

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 11-03

Issued: August 9, 2011

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LOCAL 1650 IAFF, AFL-CIO-CLC,	)	
	)	
Complainant,	)	
	)	
v.	)	INTERIM
	)	ORDER
CITY OF AUGUSTA,	)	
	)	
Respondent.	)	
_____	)	

On May 11, 2011, a hearing was held in which evidence was presented regarding the parties' agreement on negotiating ground rules and the effect of the Employer's subsequent revocation of the ground rule referred to as an evergreen clause. At the start of the hearing, the Complainant's representative indicated an intent to call various witnesses to testify on matters related to the Employer's unilateral changes to three mandatory subjects of bargaining that were covered by the expired collective bargaining agreement. The City objected to the expansion of the focus of the hearing because they did not have the notice necessary to prepare a proper defense. The City noted that the allegations in the complaint concern the evergreen clause in the ground rules and do not relate to unilateral changes made after the expiration of the collective bargaining agreement. Both parties noted that grievances had been filed on these issues and they were being held in abeyance pending the resolution of the current prohibited practice complaint.

After some discussion about the different options available to the Board and the potential relevance of 26 M.R.S.A. §964-A(2), the parties agreed to brief the issue. The Complainant had until June 10, 2011, to file a brief to identify the three unilateral changes the Employer allegedly made and to present legal arguments as to why the alleged unilateral changes are relevant to the present complaint. The Employer had until June 30, 2011, to respond. After reviewing the briefs, the Board would determine if an additional day of hearing should be scheduled, and, if not, what the next step should be.

#### DISCUSSION

In its brief, the Union identified the three specific provisions of the collective bargaining agreement that it alleges were unilaterally changed by the Employer. The provisions are: Retiree Health Insurance - Art 12, sec. 3, which states the City will pay 100% of certain retirees' health insurance premium; Sick Leave - Art. 11, sec. 2, regarding the payment of certain unused sick leave hours; and Clothing - Art. 30, regarding the payout of any unused clothing allowance. (The clothing allowance issue only pertains to the Firefighters' contract; the other two provisions are in the contracts for both the Firefighters and the Battalion Chiefs.) Only one of these three issues was mentioned in the prohibited practice complaint, and the reference to that issue was not the main thrust of Complaint.

Most of the factual assertions in the Complaint relate to the establishment of the ground rules and the subsequent discussion and activity regarding the evergreen clause. Although

a proposed change to retiree health insurance was mentioned in paragraphs 14 and 15, the focus of the complaint was not related to allegations of unilateral changes in mandatory subjects of bargaining. Even if this Board were inclined to allow the Complaint to be amended pursuant to MLRB Rule Ch. 12, sect 20, that does not end the analysis. The meaning of section 964-A(2) and its impact on the proceeding of this case must be considered.

Enacted in 2005, §964-A(2) mandates the continuation of grievance arbitration provisions after the expiration of the collective bargaining agreement. Section 964-A(2) provides:

2. Contract signed after October 1, 2005. If a contract between a public employer and a bargaining agent signed after October 1, 2005 expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract remain in effect until the parties execute a new contract. In any arbitration that is conducted pursuant to this subsection, an arbitrator shall apply only those provisions enforceable by virtue of the static status quo doctrine and may not add to, restrict or modify the applicable static status quo following the expiration of the contract unless the parties have otherwise agreed in the collective bargaining agreement. All such grievances that are appealed to arbitration are subject exclusively to the grievance and arbitration process contained in the expired agreement, and the board does not have jurisdiction over such grievances. The arbitrator's determination is subject to appeal, pursuant to the Uniform Arbitration Act. Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board, subject to appeal pursuant to applicable law. The grievance arbitration is stayed pending resolution of this issue by the board. The board may adopt rules as necessary to establish a procedure to implement the intent of this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. Nothing in this subsection expands,

limits or modifies the scope of any grievance arbitration provisions, including procedural requirements.

The Board's first case involving §964-A was issued in January of this year, and it gives a detailed explanation of the history of the provision. Sanford Prof'l Fire Fighters v. Town of Sanford, No. 11-04 (Jan. 28, 2011)(addressing the impact of §964-A(1)).<sup>1</sup> To summarize, prior to the enactment of §964-A, the arbitration provision of a grievance procedure did not survive the expiration of the collective bargaining agreement because an agreement is needed to make an arbitration provision enforceable. See Teamsters v. Portland Water District, 651 A.2d 339, at 341-342 fn. 5 (1994), and MSEA v. Bureau of Employee Relations, 652 A.2d 654, 655 (1995). This is so even though the prior steps of the grievance procedure must continue pursuant to the obligation to maintain the status quo. See NCEU v. York County, No. 11-07 Interim Decision at 13 (May 17, 2011) and cases cited therein. Section 964-A(2) makes the arbitration provision operational for certain issues contained in any collective bargaining agreement signed after October 1, 2005.

The issues that are covered by §964-A(2) are those that "are enforceable by virtue of the static status quo doctrine." This relates to the Law Court decision in Board of Trustees of the University of Maine System v. Associated COLT Staff, in which the Law Court said the obligation to maintain the status quo does not include the obligation to continue to pay step increases, as that would require the employer to pay automatic salary increases which were not part of the agreement. 659 A.2d 842 (May 26,

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<sup>1</sup>Section 964-A(1) is also discussed in NCEU v. York County, No. 11-07 (Interim Decision)(May 17, 2011).

1995).<sup>2</sup> The Legislature's inclusion of the word "static" in §964-A(2) emphasizes that the Law Court's distinction should not be forgotten: to continue step increases and other dynamic provisions having the effect of automatic salary increases is not maintaining the status quo, it is changing it.

While the Law Court held in Teamsters v. Portland Water District that the arbitration provision of a grievance procedure does not survive the expiration of the collective bargaining agreement, the Court also noted that the remedy for a failure to maintain the status quo is a prohibited practice complaint before the Board, rather than grievance arbitration under the expired contract. Teamsters v. Portland Water District, 651 A.2d at 342, citing Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806 at 809-810 (1982). Over the years, the Board has heard many cases involving unilateral changes in the status quo where the terms of the expired collective bargaining agreement are evidence of the status quo that must be maintained. See, e.g., Easton Teachers Association v. Easton School Committee, No. 79-14 at 3-5 (March 13, 1979), Bangor Education Assoc. v. Bangor School Committee, No. 83-11, (March 29, 1983), Auburn School Support Personnel v. Auburn School Committee, No. 91-12, (July 11, 1991) at 11, MSEA v. City of Lewiston School Dept, No. 09-05 (Jan. 15, 2009), aff'd AP-09-001, (Oct. 7, 2009, Androscoggin Sup. Ct., Delahanty, J.).

If, however, the Board is presented with a case alleging a unilateral change while the collective bargaining agreement is still in effect, the question of deferral to arbitration may need to be addressed. Generally speaking, if the prohibited practice

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<sup>2</sup>In its ruling, the Law Court overturned the Board's decision that step increases, as a 'dynamic' status quo, should be continued. 659 A.2d 842, reversing No. 93-21 (July 9, 1993).

complaint involves the same issues that are pending in a grievance, the Board will defer to arbitration or stay the proceedings while arbitration is completed. See MLRB Rule Ch. 12, §10(6)(Allowing oral argument at the prehearing conference on any request for deferral to arbitration). As arbitration is the preferred method of resolving these disputes, the Board's long-standing policy has been to defer to the parties' voluntary dispute resolution machinery when appropriate. See MSEA v. State of Maine, No. 86-09 at 5 (April 23, 1986)(" . . . dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract," quoting United Technologies Corp., 268 NLRB 557, 559 (1984)). See also Teamsters Local Union No. 48 v. City of Calais, No. 80-29 (May 13, 1980); MSAD #45 Teachers Assoc. v. MSAD #45 Board of Directors, No. 78-10 (Jan. 24, 1978); Tri-22 Teachers Assoc. v. MSAD, No. 22, No. 75-28 (Sept. 9, 1975).

In light of this background, a reasonable interpretation of §964-A is that it reflects the legislative sentiment that grievance arbitration is the preferred method for resolving post-expiration unilateral change cases stemming from the terms of the expired collective bargaining agreement.

The role of the Board is dictated by that portion of §964-A(2) which states:

. . . Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board . . .

Thus, the Board determines what the status quo is that must be maintained, and the arbitrator will determine whether, in fact, there has been a change. There are two questions that the Board must address in making its determination: First, is the provision of the collective bargaining agreement at issue a

mandatory subject of bargaining or a permissive subject of bargaining, and second, is enforcement of the provision at issue precluded by the Law Court's holding in University of Maine System v. Associated COLT Staff.

With respect to the first question, the obligation to bargain is not limitless, but only extends to "to wages, hours, working conditions and contract grievance arbitration," that is, the mandatory subjects of bargaining. 26 M.R.S.A. §965(1)(C). As the duty to maintain the status quo while negotiating a successor agreement is based on this same duty to bargain, there is no obligation to maintain the status quo with respect to permissive subjects of bargaining. See, e.g., IAM District Lodge #4 v. Town of Wiscasset, No. 03-14 (Oct. 14, 2003) at 5.

With respect to the second question, there have been only a few cases in which this Board has addressed the impact of the Law Court's decision in COLT. The first case was AFSCME v. State of Maine, in which the Board held that the terms of the expired collective bargaining agreement did not contain an express contractual obligation to continue paying step increases after the termination of the agreement. No. 03-13, (April 21, 2004). In MSEA v. City of Lewiston School Department, the Board held that the status quo to be maintained for health insurance premiums depends on how the premium cost-sharing is expressed in the expired agreement. No. 09-05 (Jan. 15, 2009), affirmed by the Androscoggin Superior Court, AP-09-001 (Delahanty, J.) (Oct. 7, 2009). More recently, in Maine Employees United/Saco Public Works Association v. City of Saco, the Board held that dues checkoff is a mandatory subject that must be maintained as part of the status quo. No. 11-02 (March 29, 2011). In NCEU v. York County, the Board held that the grievance procedure in the

expired contract served as evidence of the status quo that must be maintained. No. 11-07, Interim Decision (May 17, 2011).

We conclude that it is incumbent upon the Board to resolve the enforceability of the three contractual provisions at issue under the terms of §964-A(2). There is no language in 964-A(2) requiring either party to file a request for the Board to resolve a dispute on status quo. The statute merely says "Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board". We conclude that there is such a dispute in this case and that it is appropriate for this Board to resolve the issue.

#### ORDER

In light of the issues discussed above, the Board orders the parties to present briefs that address the two subject areas the Board will decide. The briefs must address the merits of the prohibited practice complaint heard on May 11, 2011. The briefs must also address the question of whether the three issues identified are enforceable by virtue of the static status quo doctrine. As previously noted, those three issues are: Retiree Health Insurance - Art 12, sec. 3, which states the City will pay 100% of certain retirees' health insurance premium; Sick Leave - Art. 11, sec. 2, regarding the payment of certain unused sick leave hours; and Clothing - Art. 30, regarding the payout of any unused clothing allowance.

The parties briefs must be received by the Board within 30 days of the issue date of this order, with reply briefs due

within 10 days of that date. If the parties are able to agree upon a different briefing schedule, the Board will accept such an agreement.

Dated at Augusta, Maine, this 9<sup>th</sup> day of August, 2011.

MAINE LABOR RELATIONS BOARD

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David C. Elliott, Esq.  
Chair

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Carol B. Gilmore  
Employee Representative

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Patricia M. Dunn, Esq.  
Employer Representative