STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 14-04
Issued:

TEAMSTERS LOCAL UNION 340, Complainant, v. TOWN OF ELIOT, Respondent.	DECISION AND ORDER

Teamsters Local Union 340 filed a prohibited practice complaint with the Maine Labor Relations Board on July 23, 2013, as amended on August 7, 2013, alleging that the Town of Eliot failed to bargain in good faith, thereby violating §964(1)(E) of the Municipal Public Employees Labor Relations Law (the "Act"). Specifically, the complaint alleges that the Town unilaterally changed the hours and work schedule of a bargaining unit employee without first bargaining with Teamsters Local Union 340.

A prehearing conference was held on September 26, 2013, at which time the Union was represented by Mr. Ray Cote, a Teamsters Business Agent, and the Town of Eliot was represented by Linda D. McGill, Esq. An evidentiary hearing was held on December 19, 2013, by which time the Union was represented by Howard T. Reben, Esq. Both parties were able to examine and cross-examine witnesses and to offer documentary evidence at the evidentiary hearing. Chair Katharine I. Rand presided at the hearing, with Employer Representative Karl Dornish, Jr., and Employee Representative Wayne Whitney serving as the other two

Board members. The parties' post-hearing briefs were filed by January 30, 2014, and the Board deliberated this matter on February 19, 2014.

JURISDICTION

Teamsters Local Union 340 is a bargaining agent within the meaning of 26 MRSA §962(2), and the Town of Eliot is the public employer within the meaning of 26 MRSA §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 MRSA §968(5).

FACTS

1. Teamsters Union Local 340 is the certified bargaining agent for the general government bargaining unit of employees of the Town of Eliot. The position of Assistant Director of Community Services is one of the positions in that bargaining unit.
2. Natalie Gould had been employed by the Town for about nine (9) years and during the times relevant to this complaint held the position of Assistant Director of Community Services.
3. The parties began negotiations for their initial collective bargaining agreement with a meeting in May of 2013. At the meeting of July 2, 2013, the first proposals for the bargaining agreement were presented.
4. The Chief Negotiator for the Town of Eliot’s bargaining team was David Barrett, the Director of Personnel Services and Labor Relations for the Maine Municipal Association. The other members of the Town’s team were Mr. Michael Moynahan, Chair of the Town’s Select Board, Mr. Dan Blanchette, the Administrative Assistant to the Board, and Ms. Heather Roy,

the Director of Recreation.

5. The bargaining team for Teamsters Union Local 340 consisted of Ms. Traci Place and Mr. Ray Cote, both Business Agents for the Teamsters.

6. The Town of Eliot operates under the Town Meeting form of government. At the Town Meeting on June 15, 2013, the Town voted on 51 warrant articles. On budgetary items, there were sometimes two proposals presented for a vote: one recommended by the Board of Selectmen and the other recommended by the Budget Committee. The budget for the Community Services Department adopted at the Town Meeting was the budget recommended by the Budget Committee, not by the Board of Selectmen. The payroll line of the adopted budget was $15,000 less than the amount presented in budget recommended by the Board of Selectmen.

7. The vote to reduce the payroll line of the Community Services Department by $15,000 did not specify how this reduction was to be accomplished.

8. The Town meeting also voted against allowing the Town to exceed the property tax levy limit established by the "LD 1 budget cap".[1] As the Town's budget exceeded the cap by $220,000, another town meeting had to be held in August to approve a budget having $220,000 worth of cuts. The Board of Selectmen identified the cuts, and the revised budget was approved in the subsequent August Town Meeting. That budget did not affect the Community Services Department any further than the action on June 15, 2013.

9. After the June 15, 2013, Town Meeting and prior to the bargaining session on July 2, 2013, Mr. Moynahan and Mr. Blanchette met to develop different options to achieve the $15,000 reduction imposed by the Town Meeting vote.

10. On July 2, 2013, the parties had their first negotiating

[1] 30-A MRSA §5721-A.

session following the June Town Meeting. The bargaining session ran from 3:00 to 5:00 p.m., as scheduled. Prior to the start of the negotiating session, the Town's bargaining team members informed David Barrett of the Town Meeting vote on the Community Services Department payroll line.

11. The payroll line of the Community Services Department covers the salaries for two positions. The Director, Ms. Roy, makes about $54,000 a year, and the Assistant Director, Ms. Gould, makes about $41,000 a year.[2]

12. At the end of the July 2, 2013, bargaining session, the Town raised the subject of the Town Meeting vote that had reduced the payroll line of the Community Services Department. At some point early on in the discussion, Mr. Moynahan left but the other members of the Town's bargaining team remained. They described the options of allowing Ms. Gould to work fewer hours and stretch her employment out over a longer period. For example, if Ms. Gould continued to work full time, she would have to be laid off in mid- to late-January. If she worked 30 hours instead, her position would last a month or two longer. The option of working 24 hours a week would bring Ms. Gould through the fiscal year, but she would not be eligible for any insurance benefit.

13. During the discussion about these options for dealing with the Community Services salary line reduction, Mr. Cote said to Ms. Roy: "You're asking the bargaining unit employee to take a cut. Why can't you take a cut as well or take a cut instead of, considering the fact that your salary is significantly more than Natalie's?"

14. While the options were still being discussed, Mr. Blanchette left the room to make copies of documents related to

---

[2] There is conflicting testimony on Ms. Gould's salary. Ms. Roy estified it is $35,000. The exact amount is immaterial.

agreements made earlier in the bargaining session.

15. Mr. Barrett suggested that Ms. Roy should speak with Ms. Gould about the alternatives and find out what her preference was. Mr. Barrett testified that the Union did not object to the plan for the supervisor to talk to Ms. Gould about the different options, and "implicit in that" was the expectation of finding out what her preference was. There is nothing in his testimony suggesting that the plan involved anything more than having the discussion with the employee. Mr. Barrett left the room with the impression that there was mutual agreement to follow through with this plan.

16. Ms. Roy testified that agreement was for her "to have a discussion with Natalie about the options." In each instance in which Ms. Roy testified about what was said at the end of the July 2, 2013, bargaining session, she stated that the meeting was to "present" or "give" the options to Ms. Gould, or for "giving the employee some feedback on the options."

17. When Mr. Blanchette returned from making copies, both bargaining teams were putting their things together and getting ready to leave. He asked whether they had decided anything. He was told by someone that "they were going to let Natalie choose."

18. The Union representatives did not object to the decision to have Ms. Roy meet with Ms. Gould to discuss the options. The Union representatives did not ask to be present at the meeting between Ms. Roy and Ms. Gould nor did they ask to be notified when that meeting was to occur.

19. Mr. Cote testified that his understanding was that after Ms. Roy spoke to Ms. Gould about the options, the issue would come back to the bargaining table. Nothing was said to the Town representatives at the July 2, 2013, meeting or

after that reflects this view. Ms. Heather Roy testified that her understanding was that after the meeting she would present the option chosen by Ms. Gould to the Board of Selectmen for implementation. Nothing was said to the Teamsters representatives at the July 2, 2013, meeting or after that reflects this view.

20. At no time during the July 2, 2013, meeting did the Union demand bargaining or state that they expected the salary reduction or the impact of the reduction in hours to be negotiated.

21. The minutes from the Selectmen's meeting the next day, on July 3, 2013, reflect a statement by Mr. Blanchette about the need to negotiate with the union.

> Mr. Blanchette commented on employees that were now covered by union saying that they could not cut the hours without first negotiating that with the union. He added that not having a contract didn't mean that they didn't have a union; that once they had a union to the point of the contract they were supposed to keep status quo.
>
> Union Exhibit #4, at 4.

The subject under discussion at the time was the proposed budget cuts based on a decision to eliminate the Town's plan to move the Eliot Community Services Department (ECSD) to the elementary school. This proposed change in plan was part of the effort to meet the $220,000 reduction needed to comply with the "LD 1 budget cap."

22. An unsigned Memo from Mr. Blanchette to "Teamsters" dated July 2, 2013, states, in full:

> The Town meeting reduces the CSD payroll by $15,000. There are two positions funded out of that line item—Director at $55,296.60 and The Assistant at $41,014.40. We are proposing a reduction in hours of the assistant from 40 hours per week to 24 hours. I do not think that we can

keep them on the insurance package if they work less than 30 (I am checking on that).

Union Exhibit #3.

Although this exhibit was introduced into evidence by the Union along with the other three exhibits,[3] no one offered any testimony to explain it, to indicate if, when or how it was delivered or presented to the Union, and whether it played any role in the negotiating session or the discussion about Ms. Gould's future. Furthermore, neither party mentioned this exhibit during the hearing or in their written briefs to the Board.

23. The meeting between Ms. Roy and Ms. Gould occurred at some point later in July. Ms. Gould did not ask for a union representative to be present at this meeting, nor did the Union inquire about attending this meeting.

24. The Teamsters never authorized the Town to reduce Gould's hours nor did they authorize the Town to bargain directly with the employee.

25. Natalie Gould's pay was reduced from 40 hours to 30 hours in the beginning of August of 2013. It is not clear when the Union learned of this change or when precisely it was implemented.

[3] The other exhibits were: Ex. #1, Warrant Articles for the June 15, 2013, Town Meeting; Ex. #2, Minutes of the June 15, 2013, Town Meeting; Ex. #4, Minutes of the Special Board of Selectmen's Meeting of July 3, 2013.

DISCUSSION

The question presented in this case is whether the Town of Eliot unilaterally changed Natalie Gould's work week from 40 hours to 30 hours effective at the beginning of August of 2013 in violation of 26 MRSA §964(1)(E).[4] Section 964(1)(E) prohibits a public employer from refusing to bargain over wages, hours, working conditions and contract grievance arbitration. A corollary to the duty to bargain is the prohibition against making unilateral changes, as explained by the following:

> . . . Changes in the mandatory subjects of bargaining implemented unilaterally by the public employer contravene the duty to bargain created by Sec. 965(1) of the Act and violate 26 M.R.S.A. Sec. 964(1)(E). The rationale behind this principle of labor law is that an employer's unilateral change in a mandatory subject of bargaining "is a circumvention of the duty to negotiate which frustrates the objectives of [the Act] much as does a flat refusal." NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806, 809-810 (Me. 1982).
>
> In order to constitute a violation of Sec. 964(1)(E), three elements must be present. The public employer's action must: (1) be unilateral, (2) be a change from a well-established practice, and (3) involve one or more of the mandatory subjects of bargaining. Bangor Fire Fighters Association v. City of Bangor, MLRB No. 84-15, at 8 (Apr. 4, 1984). An employer's action is unilateral if it is taken without prior notice to the bargaining agent of the employees involved in order to afford said representative a reasonable opportunity to demand negotiations on the contemplated change. City of Bangor v. AFSCME, Council 74, 449 A.2d 1129, 1135 (Me. 1982).

Teamsters Local Union No. 48 v. Eastport School Department, No. 85-18 at 4 (Oct. 10, 1985).

[4] We note that the Complainant does not argue that the action of the Town Meeting to reduce the payroll budget for the Community Services Department constituted a violation of the Act.

There are certain limited situations in which an employer's unilateral change while negotiations are in progress might not violate §964(1)(E). This Board has identified four exceptions to the broad rule against unilateral changes. The first exception is when a bona fide impasse has been reached between the negotiating parties. See, e.g., Mountain Valley Education Association v. MSAD #43 Board of Directors, 655 A.2d 348, 352 (Me. 1995) (A party may unilaterally implement its last best offer when negotiations have reached a bona fide impasse after the completion of the statutory impasse resolution procedures). The second exception is when important business exigencies require immediate managerial decision. See, e.g., MSEA v. State of Maine, Bureau of Alcoholic Beverages, No. 78-23 at 4 (July 15, 1978)(A business exigency is "a sudden, out-of-the-ordinary event threatening serious harm and requiring immediate managerial action."), aff'd, State of Maine, Bureau of Alcoholic Beverages v. MLRB and MSEA, 413 A.2d 510 (Me. 1980). The third exception is when the union has waived its right to bargain about the unilateral change (discussed below), and the fourth is when the unilateral change results from a customary practice which existed prior to the start of negotiations for an initial collective bargaining agreement. See Council #74, AFSCME v. Town of Brunswick, No. 85-08 at 6 (Apr. 19, 1985).

There are two questions before the Board in this case. The first is whether the change was, in fact, unilateral. If the Union agreed to allow the Town to let Ms. Gould choose among the work schedule alternatives and to then implement that choice, then it is not a unilateral change. The second question is whether the Town is correct to assert that the Union waived its statutory right to bargain over the issue by failing to demand bargaining. We will address each of these matters in turn.

The Town argues that the change was not unilateral because the Union had agreed to let the Town make the change, or that it was reasonable for the Town to think there was an agreement. As indicated in our factual findings, the record is clear that the parties agreed to have the head of the department, Ms. Roy, speak to Ms. Gould to determine her preference. Contrary to the Town's argument, there is nothing in the record to support a finding that the Union had agreed that the Town could implement whatever Ms. Gould's choice happened to be. The agreement was simply to discuss the various options with her and find out what her preference was.

Our conclusion that there was no agreement is based on the testimony of all of the parties involved in the discussion at the end of the bargaining session and the absence of any notes or other memorialization of an agreement. Of the four members of the Town's bargaining team, only Mr. Barrett and Ms. Roy were present when the plan to speak with Ms. Gould was developed. There is nothing in the testimony of either of them to support a conclusion that the plan involved anything more than having the discussion with the employee. With respect to what the next step would be, Ms. Roy testified that she was under the impression that she could just take Natalie's choice directly to the Board of Selectmen for implementation. There is no testimony by any of the individuals present during this conversation that even suggests that implementation of Ms. Gould's preference was part of the discussion, let alone part of an agreement.[5] On the contrary, Mr. Cote, the Union representative, testified that he left the meeting thinking that the Town would bring the issue

[5] Mr. Blanchette was not present during the discussion after the options were laid out. He testified that when he returned to the room he was told by someone they decided "to let Natalie choose." Even if those were the words used, it is not evidence of an agreement to implement that choice without further discussion.

back to the bargaining table. Ms. Roy and Mr. Cote did not communicate their views to each other. Clearly, there was no "meeting of minds."

It is particularly significant that there is no evidence that either party made a written notation of any agreement to implement Ms. Gould's as-yet-unstated preference once the options were described to her. The discussion of the potential reduction in hours was in the context of the early stages of bargaining for an initial agreement. It is standard practice in collective bargaining for the parties to memorialize any agreements made on issues raised at the table at the time the agreement is made. That these particular parties followed the practice of reducing agreements to writing is evidenced by Mr. Blanchette's testimony that he left the room after the options were explained in order to make copies of agreements made earlier in the negotiation session. No one from either bargaining team could point to a written agreement or even any discussion about memorializing an agreement to reduce Ms. Gould's hours of employment.

Thus, we conclude that the discussion occurring at the end of the July 2, 2013, negotiating session did not result in an agreement to implement anything, but was merely an agreement to let Ms. Roy speak with Ms. Gould in order to determine her preference. The meeting with Ms. Gould was to be a continuation of the discussion in order to find out how Ms. Gould felt. It was merely a "fact-finding" mission to inform the parties of the affected employee's preference.[6]

The Union argues that in the absence of an express agreement, there can be no unilateral changes in a mandatory

[6] Likewise, we reject the Town's claim that it was reasonable for the Town to think there was an agreement.

subject of bargaining during collective bargaining negotiations. The Town argues that the change to Ms. Gould's work schedule was not unilateral because the Union failed to demand bargaining during the July 2, 2013, discussion and did not make any effort to demand bargaining prior to filing the complaint.

In its written argument to the Board, the Town points to the established standard that once the Union receives notice of the Employer's contemplated change, a failure to demand bargaining in a timely manner is equivalent to a waiver of that right. The oft-quoted standard is:

> An employer's action is unilateral if it is taken without prior notice to the bargaining agent of the employees involved in order to afford said representatives reasonable opportunity to demand negotiations on the contemplated change. City of Bangor v. AFSCME, 449 A.2d 1129 1135 (Me. 1982).

Teamsters v. Eastport, No. 85-18 at 4.

With respect to the Town's legal argument, we question whether a waiver by inaction (that is, failure to demand bargaining) can be appropriate when the parties are in the process of negotiating an agreement. As mentioned above, one of the four exceptions to the unilateral change rule while negotiations are in progress is when the Union has waived the right to bargain. That is precisely the issue raised in the current case.

It is well-established law that while a collective bargaining agreement is in effect, a union's waiver of the right to demand mid-term bargaining must be "clear and unmistakable" before an employer can lawfully make a unilateral change. MSEA v. State of Maine, 499 A.2d 1228, 1232 (Me. 1985)(Waiver found in

the clear and unmistakable broad language of the zipper clause.) Such a waiver "'should be express, and ... mere inference, no matter how strong, should be insufficient.'" Saco Valley Teachers Assoc. v. MSAD No. 6 Bd. of Dir., No. 85-07 and 85-09, at 10-11, (Mar. 14, 1985)(finding no express waiver in zipper clause and refusing to find waiver by inference from Union's raising subject in "re-opener" discussions as there was no evidence union consciously relinquished any right), quoting NLRB v. Perkins Machine Co., 326 F.2d 488, 489 (lst. Cir. 1964). Similarly, failure to mention an established practice in a bargaining agreement does not constitute a waiver of the right to bargain over changes to that practice. MSEA v. State, No. 84-19 at 9 (July 23, 1984), citing Communications Workers of America v. NLRB, 644 F.2d 923, 928 (1st Cir. 1981) and NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 684 (2nd Cir. 1952).

When the parties are engaged in bargaining, this Board has rejected the argument that a failure to demand bargaining is a waiver of the statutory right to bargain when the subject of the unilateral change is already on the bargaining table. In doing so, however, the Board did not expressly state that the "clear and unmistakable" standard is appropriate when negotiations are in progress. For example, in Malcolm Charles v. City of Waterville, the Board rejected the City's argument that the Union had not demanded bargaining over a specific change affecting vacation and sick leave, holding that "[o]nce the bargaining agent submitted its proposals to negotiate over vacation time and sick leave, Respondent was placed on adequate notice that these items were areas in which no unilateral changes should occur without prior negotiation" and "the bargaining agent was not required to reiterate its bargaining proposals each and every time it learned of a possible change in the vacation or sick leave schedules." Malcolm Charles v. City of Waterville, No. 78-

19 at 6-7 (July 21, 1978). Similarly, in MSEA v. Bureau of Alcoholic Beverages, the Board held that the Union had not waived its right to bargain about the unilateral change by not making a specific request to bargain when it learned of the State's intent to keep the liquor stores open on Washington's Birthday because the Union had submitted a proposal to negotiate holiday work at the start of negotiations. MSEA v. Bureau of Alcoholic Beverages, No. 78-23 at 4-5, aff'd State of Maine, Bureau of Alcoholic Beverages v. MLRB and MSEA, 413 A.2d 510. The Board held that ". . . once MSEA submitted its proposal to negotiate over holiday work, Respondents were placed on adequate notice that holiday work was an area in which no unilateral changes should occur without prior negotiation and settlement." Id. at 5. In a factually complex 1997 case, the Board applied the "clear and unmistakable" standard for waiver of the right to bargain over the implementation of bus driver evaluations once that issue was placed on the bargaining table. In the very same paragraph, the Board rejected a claim of waiver based on the union's earlier failure to demand bargaining because the union had not received notice prior to the implementation. Litchfield Educ. Support Personnel Assoc. (MEA) v. Litchfield School Committee, No. 97-09 at 38 (July 13, 1998). Thus, considering all of these cases, we cannot assert that the Board's precedent is crystal clear on this issue.

We need not address the question of whether the "clear and unmistakable" standard should be applied in this case[7] because we

[7] Applying the clear and unmistakable standard to a unilateral change while negotiations are in progress requires evidence of the substance of the negotiations. In this case, we know nothing about other matters on the table, but the Town brought up the issue of the $15,000 cut near the end of a bargaining session when it consulted the Union about several options. Why the parties treated the issue so cavalierly, presumably unlike the other proposals that were on the table, is unclear. Based on the Town's behavior, the Union could have reasonably concluded that the issue was either on the table already,

conclude that the Town has failed to meet the less rigorous requirement of providing prior notice to afford the bargaining agent a "reasonable opportunity to demand negotiations on the contemplated change." As the Union's obligation to demand bargaining does not arise until the employer provides notice of the change, we will first address the sufficiency of the notice.

There are several elements to the notice requirement: the notice must be provided to the bargaining agent,[8] the notice must be timely,[9] and it must give a reasonable opportunity to demand bargaining. If sufficient and timely notice is provided to the bargaining agent, then an agent's failure to demand bargaining is considered a waiver of the statutory right to bargain over that issue.

The Town bargaining team representatives informed the Union on July 2, 2013, that the payroll line of the Community Services Department budget had been cut by $15,000 at the Town Meeting. Even if the Town had made it clear that its position was that the entire burden of the cut would be borne by Ms. Gould, the Town did not present the Union with notice of how this budget cut would be implemented. There were several options under consideration, and one suggested by the Union but not likely favored by the Town, that is, to have some of the cut be borne by the manager, Ms. Roy. Until the Town identified the change it

---

or would be placed on the table after the Town completed its fact-finding mission and had a specific proposal to make.

[8]An employer's notice to the affected employees of its intention to implement a change in a mandatory subject is not the same as giving notice to the bargaining agent, Saco Valley, Nos. 85-07 & -09 at 11-12, and in such cases the question may be whether the bargaining agent had actual notice. Monmouth School Bus Drivers & Custodians v. Monmouth School Committee, No. 91-09 at 56 (Feb. 22, 1992).

[9]For example, actual notice to the Union of a "rally" for which bus driver attendance was mandatory was insufficient when provided only three days before the rally. Monmouth School Bus, No. 91-09 at

intended to implement, the Union was not on notice of "the contemplated change". As such, there was no "reasonable opportunity" to decide whether to demand bargaining. To find a waiver in this case without being satisfied that the Union knew what it was waiving is akin to requiring the union to "buy a pig in a poke."

In MSEA v. State of Maine, the Board addressed the substantive terms of the notice of an intended change. In that case, the State needed to act promptly to limit its exposure following a U.S. Supreme Court decision that invalidated the way the State was compensating certain employees for overtime work. No. 85-19 (Dec. 2, 1985). After several meetings with the Union, the State implemented its stated plan to limit the hours of certain employees through an Executive Order.[10] The Union argued that they did not know the details of the Order until the morning it was issued. The Board rejected this argument with:

> In view of the extensive prior discussions between the parties, the mere fact that the State did not make available to MSEA the exact terms of the Executive Order until the morning of its promulgation did not, by itself, render unreasonably short the notice by the State of its prospective action; the Executive Order embodied no changes that should not have been expected as a result of those early discussions. Since reduction in the hours of non-standard employees to the work-hour levels set forth in the FLSA was the only method legally available to the State to limit FLSA overtime liability, the MSEA should reasonably have expected the nature of the State's ultimate action to be exactly such a limitation.

MSEA v. State, No. 85-19 at 22. In stark contrast to MSEA's situation of knowing exactly what change the State would be

---

56.

[10] The Board concluded that the State was authorized to issue the Executive Order by the terms of the Management Rights article of the collective bargaining agreement. MSEA v. State, No. 85-19 at 20.

implementing, in the present case the Union could not possibly have received proper notice because the Town of Eliot was still considering its options. Thus, it is unnecessary to address whether the Union made a bargaining demand because we conclude that the Town had not provided notice of the contemplated change to the Union.[11]

We conclude that the Town's reduction of Ms. Gould's hours of employment without prior notice to the bargaining agent to provide a reasonable opportunity to demand bargaining about the reduction and its impact was an unlawful unilateral change in a mandatory subject in violation of 26 M.R.S.A. 964(1)(E).

Before turning to remedy, we note that this prohibited practice complaint could have been avoided by either party simply picking up the phone at one of several points along the way. Had the Town notified the Union of its intended change as soon as it had Ms. Gould's information, this prohibited practice complaint may not have arisen. Had the Union representatives picked up the phone as soon as they got wind of a planned change and before filing the PPC, there may have been no need to file a complaint. Similarly, once the Town received the PPC, a phone call could have led to a different path.

Upon finding that a party has engaged in a prohibited

[11] The National Labor Relations Board cases cited by the Town are unavailing because, in each of them, the NLRB found that there was clear notice to the union of the contemplated change. In U.S. Lingerie Corp. v. Undergarment and Negligee Workers Union, Local 62, the Union was on notice at least a couple of weeks ahead of time that the employer was going to close its New York operation and relocate to another state but failed to demand bargaining. 170 NLRB 750 (1968). In Diamond Walnut Growers, Inc. v. Cannery Workers, Processors, Warehousemen & Helpers, Local 601, the Union had notice of the employer's addition of testing requirements for certain jobs, but failed to demand bargaining. 312 NLRB 61 (1993).

practice, we are instructed by Section 968(5)(C) to order the party "to cease and desist from such prohibited practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." A properly designed remedial order also seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice. Caribou School Department v. Caribou Teachers Association, 402 A.2d 1279, 1284 (Me. 1979). We accordingly will order the Town to restore the status quo as it existed prior to its unilateral change. We expect the parties to negotiate in good faith to achieve this result. As the Town of Eliot acknowledged in its oral and written argument to the Board, even if the Town were authorized to lay off an employee, the Town would still be obligated to bargain over the impact or effects of such a layoff. We do not know if the parties are currently negotiating that issue.

ORDER

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 MRSA §968(5), we hereby ORDER the Town to remedy its violation of the Act by reinstating Ms. Gould to her position on a 40-hour schedule with back pay. With that restoration of the situation, we further ORDER the parties to negotiate in good faith over the reduction in Ms. Gould's hours and the impact of such a reduction.

Dated at Augusta, Maine, this 21st day of March, 2014.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 MRSA § 968(5)(F) to seek a review by the decision by

/s/_____

filing a complaint in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Karl Dornish, Jr.
Employer Representative

/s/_____
Wayne W. Whitney
Employee Representative

Employee Representative Wayne W. Whitney participated in the deliberation of this case and concurs with the decision above, but was unavailable to sign this Decision and Order.

Chair Katharine I. Rand dissented with respect to the remedy ordered by the Board Majority.

I agree with the majority opinion in all respects, except for that portion of the remedy requiring back pay. While it is impossible to know what result would have obtained had the Town bargained with the Union over the implementation of the $15,000 payroll reduction, as it was required to do, I conclude that under no circumstances would the employee have continued working 40 hours per week until the date of decision. In my view, the back pay award represents an unjustified windfall for the employee and I therefore dissent from the majority opinion to the extent it purports to make the employee whole through back pay.

/s/_____
Katharine I. Rand
Chair