

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 16-UD-01

Issued: October 26, 2015

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NATIONAL CORRECTIONAL EMPLOYEES)	
UNION,)	
)	
Petitioner,)	
)	
and)	
)	
AFSCME COUNCIL 93,)	UNIT DETERMINATION
)	REPORT
Bargaining Agent,)	
)	
and)	
)	
STATE OF MAINE,)	
)	
Employer.)	
_____)	

PROCEDURAL HISTORY

The National Correctional Employees Union (hereinafter "NCEU") filed a Petition for Unit Determination and Bargaining Agent Election, together with a showing of interest, on July 1, 2015. The Unit Determination seeks severance of the Department of Corrections employees whose classifications are currently included in the State Executive Branch Institutional Services Bargaining Unit. If the severance is granted, the Petition also seeks a decertification/bargaining agent election for the newly-formed unit of Corrections Department employees.

Prior to serving the Petition on the Public Employer, the State of Maine ("State"), and the incumbent Bargaining Agent, Council 93, American Federation of State, County and Municipal Employees ("AFSCME"), the Executive Director reviewed the petition for sufficiency pursuant to Chapter 11, § 9 of the Board's Rules and Procedures. The review resulted in the preliminary decision

that the petition was legally sufficient, timely filed, and supported by a numerically sufficient showing of interest. To wit:

- The Petitioner, NCEU is a public employee organization within the meaning of 26 M.R.S.A. § 979-A(1) and has standing to file the petition. Board Rules, Ch. 11, § 5(1).
- A petition for unit determination is the appropriate mechanism "to sever a group of positions from an existing unit to create a new separate unit." Board Rules, Ch. 11, § 1(1).
- The showing of interest was numerically sufficient (30% minimum), considering either the Petitioner's estimate of the number of employees in the proposed unit (500) or the total number of Department of Corrections positions in the Institutional Services Bargaining Unit (704) reported by the State.¹
- On its face, the 2013-2015 collective bargaining agreement between AFSCME and the State for the Institutional Services Bargaining Unit expired on June 30, 2015; therefore, the petition was timely filed.

On July 6, 2015, AFSCME filed a Motion to Dismiss the "Decertification/Bargaining Agent Election portion of the Petition" based on the "contract bar doctrine" and on the inadequacy of the showing of interest.² On July 14, 2015, and July 15, 2015, respectively, AFSCME and the State submitted timely responses to the merits of the Unit Determination Petition.

Although AFSCME's motion to dismiss was limited to the election portion of the pending petition, the controlling statute, 26 M.R.S.A. § 979-F (2) (D), provides that "[w]here there is a collective bargaining agreement in effect, no question concerning unit or representation may be raised except during the period not more than 90 nor less than 60 days prior to the expiration date of the agreement." (emphasis added). Material submitted by AFSCME

¹ The State provided the figures on April 30, 2015, in response to an inquiry from the Board regarding an earlier petition filed by NCEU.

² During the course of the pre-hearing conference, AFSCME preserved their right to assert this claim at the appropriate time, if the severance is granted and the petition for decertification/bargaining election is processed.

with its motion as well as subsequent Legislation³ raised the question of whether the statutory contract bar rule requires dismissal of the petition for unit determination.

The contract bar issue presents a jurisdictional question which is potentially dispositive; therefore, it must be addressed first. To facilitate resolution of this issue, the parties were invited to a pre-hearing conference and were asked to be prepared to address whether a 120-day notice, mentioned in the Termination paragraph of Article 62 of the 2013-2015 collective bargaining agreement, was given and, if so, whether a collective bargaining agreement was in effect at all relevant times since June 30, 2015. In particular, the parties were directed to present documentary evidence regarding the following:

- Was a 120-day notice given?
- Was a notice of termination given?
- If so, when was it given?
- What was the termination date specified in the notice?
- Was the final tentative agreement ratified by the membership?
- What date was the ratification?
- Was a successor agreement signed by the parties?
- What date was it signed?

In addition, the parties were asked to bring a list of witnesses they intend to call and a list of the documents each party intends

³ L.D. 1453, An Act To Fund Agreements with Bargaining Units for Certain Executive Branch Employees and Ensure Equitable Treatment for Other Executive Branch Employees was adopted by the Legislature on July 16, 2015, signed by the Governor on July 17, and became Law as Ch. 376, Public Laws of 2015, as emergency legislation effective July 17, 2015. Section 1 of the Law adjusts the salary schedules for executive branch employee bargaining units represented by AFSCME, the Maine State Troopers Association, and the Maine State Law Enforcement Association, "effective at the beginning of the pay week commencing closest to September 1, 2015, ... consistent with the terms of any tentative agreements ratified prior to September 30, 2015."

to offer to facilitate document management at the evidentiary hearing.

The undersigned presided at the pre-hearing conference on September 4, 2015, at the Board's offices in Augusta. Appearing on behalf of the parties were: Dan Felkel, Esq., Jon Goodman, Esq., and Labor Representative William Doyle on behalf of the Petitioner; Joseph Delorey, General Counsel, Staff Representative James Mackie, and Field Service Director Gordon Blaquiére on behalf of AFSCME; and Julie Armstrong, Esq., Nicholas Laskey, Esq., and Charlene Gamage, Human Resources Director for the Department of Corrections, on behalf of the State of Maine.

During the pre-hearing conference, NCEU and the State presented preliminary witness and exhibit lists. AFSCME requested that its preliminary lists be submitted no later than September 11, the request was granted, and the submissions were timely received. The parties were directed to file and serve simultaneous main briefs, addressing the contract bar issue, no later than October 2, 2015, and reply briefs, if any, no later than October 9, 2015. The parties all filed main briefs and no reply briefs were received.

JURISDICTION

The Petitioner, National Correctional Employees Association, is a public employee organization within the meaning of § 979-A(1) of the State Employees Labor Relations Act ("SELRA" or "ACT"), 26 M.R.S.A. § 979, et seq. The American Federation of State, County and Municipal Employees is the certified bargaining agent, as defined in § 979-A(1) of the Act, for the State Executive Branch Institutional Services Bargaining Unit. The jurisdiction of the executive director to hear and decide this matter lies in of §§ 979-E(1) and (2) and 979-F(2)(D) of the Act, as interpreted by Chapter 11, of §§ 1(1) and 23 of the Board's Rules and Procedures.

STIPULATIONS OF FACT

During the course of the pre-hearing conference, the parties agreed to the following facts:

1. A 120-day notice of intent to renegotiate the terms of the collective bargaining agreement between the State of Maine and AFSCME Council 93 for the State Institutional Services bargaining unit 2013-2015 collective bargaining agreement was given. The 120-day notice, mentioned in the conclusion of negotiations article of the contract, was given by James Mackie of AFSCME to Breena Whitcomb, the chief negotiator for the Executive Branch, on December 4, 2014.

2. A notice of termination was given by Breena Whitcomb of the State to James Mackie of AFSCME on June 30, 2015. That notice would be effective on July 10, 2015.

3. The notice of termination given on June 30 was the first and only notice given by either party.

4. A final tentative agreement was reached on the successor collective bargaining agreement. That final tentative agreement was reached between the State and AFSCME Council 93 on July 1, 2015, subject only to ratification by the membership of AFSCME Council 93 in the institutional services bargaining unit.

5. The final tentative agreement (and, actually, the successor collective bargaining agreement) was reduced to writing and was signed by the parties on July 1, 2015.

6. The ratification vote was held on July 7, 2015. The contract was ratified by the membership and notice of the ratification was given by AFSCME Council 93 to the State on July 7, 2015.

7. In negotiations since at least 2000, the State and AFSCME have not signed formal successor collective bargaining agreements other than the signed tentative agreements which they had signed prior to ratification.

8. The successor collective bargaining agreement, referred to in the foregoing stipulations, consists of the existing contract as modified by the set of TA's.

EXHIBITS

In addition to the 2013-2015 collective bargaining agreement for the Institutional Services Bargaining Unit which is in the

record as an attachment to the petition, AFSCME Exhibit 1 was admitted with no objection. AFSCME Exhibit 1 consists of the following documents:

a. December 4, 2014, letter from Jim Mackie to Breena Whitcomb, subject line Institutional Services Bargaining Unit AFSCME Locals, certified mail receipt attached.

b. Letter from Breena Whitcomb to James Mackie, dated June 30, 2015 regarding termination of agreement.

c. A one-page document, dated June 30, 2015, titled State of Maine Package Proposal to AFSCME Option 1 with the signatures of Breena Whitcomb and James Mackie; signed July 1, 2015, incorporating by reference the tentative agreements signed by AFSCME and the State, consisting of 34 pages, copies of which were provided for the record.

d. Affidavit of James Mackie dated September 4, 2015, regarding the contract ratification vote held July 7, 2015, with tally sheet that he prepared on July 7, reflecting the affirmative vote of those voting from the bargaining unit.

DISCUSSION

The State Employees Labor Relations Act seeks to achieve a balance between two public policy goals. The first is to provide public employees a reasonable, periodic, and predictable opportunity to select or change their bargaining agent or to choose not to be represented for purposes of collective bargaining. The second policy goal is to foster improvement of the relationship between public employees and their employer through a stable collective bargaining relationship. *MSAD #16 Support Staff Assoc./MEA/NEA and MSAD #16 Board of Directors*, No 00-UD-04, at 4 (Apr. 26, 2000). The Act seeks to achieve this balance through the contract bar provision, including the 30-day open "window" period, and the prohibition on collective bargaining agreements longer than three years.

The contract bar provision of the Act, 26 MRSA § 979-F (2) (D), states:

No question concerning representation may be raised within one year of a certification or attempted certification. Where there is a valid collective bargaining agreement in effect, no question concerning unit or representation may be raised except during the period not more than 90 nor less than 60 days prior to the expiration date of the agreement. Unit clarification proceedings are not subject to this time limitation and may be brought at any time consistent with section 979-E, subsection 3.

This provision, together with the three-year maximum term for negotiated agreements (found in § 979-D(1)(C)), guarantees that bargaining unit employees can raise questions concerning representation at least once every three years. In fact, the only filing period guaranteed by Statute is the 30-day "window" period.⁴ Other than that brief window, the "contract bar" precludes representation filings while a collective bargaining agreement is in effect. Thus, waiting to file a petition for election after expiration does not guarantee a timely filing. If there is no hiatus between the expiring and the successor agreements, the contract bar applies.

Turning to the facts of this case, Article 62 of the 2013-2015 collective bargaining agreement between AFSCME and the State for the Institutional Services Bargaining Unit states:

Term of Agreement

This Agreement shall be effective from July 2, 2013 through June 30, 2015, unless otherwise specified herein.

Termination

Unless otherwise specifically provided for herein, this Agreement shall apply to those employees in the bargaining unit on the date of the signing of this

⁴ In mitigation of the effect of the short window period, Chapter 11, § 8(1) of the Board's Rules provides that showing of interest documents in support of a petition for election may be up to six months old on the date they are filed with the Board.

Agreement and shall be effective as of July 2, 2013 and shall remain in full force and effect until the 30th day of June 2015. It shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing at least one hundred twenty (120) days prior to the anniversary date that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than ninety (90) days prior to the anniversary date; this agreement shall remain in full force and effect and be effective during the period of negotiations or until notice of termination of this Agreement is provided to the other party in the manner set forth in the following paragraph.

In the event that either party desires to terminate this Agreement, written notice must be given to the other party not less than ten (10) days prior to the desired termination date which shall not be before the anniversary date set forth in the preceding paragraph.

On December 4, 2014, AFSCME gave the State a 120-day notice of intent to seek modification of the expiring agreement. Since the term of the collective bargaining agreement in the instant case was two years, the effect of the 120-day notice under the "termination" provision of Article 62 would have been to continue the agreement "in full force and effect" during negotiations for a successor agreement until the successor agreement was concluded or June 30, 2016,⁵ whichever occurred earlier, absent a notice of termination.⁶ The State gave AFSCME a notice of termination on June 30, 2015, effective on July 10, 2015. I conclude, therefore, that a

⁵ An automatic renewal provision cannot operate to extend a collective bargaining agreement beyond the 3-year maximum set in statute. *National Correctional Employees Union v. York County*, No. 11-07, Interim Decision at 7-8 (May 17, 2011).

⁶ In *AFSCME v. State of Maine, Dept. of Administrative and Financial Service et al.*, Nos. 03-15 & 04-03 (Apr. 21, 2004), the collective bargaining agreement was reached on February 1, 2002, and was set to expire on June 30, 2003. *Id.* at 7. Under a Term of Agreement/Termination Article that was essentially identical to the one in this case, the State gave timely notice that it would terminate the agreement on June 30, 2013. *Id.* at 12-13. Interpreting and applying the Term of Agreement/Termination Article, the Board observed that "the collective bargaining agreement would have remained in effect following June 30, 2003, had the State not exercised its right to terminate the contract in accordance with Article 57 of the Agreement." *Id.* at 28.

collective bargaining agreement was in effect until at least July 10, 2015.

In the facts of this case, AFSCME and the State reached final tentative agreement on a successor collective bargaining agreement on July 1, 2015. This agreement was written, it consisted of the expiring collective bargaining agreement and several tentative agreements modifying that agreement, and it was signed by the chief negotiators of the two parties. The Governor's chief negotiator had the statutory authority to reach binding agreement at the table, § 979-A(5), but the Union needed ratification by the Union membership in the Institutional Services bargaining unit. See *Fox Island Teachers Ass'n v. MSAD No. 8 Board of Directors*, No. 81-28, at 6-7 (MLRB Apr. 22, 1981) (If "a principal party has reserved the right to ratify, any agreement reached by the negotiators will not be concluded or binding until it is ratified by the principal."), quoted and applied, *Teamsters Local 48 v. City of Westbrook*, No. 89-05, at 9-10 (MLRB Oct. 25, 1988). A ratification vote was held on July 7, 2015, the agreement was ratified by a majority of the Union members who voted, and, on the same date, AFSCME notified the State that the agreement had been ratified. The Governor's chief negotiator has the authority to reach final agreement without the ratification of the Legislative branch of the government--to argue otherwise would be in direct contravention of the Constitutional separation of powers in State government.⁷ Consequently, once AFSCME notified the State of ratification by the Union members, a collective bargaining agreement was concluded.

The final question is the significance, if any, of the fact that the Legislature did not enact the bill to fund the cost items

⁷ In *Maine Dept. of Inland Fisheries and Wildlife v. Maine State Employees Ass'n*, 503 A.2d 1285, 1288 (Me. 1986), the Law Court held that the Legislature's appropriation of money to fund cost items in collective bargaining agreements negotiated by the Governor does not constitute "ratification" of the terms of the collective bargaining agreement.

included in the collective bargaining agreement until July 16, 2015, and the bill was not signed by the Governor until July 17, 2015, at which point it became Law. As part of the duty to negotiate in good faith, § 979-D(1)(E)(3) of the Act provides:

Cost items shall be submitted for inclusion in the Governor's next operating budget within 10 days after the date on which the agreement is ratified by the parties. If the Legislature rejects any of the cost items submitted to it, all cost items submitted shall be returned to the parties for further bargaining.

The AFSCME members ratified the agreement on July 7th and the Legislature considered the funding bill, L.D. 1453, on July 16th. The Governor met the statutory obligation to submit the funding bill within 10 days of the ratification. Had the Legislature declined to fund the cost items in the agreement, the Law provides that the cost items submitted would be returned to the parties for further bargaining. The balance of the agreement would be in full force and effect for the term agreed to by the parties.⁸

The 2013-2015 collective bargaining agreement between AFSCME and the State of Maine for the State Employee Institutional Services Bargaining Unit expired on July 10, 2015. Prior to the expiration of that agreement, the parties reached agreement on a successor collective bargaining agreement on July 7, 2015. There was a valid collective bargaining agreement in effect at all relevant times; therefore, the Petition for Unit Determination and

⁸ This result would parallel that where negotiating parties are unable to reach complete agreement on a successor collective bargaining agreement and have exhausted the statutory dispute resolution processes: mediation, fact-finding, and interest arbitration. In that case, all open issues remaining after fact-finding are submitted to interest arbitration and the arbitrators' decision is "final and binding on the parties," except as to those issues regarding "salaries, pensions and insurance," where the arbitrators may recommend a settlement, which is "advisory and shall not be binding upon the parties." § 979-D(4)(D). In that instance, the successor collective bargaining agreement consists of the agreements reached by the parties and the binding portions of the interest arbitration award. *Mountain Valley Educ. Ass'n v. MSAD No. 43*, 655 A.2d 348, 354 (Me. 1995).

Bargaining Agent Election filed by the National Correctional Employees Union on July 1, 2015 must be dismissed pursuant to the provisions of 26 M.R.S.A. § 979-F(2)(E).

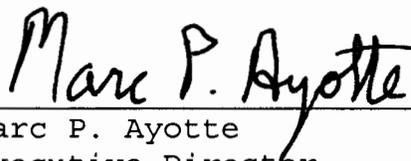
ORDER

On the basis of the foregoing stipulated facts and discussion and by virtue of and pursuant to the powers granted to the executive director 26 M.R.S.A. §§ 979-E(1) and (2) and 979-F(2)(D), it is

ORDERED that the Petition for Unit Determination and Bargaining Agent Election for the State Employee Institutional Services Bargaining Unit filed by the National Correctional Employees Union on July 1, 2015, is DISMISSED.

Dated at Augusta, Maine, this 26th day of October 2015

MAINE LABOR RELATIONS BOARD



Marc P. Ayotte
Executive Director

Any party aggrieved by this decision may appeal to the Labor Relations Board by filing a notice of appeal with the Board within 15 days of the date of this decision. 26 M.R.S.A. § 979-G(2). See Chapter 11, § 30 of the Board's Rules for further relevant information.