

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 18-11

Issued: May 25, 2018

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MAINE STATE EMPLOYEES)	
ASSOCIATION, SEIU, LOCAL 1989,)	
)	
Complainant,)	ORDER ON APPEAL OF
v.)	EXECUTIVE DIRECTOR'S
)	PARTIAL DISMISSAL
STATE OF MAINE,)	OF COMPLAINT
)	
Respondent.)	
_____)	

On December 20, 2017, the Maine State Employees Association filed a prohibited practice complaint alleging that the State of Maine violated 26 M.R.S. §979-C(1)(A) and (E) in two ways: First, by making an unlawful unilateral change in the reclassification and reallocation procedures and, second, by failing to provide information requested by the Association. The Board's Executive Director dismissed the first count of the complaint for failure to state a claim upon which relief may be granted, pursuant to §979-H(2). The Association appealed that dismissal to the Board.

The first count of the complaint alleges that the State made a unilateral change in working conditions following the issuance of the Governor's Memorandum of May 22, 2017 ("Memorandum"), requiring managers and supervisors to meet with employees to identify the duties assigned to and performed by the employee and determine whether those duties matched the job descriptions. If there was a disagreement or it was clear the job duties were not those identified in the job description, the manager was directed to have a job analysis prepared and, if the duties described result in a position upgrade, to find

funding to support that upgrade. If there was not sufficient funding, the managers were directed to reassign duties which were outside the employee's classification. If the duties described result in downgrading the position, the Memorandum stated the salary should also be reduced.

The complaint indicates that the Reclassifications article (Art. 53) was a subject of several proposals and counterproposals in the course of negotiating the 2017-2019 collective bargaining agreement, including the State's proposal to eliminate "red-lining" (freezing pay) of employees whose positions were downgraded until the employee's pay range caught up to his/her pay level. The State's proposal to eliminate red-lining was not adopted. The parties agreed to some changes to Article 53 in the successor agreement, but the complaint did not describe these changes.

MSEA alleges that implementing the Memorandum's directive was a unilateral change in the "long-established process for reclassification and reallocation," managers misled employees about the purpose of these discussions, and the Bureau of Human Resources staff abandoned their established role of auditing positions and interviewing employees prior to approving reclassifications.

The State argues that the zipper clause contained in the parties' collective bargaining agreements completely waives the parties' statutory obligation to bargain during the term of the agreement. The concept of waiver is reflected in § 979-D(1)(B), which requires parties to bargain upon request, "provided the parties have not otherwise agreed in a prior written contract." The zipper clause in both the 2017-2019 agreements and the 2015-2017 agreements states:

Each party agrees that it shall not attempt to compel

negotiations during the term of this Agreement on matters that could have been raised during the negotiations that preceded this Agreement, matters that were raised during the negotiations that preceded this Agreement or matters that are specifically addressed in this Agreement.¹

The parties' collective bargaining agreements include a Maintenance of Benefits article which establishes a contractual bargaining obligation for certain changes to mandatory subjects of bargaining not covered by the agreement.

The State argues that because the zipper clause operates as a complete waiver of the statutory right to demand bargaining, and because the zipper clause was in effect at all relevant times, Count 1 of the complaint must be dismissed for failure to state a claim. The State also notes that "[a]ny alleged violation of the State's contractual bargaining obligations would constitute a grievance [not a PPC]," and contractual violations are not within the Board's jurisdiction.

The Executive Director dismissed Count 1 of the Complaint because by agreeing to the zipper clause, MSEA had waived the statutory right to demand bargaining during the term of the agreement. The Executive Director noted that the zipper clause in this case is identical to the clause considered by the Law Court to be very broad and unequivocal in State of Maine v. MSEA et al., 499 A.2d 1228 (Me. 1985). The Executive Director also noted that during negotiations for a successor agreement (which is not affected by a zipper clause) the parties did bargain over the Reclassification article and agreed to some changes. Finally, the Executive Director observed that if the

¹ The zipper clause is par. B of Art. 13, "Conclusion of Negotiations." It continued in effect after the expiration of the agreement pursuant to the 2nd par. of Art. 74, "Terms of Agreement." The successor agreement included the same zipper clause.

State's action arguably violated the agreement, MSEA could have pursued a grievance or an appeal of a reclassification decision to binding arbitration.

We agree that State of Maine v. MSEA is controlling. 499 A.2d 1228. In that case, the State made several departmental reorganizations which had significant effects on the working conditions of a number of employees. Id. at 1229. The zipper clause central to that case is identical to the zipper clause in this case. In both cases, the union waived its right to bargain on matters "that could have been raised" or "that were raised" during negotiations, and on matters "specifically addressed in the agreement." The Board concluded that even though the changes were authorized by the agreement's Management Rights article and therefore "specifically addressed" in the agreement, the State should have bargained over the impact of certain changes, where those impacts were not already addressed in the contract. Id. at 1230.

On appeal, the Law Court disagreed with the Board's holding on impact bargaining. The Law Court held that MSEA had waived its right to demand bargaining over the impact of these reorganizations because the zipper clause waived the statutory right to bargain in "clear and unmistakable language." Id. at 1233. The Law Court observed that MSEA could have preserved the statutory duty to bargain over the impact of organizational changes, but did not. Id. at 1232. The parties had agreed to the broad language of the zipper clause, including matters which "could have been raised," language which the Court considered unequivocal. Id. at 1232. The Law Court considered the analysis in NLRB v. Southern Materials Co., 447 F.2d 15 (4th Cir. 1971), to be persuasive. In that case, the company changed two matters not covered by the agreement. The Southern Materials court

concluded it was not an unfair labor practice because the union had relinquished the right to require bargaining by agreeing to a zipper clause that included matters not covered by the agreement. 447 F.2d at 18. The Law Court noted that the zipper clause in that case was no broader than the zipper clause before it. State v. MSEA, 499 A.2d at 1231.

In the present case, MSEA's argument that the allegations of Count 1 constitute a statutory violation has two components. First, MSEA argues that zipper clauses do not authorize unilateral changes, they merely enable a party to refuse to negotiate over a given subject during the term of the agreement. Second, MSEA argues that State v. MSEA is inapplicable because that case dealt with impact bargaining over changes that were specifically authorized by the collective bargaining agreement. Neither argument stands up to scrutiny.

The argument that zipper clauses do not authorize unilateral changes is the same sword/shield analysis that the Law Court expressly rejected in State v. MSEA. 499 A.2d at 1232. The Law Court noted that the "sword-shield" analysis is "clearly inconsistent" with Southern Materials, which dealt with a unilateral change during the term of the collective bargaining agreement. Id. at 1232. In addition, the Law Court held that to apply an analysis that lets a zipper clause act as a 'shield' against mid-term bargaining demands but not as a 'sword' to give the employer power to change terms not contained in the contract "would effectively negate an otherwise valid contractual provision." Id. The Law Court emphasized that the sword/shield analysis would restrict or eliminate the statutory right to negotiate a waiver of mid-term bargaining, a policy decision that must be achieved through legislation. Id.

In spite of the fact that the Law Court expressly stated that

the sword-shield analysis is inconsistent with Southern Materials, MSEA claims that the Fourth Circuit Court of Appeals held in that case that a broad zipper clause did not give the employer the right to unilaterally discontinue giving out Christmas turkeys. (MSEA Br. 12.) In the sentence quoted by MSEA to support this assertion, the Circuit Court was not referring to the zipper clause, it was addressing the effect of the parties "Maintenance of Standards" clause on the duty to bargain. Southern Materials Co., 447 A.2d at 18. The maintenance of standards clause at issue in Southern Materials prevented the employer from changing any benefit included in the clause.² The full paragraph of the Court's discussion of this issue makes it clear that the final sentence (quoted by MSEA) was not a ruling on the zipper clause:

The text of the waiver clause relieved each party of the obligation to bargain collectively during the term of the contract not only with respect to 'any subject matter referred to or covered in' the contract, but, more importantly, with respect to 'any subject matter *not* specifically referred to as covered in' the contract. (emphasis added.) Thus, whether the maintenance of standards clause is construed to include or exclude Christmas bonuses is immaterial with respect to the company's obligation and the union's right to bargain, because the waiver of the duty to bargain expressly included that which was excluded from the contract as well as that which was included. This is not to say, however, that if the maintenance of standards clause includes Christmas bonuses that the company would have any right to discontinue them unilaterally. It would only have the right to decline the union's request to reconsider them during the life of the contract, and conversely the union could decline a similar request by the company.

NLRB v. Southern Materials Co., 447 F.2d at 18.

² The clause stated 'no employee shall suffer a reduction in his hourly rate of pay by the execution of this agreement,' 447 F.2d at 17. The Court remanded the case to the NLRB to determine whether the employer fraudulently induced the union to accept the waiver and this maintenance of standards language, which the union thought included benefits. Id. at 19.

The Maine Law Court considered the holding of the Southern Materials Court to be persuasive with respect to the effect of the waiver of mid-term negotiations as well as the impact of the maintenance of benefit provision, stating:

Had [Southern Materials] bonuses not been included [in the maintenance of benefits provision], the zipper clause would preclude mid-term negotiations. Had bonuses been included, the mid-term negotiations would still be waived but the employer would be in violation of the contract and subject to grievance arbitration rather than the unfair labor practice jurisdiction of the NLRB.

State v. MSEA, 499 A.2d at 1231.

Addressing the issue presented in State v. MSEA, the Law Court held that the "Maintenance of Benefits" provision agreed to by the parties created a contractual right to bargain over changes to "negotiable wages, hours and working conditions not covered by this Agreement" In the present case, the 2015-2017 collective bargaining agreement contained an identical provision. Thus, to the extent that the Maintenance of Benefits provision of the expired agreement created a contractual bargaining obligation, any failure to bargain would be subject to the agreement's grievance procedure, rather than a prohibited practice complaint.³ By waiving the statutory right to bargain in the zipper clause, the parties have foreclosed a statutory remedy.⁴ The only recourse left is that

³ We note that in State v. MSEA, the Law Court rejected the notion that the presence or absence of a Maintenance of Benefit provision affects the scope of the zipper clause, and held that it merely creates a contractual right and a potential grievance. Id. at 1231 ("The MSEA's argument misses the point[,]. . . a contractual and a statutory obligation to bargain may exist independently and may differ in content.")

⁴ As the Executive Director noted in footnote 2 of his ruling, waiving the right to demand mid-term bargaining over the charged changes to the reclassification process means the State had no statutory obligation to notify the union prior to implementing the change while the agreement was

preserved in the contract itself. If, as MSEA argues, the zipper clause could not be used to make any changes not specifically authorized by the terms of the agreement, not only would the zipper clause be meaningless, the maintenance of benefits provision would be a nullity as well.

The Union contends that the Court's analysis in State v. MSEA is inapplicable because the decision was dependent on the fact that the reorganizations at issue were authorized by the management rights clause and the only issue was whether impact bargaining had been waived. (Br. at 13) This is not the case: the Law Court's reference to the fact that the parties had authorized the departmental reorganizations in the Management Rights clause was to emphasize that impact was a matter that "could have been raised" during the contract negotiations, and was therefore subject to the zipper clause. See 499 A.2d 1232. The MSEA's argument simply has no merit: In Southern Materials, the collective bargaining agreement was silent on the issue of Christmas bonuses, and the waiver was considered sufficient contractual authority for the employer to make the change. Id. at 1231.

We note that the Board's 1989 decision in Maine State Employees Association v. State of Maine is not at odds with the Law Court's 1985 decision in State v. MSEA. MSEA is correct in stating that in the 1989 case, the Board concluded that the State's unilateral discontinuance of a promotions practice was an unlawful unilateral change. MSEA v. State of Maine, No. 89-06 at 15 (Sept. 5, 1989). The decision was not inconsistent the Law Court's earlier decision because it did not involve the zipper clause. The promotions practice at issue derived from a "stop-gap" side agreement the parties had executed to address certain federal requirements tied to funding

in effect. Consequently, the Union's fait accompli argument is not relevant.

nearly 100 positions at the Department of Labor. The duration of this agreement was unclear, but the Board concluded that promotions practice, which had continued for several years, was expressly incorporated into the seniority provisions of the collective bargaining agreements by the words, "current procedures for filling vacancies in the competitive service shall be continued during the term of this Agreement". Id. at 15. The case turned on the State's repudiation of the established practice that had been expressly incorporated into the parties' agreements.

For the foregoing reasons, we dismiss Count 1 of the complaint because it does not state a claim of a violation of the Act. The Executive Director will schedule a prehearing on Count II in the normal course of business.

Dated this 25th day of May 2018

MAINE LABOR RELATIONS BOARD

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Amie B. Parker
Employee Representative