (finding causal connection where Police Chief skewed evaluation scores of promotion candidates to defeat the chances of union activists).

In written argument to the Executive Director, the Complainants' argument of causal connection is more explicit than in the Complaint itself. The Complainants assert, "The December 17, 2012 letter does not allege any new facts that form the basis of [McLaughlin's] termination [and that] the only new fact or occurrence was the issuance of the arbitration decision." (Brief to Ex. Dir. at 6.) The Complainants also repeat the argument made in the Complaint that the facts and circumstances forming the basis of the arbitrator's decision are identical to the facts and circumstances of the termination. (Brief at 2) We note that the Complaint does not give any indication of what those "identical facts" are.

The termination letter and the arbitration decision make it abundantly clear that the factual allegations in the Complaint that purport to establish causal connection between the termina-

tion and McLaughlin's participation in arbitration are simply not accurate. Contrary to the Complainants' assertion, the termination letter does, in fact, refer to new facts that the State contended led to the decision to discharge McLaughlin. Those new facts were the consequences of the arbitrators' findings regarding McLaughlin's credibility: the District Attorneys' decision not to use McLaughlin as a witness and the resulting impact on McLaughlin's ability to perform his job.

The Arbitration decision upheld the suspension given in early 2011, concluding that the discipline was warranted. Part of the arbitrator's reasoning was McLaughlin's lack of credibility as a witness in the arbitration hearing regarding the events that led to the suspension. Indeed, the arbitrator made some very explicit comments in the arbitration decision about the individual complainant's credibility.

The Employer's termination letter stated quite clearly that McLaughlin was being terminated because the State's seven District Attorneys had asserted that, based on the arbitration decision, they would not use him as a witness because he was "Giglio impaired." Giglio is the United States Supreme Court decision requiring prosecutors to provide potential impeachment evidence to the defense where the credibility of a witness will likely be key to the outcome of the case.⁵ Here, the arbitration award was potential impeachment evidence if McLaughlin were called as a witness for the prosecution. The impact of the arbitrator's conclusions that McLaughlin was untruthful was the

⁵Giglio v. United States, 405 U. S. 150, 154 (1972) (exculpatory evidence includes evidence affecting witness credibility, where that witness' reliability is likely to determine guilt or innocence). A "Giglio-impaired" agent is one where potential impeachment evidence would make that agent's testimony of little value in a case.

stated basis for the Employer's decision.

The allegation of fact in the Complaint that there was "no new fact" between the arbitration decision and the discharge and the allegation that the two events were based on identical facts and circumstances are directly contradicted by the termination letter and the arbitration decision. We conclude that a causal connection dependent on an assertion of "no new fact" is not viable in light of the termination letter and the arbitration decision.⁶

It is important to note that there are no allegations in the Complaint that the Employer's statements in the termination letter were not true, nor are there other facts alleged that would bring into question the veracity of the contents of that letter or that suggest the State did not really terminate McLaughlin for the reasons stated in the letter. Similarly, there is nothing in the Complaint disputing the substance of the arbitration decision. In his preliminary ruling dismissing the Complaint, the Executive Director considered the substance of both of the documents and gave the Complainants ample opportunity to amend the Complaint. The Complainants chose not to offer any amendments, merely stating that "there were no deficiencies to be cured." (Complainants' Letter to Executive Director of August 6, 2013.)

The Complainants could have used the opportunity granted by the Executive Director to amend the Complaint to elaborate on the circumstances believed to have surrounded the discharge. In its appeal to the Board, the Complainants argue,

⁶ We need not make a factual or legal conclusion that the reason asserted in the letter was the reason for the discharge; we simply conclude that the allegation of "no new fact" serving as the basis for the discharge cannot be used to allege a causal connection.

Neither the Board nor the Complainant knows what was said to the district attorneys, what background information they were given, or what they actually said in response to the information they were given.

Brief in Opposition to Motion to Dismiss, at 3. If the nature of the exchanges between the Employer and the district attorneys was intended to be the basis of the alleged discriminatory conduct, the Complainant should have made such an allegation in the Complaint. There are no factual allegations in the Complaint regarding the Employer's interaction with the district attorneys about McLaughlin or the arbitration decision, or any other allegation that might support a causal connection between the protected activity and the discharge.

A claim that more information will become evident at the hearing is not a suitable basis for finding an insufficient complaint sufficient. The Board specifically rejected this argument in MSAD #46 Educ. Assoc. v. MSAD #46, responding to the complainant's assertion that if the statements alleged in the complaint did not on their face constitute a violation, a hearing should be held to "establish the context of the statements to demonstrate their threatening and retaliatory nature." The Board stated,

It is not enough to make an assertion that additional facts to be proved at hearing will support a claim. The complaint must allege facts which state a claim for relief. While we do not demand excruciating detail or the use of any particular magic words, there must be at least a general statement of facts which, if true, would entitle the complainant to relief.

MSAD #46 Educ. Assoc. v. MSAD #46, [No. 02-09](#) at 10 (July 23, 2003).

Paragraph 14 of the Complaint asserts, in a conclusory manner, that the State's rationale of the "Giglio issue" to support

the termination on December 17, 2012, "is a pretext." A pretext is an excuse put forward to conceal an illegal act. As explained above, however, the Board is not bound to accept legal conclusions, such as this, that are unsupported by any factual allegations. There are no allegations in the Complaint that dispute the validity of the statements made in the termination letter or the accuracy of the references to the arbitrator's decision. Thus, there are no factual allegations suggesting the State's articulated reason for the termination was, in fact, pretext.

While the Complainant alleges that "the Giglio issue" was a pretext for the December 17, 2012 termination, the Complaint does not state what is meant by "the Giglio issue". In a separate paragraph, however, the Complaint alleges that "the 'Giglio' issue had been known to the State since the date when McLaughlin was first suspended without pay on January 13, 2011". The arbitration decision indicates that the notice of suspension from the Associate Commissioner cited McLaughlin's "lack of forthrightness" during the investigation of his misconduct as a primary reason for imposing such a long suspension. Arb. Decision at 23. The allegations in ¶14 and ¶15 imply that the "Giglio issue" was a general issue of honesty.

There is nothing in the December 17, 2012, termination letter suggesting the presence of a Giglio impairment pre-dating the arbitration decision. Rather, the letter clearly states that the basis for the discharge was the district attorneys' response to the arbitrator's conclusion about McLaughlin's credibility. Again, the letter not only disproves the Complainant's assertion that there was "no new fact" supporting his termination, it also disproves the assertion that the "Giglio issue" was not a new issue.

We conclude that the only factual allegations in the Complaint that could be read to allege a causal connection are directly contradicted by the information in the termination letter and the arbitration decision. We therefore hold that the Complaint fails to allege the necessary third element of a §979-D(1)(B) charge: a causal connection between the protected activity and the discharge. As the facts as alleged do not, as a matter of law, constitute a violation, we must dismiss Count II of the Complaint.

§979-C(1)(D): Discrimination because of testimony under Act.

The Complainants assert in Count III that the Employer "discharged and otherwise discriminated against Mr. McLaughlin because he signed or filed an affidavit, petition or complaint and gave information and testimony under this chapter in violation of 26 M.R.S.A. §979-C(1)(D)."⁷ In the memorandum of appeal to the Board, the Complainants assert that participation in the grievance procedure is protected activity "under this chapter," that Mr. McLaughlin was discharged as a result of his participation in the grievance process, and therefore the discharge is a violation of §979-D(1)(D).

Complainant misconstrues the scope of the protection provided by §979-D(1)(D). The Board's case law makes it clear that this provision protects against discrimination for participation in a proceeding of the Maine Labor Relations Board, just as the comparable provision in the National Labor Relations Act protects employees involved in a proceeding of the National Labor

⁷ 26 M.R.S.A. §979-C(1)(D) prohibits a public employer from:

Discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this chapter.

Relations Board. As early as 1982, this Board turned to federal case law when it held that "Section 964(1)(D) protects employees involved in any stage of a Labor Relations Board proceeding from a wide variety of discriminatory actions by the employer." Southern Aroostook Teachers Assoc. v. Southern Aroostook Community School Committee, [No. 80-35](#) and 80-40 at 24 (April 14, 1982), citing NLRB v. Scrivener, 405 U.S. 117, 121-125 (1972) (discharge of employees giving sworn statements to National Labor Relations Board field examiner a violation of 29 U.S.C. §158(a)(4)). See also Bruce J. Geroux v. City of Old Town, [No. 84-24](#) at 5 (June 18, 1984) (citing Southern Aroostook when dismissing charge because "nothing in the complaint suggests that Geroux was involved in a Labor Relations Board proceeding at the time the alleged unfair labor practice occurred, nor is there an allegation that the City took any discriminatory action against him.") See also Teamsters v. Town of Winthrop and Charles H. Jackson, Police Chief, [No. 84-06](#) at 5-6 and 15-16. (Nov. 16, 1984) (protection of (1)(D) applies to testimony at Board proceeding), aff'd Inhabitants of the Town of Winthrop and Charles Jackson, Police Chief v. MLRB and Teamsters, [CV-84-538](#) (July 11, 1985).

We hold that Count III of the Complaint, charging a violation of §979-C(1)(D), must be dismissed because grievance arbitration is not a labor board proceeding.⁸ Grievance arbitration is a right that derives from the parties' collective bargaining agreement, not "this chapter," that is, the State Employees Labor Relations Law. Adopting the Complainants' position would be

⁸We note a slight blip in our case law where the Board, in dicta, incorrectly asserted that §979-C(1)(D) applies to grievance processing, not just labor board proceedings. Buzzell, Wasson and MSEA v. State of Maine, [No. 96-14](#), at 14 (Sept. 22, 1997). The Buzzell Board cites a statement in Sewall v. Portland Water District as support for this proposition, but Sewall was a (1)(A) case, not a (1)(D) case.

inconsistent with this Board's specific precedent cited above, the persuasive authority of NLRB law when the provisions at issue are equivalent provisions,⁹ and the extensive legislative history described by the U.S. Supreme Court in Scrivener demonstrating that the provision protects a activities related to a labor board proceeding. NLRB v. Scrivener, 405 U.S., at 121-126.

§979-C(1) (E): The Unilateral Change Charge

Count IV of the Complaint alleges that the State unilaterally changed the working conditions of the members of the bargaining unit thereby breaching the statutory duty to bargain and violating §979-C(1) (E). The specific allegation is that the State disregarded the binding nature of the arbitration decision concerning McLaughlin's suspension and imposed the additional discipline of discharge for the same facts that led to his suspension. The Complainants assert that the State was punishing McLaughlin a second time for the same facts that led to the suspension, citing the arbitrator's finding that the recommendation discipline of termination had been considered and changed to a suspension by management on review. Brief to Ex. Dir. at 3, 8. As we noted earlier, the Complainants' assertion that the suspension and the discharge were based on the same facts is disproved by the documents submitted by the Complainants.

⁹ In State of Maine, Bureau of Alcoholic Beverages v. MLRB and MSEA, the Law Court stated,

In applying the terms of our state labor relations laws, this court has previously found "persuasive" the construction placed on the National Labor Relations Act by federal courts, Churchill v. School Administrative Dist. No. 49 Teachers Ass'n, Me., 380 A.2d 186, 192 (1977); Lewiston Firefighters Ass'n v. City of Lewiston, Me., 354 A.2d 154, 164 (1976), particularly where provisions of the state law analogous to those of the federal law were involved, Caribou School Dept. v. Caribou Teachers Ass'n, Me., 402 A.2d 1279, 1283 (1979).

Even if the discharge was based on the prior conduct, it does not mean the Complaint alleges a unilateral change violation. There are no facts suggesting anything more than a potential grievance. The Board has repeatedly noted that a contract violation should be addressed through the parties' grievance procedure:

As we have stated, "[a] contract violation, by itself, is not a prohibited practice over which the Board has jurisdiction." Langley v. State of Maine, Dept. of Transportation, No. 00-14, at 4 (March 29, 2002). This Board does not have jurisdiction to hear grievances, so we must be careful not to interpret "unilateral change" so broadly as to expand our jurisdiction into areas beyond our statutory authority. See State of Maine v. MSEA, 499 A.2d 1228, 1239 (Oct. 29, 1985) (The MLRB has jurisdiction over prohibited practices complaints, but not over grievances.)

William D. Neily v. State of Maine, 06-13 at 14 (May 11, 2006).

Finally, the unilateral change charge does not allege a violation of the law because the current collective bargaining agreement contains a very broad "zipper clause" that precludes either party from demanding bargaining over matters that are covered by the agreement or could have been covered by the agreement. Any alleged changes to the agreed-upon arbitration procedure or charges of unjust discharge should be addressed through the grievance arbitration procedure. See State of Maine v. MSEA, 499 A.2d 1228, 1230 (Me. 1985). Count IV of the Complaint must be dismissed because the facts alleged do not, as a matter of law, constitute a violation of alleging a violation of §979-D(1) (E).

413 A.2d 510, 514 (Me. 1980).

§979-C(1) (A): The Interference, Restraint or Coercion Charge

Count I charges that the Employer interfered with, restrained or coerced McLaughlin and the MSLEA members in the exercise of the rights protected by §979-B of the Act in violation of §979-C(1) (A).

The established test of an interference, restraint, and coercion charge under §979-C(1) (A) is whether the employer has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act. See, e.g., Teamsters v. Town of Oakland, No. 78-30 at 3 (Aug. 24, 1978), MSEA v. Dept. of Human Services, No. 81-35 at 4-5 (June 26, 1981). As the Complainants have not alleged a causal connection between the protected activity and the discharge of McLaughlin, and no other facts were alleged that would constitute an interference violation, this count must be dismissed as well. It cannot reasonably be said that employees with knowledge of the facts as alleged, including the absence of a causal connection, would be interfered with, restrained, or coerced in asserting any rights guaranteed by the Act. See, MSEA v. State Development Office, 499 A.2d 165, 169 (Me. 1985).

SUMMARY

We have reviewed the Complaint and the two documents provided by the Complainants and conclude that the facts as alleged do not, as a matter of law, constitute a violation of the State Employees Labor Relations Act.

ORDER

On the basis of the foregoing findings of fact and by virtue

of and pursuant to the provisions of the powers granted to the
Maine Labor Relations Board by the provisions of 26 M.R.S.A.
§979-H(2) it is hereby ORDERED:

That the prohibited practices complaint, filed by
the Maine State Law Enforcement Association and
Timothy McLaughlin on June 13, 2013, in case No.
13-15, is dismissed.

Dated at Augusta, Maine this 31st day of October, 2013.

The parties are advised of
their right pursuant to 26
M.R.S.A. §979-H(7) to seek a
review by the Superior Court
of this decision by filing a
complaint in accordance with
Rule 80C of the Rules of Civil
Procedure within 15 days of
the date of this decision.

MAINE LABOR RELATIONS BOARD

s/ _____
Katharine I. Rand
Chair

s/ _____
Patricia M. Dunn
Employer Representative

s/ _____
Wayne W. Whitney
Employee Representative