STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 09-05
Issued: January 15, 2009

MAINE STATE EMPLOYEES ASSOCIATION, SEIU Local 1989, Complainant, v. LEWISTON SCHOOL DEPARTMENT, Respondent.	DECISION AND ORDER

This prohibited practice complaint, filed by the Maine State Employees Association, SEIU Local 1989 ("MSEA" or the "Union") on September 5, 2008, alleges that the Lewiston School Department (the "Employer") violated the Municipal Public Employees Labor Relations Law by unilaterally changing a term of employment after the expiration of the parties' collective bargaining agreement. Specifically, the complaint alleges that the Employer failed to bargain in good faith with the Union in violation of 26 M.R.S.A. §964(1)(E) when it unilaterally changed the percentage of the health insurance paid by the Employer during bargaining. The complaint further alleges that the Employer's action interfered with, restrained or coerced employees in the exercise of their rights protected by 26 M.R.S.A. §963 in violation of §964(1)(A).

At the suggestion of the Board's Executive Director, the parties agreed to have the complaint decided on the basis of a stipulated record and written briefs. The School Department was represented by Daniel C. Stockford, Esq., and MSEA was represented by Alison Mann, Esq. The stipulations were filed on October 27, 2008, and the parties' briefs and reply briefs were all filed by November 21, 2008. The Board, made up of Peter T. Dawson, Chair; Wayne Whitney, Employee Representative; and Karl

Dornish, Employer Representative, met on December 15, 2008 to deliberate on this matter.

JURISDICTION

The Maine State Employees Association-SEIU Local 1989 is the bargaining agent for various employees in a bargaining unit at the Lewiston School Department. MSEA is the bargaining agent within the meaning of 26 M.R.S.A. §962(2), and the School Department is the public employer within the meaning of 26 M.R.S.A. § 962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §968(5)(A)-(C).

STIPULATED FACTS

1. The Maine State Employees Association, SEIU Local 1989 or "MSEA" is the certified bargaining agent for one unit of employees of the Lewiston School Department, 26 M.R.S.A. §962(2).

2. The Lewiston School Department ("the Department") is a public employer as defined in 26 M.R.S.A. § 962(7).

3. The Lewiston School Department and MSEA were parties to a collective bargaining agreement that was in effect from July 1, 2005, until June 30, 2008. A true copy of the parties' 2005-2008 Collective Bargaining Agreement ("Agreement") is submitted as Joint Exhibit 1.

4. The Agreement contained the following article and section:

Article 12

Section 2. Health Insurance

> The Employer shall provide health insurance to its employees and their families. Employees shall make the following contributions to the Choice

Plus Plan premium for the applicable level of coverage, and the Employer shall pay the balance of the Choice Plus Plan premium for the applicable level of coverage. In the event the premiums of the selected health and dental plan exceed the Employer contributions, the difference may be deducted from payroll on a pre-tax basis in accordance with the rules and regulations of the IRS Section #125.

2005-2006 Employee Annually Contributes:

Single	$ 780.00
Adult w/child	1,040.00
Two adults	1,300.00
Family	1,820.00

2006-2007 For the 2006-2007 school year, the Committee's contribution will be increased by a percentage equal to the annual MEA Anthem BC/BS Choice Plus Plan premium rate increase, with a maximum cap not to exceed 13% more than the contribution for the 2005-2006 school year. Any increase above the Committee's capped contribution will be paid by the employee.

2007-2008 For the 2007-2008 school year, the Committee's contribution will be increased by a percentage equal to the annual MEA Anthem BC/BS Choice Plus Plan premium rate increase, with a maximum cap not to exceed 13% more than the contribution for the 2006-2007 school year. Any increase above the Committee's capped contribution will be paid by the employee.

The Employer reserves the right to convert this coverage to any carrier offering comparable coverage. The MEA Choice Plus Plan shall be the coverage provided for the period covered by this Collective Bargaining Agreement. If the employee chooses to enroll in the MEA Standard Plan, the employees will be responsible to pay the difference between the MEA Standard and the MEA Choice Plus Plan premiums. Any replacement health

insurance program must include Prescription Card component.

5. The employees contributed the amounts listed in Article 12, Section 2 for the 2005-2006 school year, and the Department contributed the remainder of the premium owed. The annual dollar contributions of employees and the Department for each level of coverage, as well as the percent of total premium, were as follows in 2005-2006:

	Employee Contribution	Department Contribution
Single	$ 780.00 (14.6%)	$ 4,563.84 (85.4%)
Adult w/ Child	$ 1,040.00 (11%)	$ 8,417.44 (89%)
Two Adults	$ 1,300.00 (10.8%)	$ 10,744.04 (89.2)
Family	$ 1,820.00 (12.4%)	$ 12,839.20 (87.6%)

6. On July 1, 2006, there was a 5% increase in the Anthem Blue Cross Blue Shield Choice Plus Plan premium.

7. During the 2006-2007 school year, the Department and the employees each paid 5% more than they had in the prior year, which covered the 5% overall premium increase. The annual dollar contributions of employees and the Department, for each level of coverage, as well as the percent of total premium, were as follows in 2006-2007:

	Employee Contribution	Department Contribution
Single	$ 819.00 (14.6%)	$ 4,792.08 (85.4%)
Adult w/ Child	$ 1,092.00 (11%)	$ 8,838.36 (89%)
Two Adults	$ 1,365.00 (10.8%)	$ 11,281.20 (89.2%)
Family	$ 1,911.00 (12.4%)	$ 13,481.16 (87.6%)

8. On July 1, 2007, there was an 8.66% increase in the Anthem Blue Cross Blue Shield Choice Plus Plan premium.

9. During the 2007-2008 school year, the Department and the employees each paid 8.66% more than they had in the prior year, which covered the 8.66% overall premium increase. The annual dollar contributions of employees and the Department for each level of coverage, as well as the percent of total premium, were as follows in 2007-2008:

	Employee Contribution	Department Contribution
Single	$ 889.89 (14.6%)	$ 5,207.07 (85.4%)
Adult w/ Child	$ 1,186.52 (11%)	$ 9,603.76 (89%)
Two Adults	$ 1,483.17 (10.8%)	$ 12,258.15 (89.2%)
Family	$ 2,076.49 (12.4%)	$ 14,648.63 (87.6%)

10. The Department and MSEA began negotiating over a successor agreement in mid-June, 2008, and the 2005-2008 collective bargaining agreement expired on July 30, 2008, before agreement was reached on a successor agreement.

11. On May 2, 2008, Lewiston School Department Benefits Specialist Jackie Little sent an e-mail message to Union member Jacqueline Smith setting forth the respective contributions to health insurance premiums for employees as of July 1, 2008, if the contract was not settled by July 1, 2008. A true copy of that May 2, 2008, e-mail is submitted as Joint Ex. 2.

12. On July 1, 2008, the Anthem Blue Cross Blue Shield Choice Plus Plan premium increased by 4%.

13. After June 30, 2008, the Department continued to contribute the same dollar amount to health insurance premiums that the Department contributed during the 2007-2008 school year. The annualized dollar contributions of employees and the Department for each level of coverage, as well as the percent of total

premium, have been as follows during this interim period:

	Employee Contribution	Department Contribution
Single	$ 1,133.73 (17.9%)	$ 5,207.07 (82.1%)
Adult w/ Child	$ 1,618.16 (14.4%)	$ 9,603.76 (85.6%)
Two Adults	$ 2,032.77 (14.2%)	$ 12,258.15 (85.8%)
Family	$ 2,745.49 (15.8%)	$ 14,648.63 (84.2%)

14. The Department did not negotiate with the Union regarding the rates of health insurance that would be in effect during the interim period between expiration of the 2005-2008 Agreement on July 30, 2008, and implementation of a successor agreement.

15. As of October 23, 2008, the Department and the Union continued to be involved in negotiations for a successor agreement to the 2005-2008 Agreement, including negotiations over health insurance benefits that will be effective during the term of the successor agreement.

DISCUSSION

The statutory duty to bargain requires the employer and the bargaining agent "to confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." 26 M.R.S.A. §965(1)(C). It is a well-established principle of labor law that the duty to bargain includes a prohibition against making unilateral changes in a mandatory subject of bargaining, as a unilateral change is essentially a refusal to bargain. See, e.g., Teamsters v. Town of Jay, No. 80-02 at 3 (Dec. 26, 1980) (citing NLRB v. Katz, 369 U.S. 736, 743 (1962)), and Lane v. Board of Directors of MSAD No. 8, 447 A.2d 806, 809-10 (Me. 1982). The prohibition against making unilateral changes means that the parties must maintain

the status quo following the expiration of a contract. Univ. of Maine System v. COLT, 659 A.2d 842, 843 (May, 1995) citing Lane v. MSAD No. 8, 447 A.2d at 810. In cases involving allegations of unilateral changes after the expiration of an agreement, the terms of the expired agreement are evidence of the status quo that must be maintained. See, e.g., MSEA v. School Committee of City of Lewiston, No. 90-12 (Aug. 21, 1990) at 16.

The issue presented in this case is whether increasing the employees' payroll deduction for health insurance premiums after the expiration of the collective bargaining agreement constituted a unilateral change by the Employer in violation of 26 M.R.S.A §964(1)(E). There is no dispute that upon the expiration of the 2005-2008 collective bargaining agreement, the Lewiston School Department kept its own contribution to the premium at the same dollar level and increased the amount deducted from the paychecks of each unit employee to cover the increase in the health insurance premiums imposed by the carrier. The legal question before us is whether this change constitutes a change in the status quo. If so, it is a unilateral change in a mandatory subject of bargaining that constitutes a refusal to bargain in violation of §964(1)(E) and (1)(A).[1]

The essence of this case is how to define the status quo that must be maintained for health insurance premium costs when the collective bargaining agreement has expired and the parties are negotiating a successor agreement. The employer claims the status quo should be the dollar amount paid by the employer for health insurance premiums at the expiration of the agreement. The union argues that the status quo should be the percentage of the premium being paid by the employer and the employees at the

[1]None of the exceptions to the rule against unilateral changes are at play here. See, e.g., Auburn Firefighters Assoc. IAFF v. Valente and City of Auburn, No. 87-19, at 8-9 (Sept. 11, 1987).

expiration of the agreement.[2]

The Employer argues that this matter is controlled by the Maine Law Court's decision in COLT, which overturned the Board's decision requiring the University of Maine System to continue to grant step increases after the expiration of the collective bargaining agreement. COLT, 659 A.2d at 846 (May, 1995). The Employer contends that, analytically, the step increases at issue in COLT are the same as health insurance premiums because they are both an aspect of wages. The result of the Employer's approach is that, just as COLT holds that the employer must freeze wages after the expiration of the agreement, in this instance the employer must freeze its own contribution to the health insurance premium at the dollar amount existing at expiration of the agreement.

We disagree with the proposition that COLT controls this case. In COLT, the issue was whether the status quo to be maintained included payment of annual wage increases after the expiration of the contract. The Law Court concluded that the Board's decision requiring the employer to continue granting step increases "dramatically alters the status and bargaining positions of the parties. It changes, rather than maintains, the status quo." COLT, 659 A.2d at 846. The Law Court observed,

> To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic increases in salary is another.

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[2]There are actually three options for defining the status quo on health insurance: the employer continuing to pay the same dollar amount, with the employee absorbing the full impact of the premium increase; the employee continuing to pay the same dollar amount, with the employer absorbing the full impact of the premium increase; the employer and the employee continuing to pay the same proportion of the total premium cost as established in the collective bargaining agreement. The second option was not raised by either party.

COLT, 659 A.2d at 844, quoting MSAD #43 Teachers' Ass'n v. MSAD #43 Board of Dir., 432 A.2d 395, 397 n.3 (Me. 1981).

In the present case, the Employer's interpretation of the status quo to be maintained presents a very significant change to the wages, hours and working conditions of the employees. There is no question that the status quo has changed significantly for employees in this case: The employee contribution toward the health insurance premium increased by 27% for single coverage, and 26%, 37% and 32% for adult and child, two adult, and family coverage, respectively. In dollar terms, this is a significant loss of take-home pay on an annual basis: $244, $432, $550, $669 for the four levels of coverage. Thus, where COLT represents a situation in which the Board's order was determined by the Law Court to be a significant change in the status quo, here it is the School Committee's stance on health insurance contributions that constitutes a significant change in the status quo.

We also reject the Employer's argument that the terms of the contract specifically limit the Employer contribution to a fixed amount that cannot be increased. The terms of the expired collective bargaining agreement establish how the health insurance premium costs are shared between the employee and the Employer. Other Board cases addressing unilateral changes with respect to health insurance coverage have focused on the terms of the expired agreement to determine whether the status quo is a fixed dollar amount or a percentage of the premium. For example, in Auburn School Support Personnel, the Board held that because the agreement "did not establish a procedure for determining insurance premium payments," such as saying that the employer would pay 100% of premiums, but simply stated a fixed dollar amount that the employer would pay, that dollar amount was the status quo. Auburn School Support Personnel, AFT v. Auburn School Committee, No. 91-12 (July 11, 1991) at 11-12. Similarly, in

Teamsters v. City of Augusta, the agreement specified the dollar amount for the City's contribution to the health insurance plan for each of three years, followed by a statement that "the remainder, if any, will be paid by each employee using weekly payroll deductions." No. 93-28 (Jan. 13, 1994). The Teamsters argued that because that dollar amount was 100% of the premium cost, paying 100% was the status quo that must be maintained. The Board concluded that there was "no way to consider the fixed dollar amounts in the contract as anything but a cap on the City's responsibility for insurance premiums", particularly in light of the "unequivocal" remainder language. Teamsters v. City of Augusta, No. 93-28 at p.25-26[3].

The Employer's interpretation of the collective bargaining agreement hinges on the sentence, "Any increase above the Committee's capped contribution will be paid by the employee" contained in the following section of the article dealing with insurance premiums:

> For the 2007-2008[4] school year, the Committee's contribution will be increased by a percentage equal to

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[3]See also, the following discussion from Auburn School Support Personnel, No. 91-12 at 12:

> In comparing earlier cases with the one before us, it is perhaps best to view the distinction as one of continuation of a fixed contractual term or condition versus continuation of a contractual procedure to determine that term or condition. The distinction was made clear in a more recent case, MSEA v. School Committee of the City of Lewiston, No. 90-12 (Me.L.R.B. Aug. 21, 1990). There, in response to employee reclassifications that the employer had made after contract expiration, the Board found that the procedure in the expired contract, in which the employer had agreed to consult the union prior to reclassifying employees, had to be maintained during negotiations for a new contract. Employee classifications themselves were not fixed, as long as the reclassification procedure in the expired contract was followed.

[4]There is identical language directly preceding this one that covers the 2006-2007 school year.

> the annual MEA Anthem BC/BS Choice Plus Plan premium rate increase, with a maximum cap not to exceed 13% more than the contribution for the 2006-2007 school year. Any increase above the Committee's capped contribution will be paid by the employee.

The Employer argues that the sentence demonstrates that the parties agreed "to limit the School Department's contribution to a defined amount and to require employees to pay any increases in premiums over that defined amount." (Employer Reply brief at 2). We do not think it is appropriate to pull this sentence out of the context of the agreement. In both instances in which the sentence occurs, it immediately follows the sentence defining the Employer's contribution and setting a cap on the amount of the increase the employer would pay. Thus, the sentence merely provides that if the premium increases more than 13% (the maximum increase the Employer agreed to share with the employees), then any increase above that capped contribution would be paid by the employee. It operates as a limit on the Employer's commitment to share in the costs of premium increases, not as a freeze on the Employer contribution. Thus, unlike the remainder language in the Augusta case, the plain language of the agreement does not support the Employer's argument that its contribution level should be frozen.

We agree with the Union's argument that the status quo that must be maintained is the proportion of the premium paid by the employee and the Employer, respectively. The Union points out that the contract specified the dollar amount of the employees' share during the first year, with the Employer assuming the remainder of the cost, and the employee and Employer sharing the burden of any subsequent increase in premium rates, subject to a cap for the Employer. This share, though not expressly stated in the agreement, worked out to be 10.8% to 14.6% for the employee (depending on the level of coverage chosen), with the Employer's

share of the premium ranging from 89.2% to 85.4% (see stipulation #9). The Union argues that the status quo to be maintained is sharing the premium payments at the same proportions the Employer and the employees shared over the life of the expired agreement. We agree that the terms of the collective bargaining agreement establish a practice of the Employer and the employees sharing the costs of the health insurance premium. For each of the three years of the agreement, the Employer has paid from 85.4% of the premium for a single employee up to 89.2% of the premium for two adults. The procedure established in the agreement provided that this proportional share would continue, as long as the premium did not increase over 13%. This procedure is the status quo that must be maintained while a successor agreement is being negotiated. Thus, the Employer's unilateral change in the percentage of the health insurance premium the Employer paid following the expiration of the collective bargaining agreement was a refusal to bargain in violation of 26 MRSA 964(1)(E).

We also conclude that the Employer's unilateral change in the terms and conditions of employment constitutes interference, restraint and coercion, independent of a violation of the duty to bargain. This is because unlawful unilateral changes inherently interfere with the free exercise of the right of employees to engage in collective bargaining. See, e.g., Teamsters v. Aroostook County Sheriff's Dept., No. 92-28 at 21 (Nov. 5, 1992); Coulombe v. City of South Portland, No. 86-11 at 25 (Dec. 29, 1986); Lane v. M.S.A.D. No. 8, 447 A.2d at 810.

Upon finding that a party has engaged in a prohibited practice, we are directed by section 968(5)(C) to order that 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

seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice. Caribou School Dept. v. Caribou Teachers Association, 402 A.2d 1279, 1284 (Me. 1979).

A restoration of the situation in the present case requires two steps: a return to the status quo that the Employer was obligated to maintain following the expiration of the collective bargaining agreement and restoring the employees to the position they would have been in were it not for the violation. Consequently, the Board orders the Lewiston School Department to cease and desist imposing the full amount of the health insurance premium increases occurring since July 1, 2008 on the unit employees. The Employer must return to sharing the premium costs with the employees in the same proportion that the employer and employees had shared the premium during the term of the agreement. We further order the School Department to reimburse employees for the excess deductions made since July 1, 2008. This reimbursement must be made within 30 days of this order. In accordance with Board practice,[5] interest must be computed in accordance with Florida Steel Corp., 231 NLRB 651 (1977), utilizing the interest rates specified in New Horizons for the Retarded Inc., 283 NLRB 1173 (1987).[6]

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[5]See AFSCME, v. City of Bangor, No. 80-41, at 11 (Sept. 24, 1980), modified in part, No. CV-80-574 (Me. Super. Ct., Pen. Cty., Jan. 28, 1982), Board Order aff'd, 449 A.2d 1129 (Me. 1982).

[6]Interest is to accrue commencing with the last day of each calendar quarter of the time period subject to reimbursement, on the total amount then due and owing at the short-term Federal rate then in effect, and continuing at such rate, as modified from time to time by the Secretary of the Treasury, until the Lewiston School Department has complied with this order. From July 1, 2008, to September 30, 2008, the short-term Federal rate was 5 percent. From October 1, 2008, to December 31, 2008, the short-term Federal rate was 6 percent. From January 1, 2009, to March 31, 2009, the short-term Federal rate is 5 percent. See, generally, NLRB Compliance Manual (III), section 10566 and NLRB Memorandum OM 09-26 (Dec. 30, 2008).

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 M.R.S.A. § 979-H(2), it is ORDERED:

1. That the Lewiston School Department CEASE AND DESIST from deducting health insurance premium contributions from employee paychecks at the rate that was implemented on July 1, 2008, and, until the parties have agreed otherwise, return to the same proportion of the total premium the employees contributed under the 2005-2008 collective bargaining agreement.

2. That within 30 days of this order, the Lewiston School Department shall reimburse the employees for the excess amount deducted since July 1, 2008, with interest.

3. That the Lewiston School Department shall notify the Executive Director, in writing, within 30 days from the date of this order, of what steps have been taken to comply with the order.

Dated at Augusta, Maine, this 15th day of January, 2009.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. § 968(5)(F) (Supp. 2008) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.

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Peter T. Dawson
Chair

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Karl Dornish, Jr.
Employer Representative

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Wayne W. Whitney
Employee Representative