

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 09-10

Issued: July 9, 2010

_____)	
MAINE STATE EMPLOYEES ASSOCIATION,)	
SEIU Local 1989,)	
Complainant,)	
)	DECISION
v.)	AND
)	ORDER
STATE OF MAINE,)	
DEPARTMENT OF PUBLIC SAFETY,)	
)	
Respondent.)	
_____)	

This prohibited practice complaint, filed by the Maine State Employees Association, SEIU Local 1989 ("MSEA" or the "Union") on February 26, 2009, alleges that the State of Maine's Department of Public Safety (the "Employer") violated the State Employees Labor Relations Act by engaging in direct dealing with employees, thereby breaching its duty to bargain in good faith in violation of 26 M.R.S.A. §979-C(1)(A) and (E). Specifically, the complaint alleges that the Employer failed to bargain in good faith with the Union in violation of 26 M.R.S.A. §979-C(1)(E) when the Director of the Crime Lab negotiated with employees about reassigning duties and submitting a reclassification request to compensate for the newly-assigned duties. 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. §979-B(1) in violation of §979-C(1)(A).

Throughout this proceeding, Alison Mann, Esq., represented the Maine State Employees Association, SEIU Local 1989; and Joyce Oreschovich, Esq., represented the State of Maine, Department of Public Safety, through the Bureau of Employee Relations. An evidentiary hearing was held on December 10, 2009, and January 28, 2010. The parties submitted post-hearing briefs,

the last of which was filed on March 23, 2010.¹ On May 13, 2010, the Board met to deliberate this matter.

JURISDICTION

The Maine State Employees Association-SEIU Local 1989 is the bargaining agent within the meaning of 26 M.R.S.A. §979-A(1), and the State Department of Public Safety is the employer within the meaning of 26 M.R.S.A. §979-A(5). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §979-H(2).

FACTS

1. The Maine State Police Crime Laboratory is part of the Department of Public Safety. The Crime Lab Director, Mr. Elliot Kollman, is a civilian employee who reports to the command staff of the State Police, which includes Colonel Patrick Fleming, the Chief of the Maine State Police and Major Ray Bissette, who is in charge of support services, including the Crime Lab.
2. Mr. Kollman started as the Director the Maine Crime Lab about 6 years ago. Mr. Kollman is also an American Society of Crime Laboratory Directors/Laboratory Accreditation Board Inspector. Over the years he has done ten accreditations. The Crime Lab had received an inspection and initial accreditation 3 or 4 years prior to Mr. Kollman's arrival. After his arrival, the Lab went through its first re-accreditation, with Sgt. Harwood and Director Kollman working together through the process. The next scheduled

¹On March 19, 2010, it became apparent that Board Member Wayne Whitney had a conflict that prevented him from further participation. Member Carol Gilmore received a copy of the transcript and the full record and deliberated with the Board on this case.

re-accreditation was set for April of 2009, which would be the second re-accreditation or third inspection. Five years from that accreditation would be the first one using the international standards, which impose additional requirements on the management of the Lab. One new requirement is that the supervisors in the technical areas, such as latent prints and firearms units, will be required to have technical expertise in the area being supervised.

3. The Crime Lab's organizational chart from 2007 shows the Lab divided into five sections: Biology, Chemistry, Latent Prints, Firearms, and Photograph/Evidence Receiving². The supervisors in the Biology and Chemistry units are identified as "Supervisor Senior Laboratory Scientists," which reflects the fact that they possess technical expertise in those disciplines. Sergeant Harwood is identified as the supervisor for the Latent Prints Unit, the supervisor for the Firearms Unit, and the supervisor of the Photography/Evidence Receiving Unit. Sergeant Harwood is also listed as the Assistant Director of the Laboratory.
4. While Sgt. Harwood had significant work experience in forensic science prior to becoming a member of the Maine State Police, he did not have the specific expertise and training necessary to provide technical supervision of the forensic work in the latent prints and firearms units of the Lab. Consequently, his supervisory responsibilities for these two units were administrative, not technical. If the scientists in these two units needed technical guidance with a difficult case, they were able to contact a specialist in the Portland Police Department. Sergeant Harwood was also responsible for the photography and evidence receiving

²Computer crimes may also be a separate function within the Lab.

section of the Lab, and, as the Assistant Director of the Lab, all of the section supervisors reported to the Director through him. In addition, Sergeant Harwood served as the quality manager for the Crime Lab.

5. In April of 2007, the MSEA and the State signed a Memorandum of Agreement in which the parties agreed to meet with a representative of the Bureau of Human Resources for "collaborative discussions to address the matters of pay equity and a career ladder for the Crime Lab." Staff from the Bureau of Human Resources and various forensic scientists held a series of meetings during 2007 and 2008 to discuss these issues. The career ladder issue referred to the lack of opportunity for upward mobility for those in the field of forensic science due to the extremely small job market in this field in Maine. The pay equity issue reflected a concern about different technical specialties being in different pay grades. Those involved in these meetings were in agreement that the job descriptions for all of the forensic scientists should be comparable, having the same primary duties and the same pay grade. The group's objective was to create a career ladder of Forensic Scientist I, Forensic Scientist II, and Forensic Scientist III (or Senior Forensic Scientist), with the pay grade tied to the level, not to the technical specialty. There was no discussion specifically on creating a Supervisory job description as part of this career ladder, though there was some thought that eventually it might be appropriate.
6. The Bureau of Human Resources is the agency that manages the state compensation system. The Bureau conducts job analyses and audits to ensure that every position in state government is classified appropriately and assigned to the proper pay grade. Decisions on job classifications and allocation of

those classifications to pay grades are made by the Bureau of Human Resources, not by the supervisors or managers in the operational areas. The supervisors and managers provide information on the tasks performed and the responsibilities of each job, and they respond to inquiries from the Bureau, but the decision on reclassifications rests entirely with the Bureau of Human Resources.

7. If an employee thinks that the duties and responsibilities of his or her position have changed since its initial classification, the employee may submit a request for a reclassification. Requests for reclassification are submitted through a lengthy form called an "FJA petition," which initiates what is called a "functional job analysis". A job analyst in the Bureau of Human Resources reviews the information provided by the employee and compares it to the current classification. The analyst conducts an audit to determine what tasks are being performed and to what extent. The analyst will discuss the audit with the supervisor or manager. Based on all of the information gathered, the analyst makes a determination on whether the employee should be in a different classification. Ms. Robin Danforth, the State's Merit System Coordinator, reviews all of the analysts' reports and sends the final decision to the employee, the manager, and to the Budget Office and the State Controller.
8. MSEA-SEIU or the employee's supervisor or manager may also submit a reclassification request using the same procedure and the same FJA form. About 400-500 reclassification requests are submitted each year, about 25% of which are management initiated.
9. Article 53 of the 2007-2009 collective bargaining agreement for the Professional and Technical Services bargaining unit

establishes the process for appealing reclassification determinations made by the Director of Human Resources.³ Sections 3 and 4 address the effective date of reclassification or reallocation:

3. Except for reclassifications and reallocations in connection with a reorganization, any reclassification or reallocation decision of the Director of Human Resources or the Arbitrator or Alternate shall be effective as of the date of the written initiation of the reclassification or reallocation request by the employee, MSEA-SEIU or State and shall be implemented retroactively when the funds are provided pursuant to budgetary procedures.

. . .

4. Reclassifications and reallocations in connections with a reorganization shall be effective on the date they are approved and implemented.

10. Most reclassification petitions filed by management address proposed changes in job assignments or more extensive reorganizations. A typical management-initiated reclassification petition results in a pay change that is effective when the reorganization is implemented.⁴ Most reclassification requests submitted by management are granted; if the Bureau of Human Resources determines that the request will be denied, management withdraws the request. There is nothing in the collective bargaining agreement or state

³The article defines classifications and reclassifications as "the assignment or reassignment, respectively, of a position or group of positions to an occupational classification which is appropriate for compensation and employment purposes" and defines allocation and reallocation as "the assignment or reassignment, respectively, of a classification to the appropriate grade in the compensation plan."

⁴The effective date of a pay change is not the same as the date the pay increase is received. Often, due to the budgeting process, the change is made retroactive to the effective date.

policy that prohibits management from filing a petition to address a change in duties that has already been implemented.

11. Employee-initiated reclassification requests address changes that have already occurred. As such, if the reclassification request is granted, the pay change is effective retroactively to the date the request was filed.
12. In accordance with Article 53, when the new duties are already being performed and the reclassification is subsequently granted, the employee is entitled to retroactive pay, regardless of who initiated the reclassification request. Robin Danforth, the Merit Systems Coordinator, testified that on more than one occasion she had to notify the Budget Office that a management-initiated request was actually based on duties that had already been taken on, rather than on prospective changes. Her instruction to the Budget Office is that the pay adjustment must be retroactive to the date of the change, not the date the reclassification was approved.
13. Section 11 of the FJA-1 form is the section asking for the justification for the reclassification request. In the FJA-1 form revised on 04/08, section 11 states:

Justification for request; identify changes to the position and/or reason(s) for the request.⁵
14. A number of employees in the Crime Lab had received reclassifications in the past few years. Kim Stevens's position was awarded dual-discipline status through the reclassification process, a Clerk III became a forensic

⁵The FJA form in use prior to the 04/08 revision also requested the following information: "Give purpose for assigning these duties to this position (reorganization, combination of positions, Legislative mandate, etc.)."

technician to reflect the evidence receiving responsibilities, the Forensic Chemist III serving as the unit supervisor was reclassified to a Senior Laboratory Scientist. Some of the reclassification requests that were denied by the Bureau of Human Resources are still on appeal, including that of Gretchen Lajoie. Her reclassification request, filed in 2005, was based, in part, on performing supervisory duties in the fire debris unit within the chemistry section. The request was denied and the appeal is awaiting arbitration.

15. In July of 2008, Sgt. Harwood received a promotion to a Special Projects position in the Department of Public Safety (outside of the Crime Lab) that was to become fully effective that September. With the consent of Kollman and the command staff, Sgt. Harwood began spending most of his time in his new position, although he remained available to help in the Crime Lab during the transition.
16. Upon learning of Sgt. Harwood's planned departure, Kollman went to the command staff to request that the Sergeant's position be "civilianized," that is, made into a senior laboratory scientist position, rather than a position that could only be filled by a sworn State Police officer. His arguments for this change were partly based on the ASCLD/LAB international accreditation standard, which would be imposed in five years, requiring the use of technical personnel in supervisory positions over technical functions. Kollman's request to civilianize the position was denied.
17. Given the budgetary constraints facing all state agencies, Kollman knew there was no possibility of creating a new position in the Crime Lab. Kollman had learned from someone in the Human Resources Department that if he assigned new responsibilities to an employee, he could follow that with a

reclassification request or have the changes considered through a reclassification request already submitted by the employee.

18. Kollman felt that there was an immediate need for someone with an understanding of quality management issues to get on board in order to prepare the application for re-accreditation by the March 2009 deadline. Gretchen Lajoie had some supervisory duties in the chemistry unit and regularly attended Kollman's staff meetings. Kollman considered Lajoie to be part of his supervisory staff and was comfortable assigning the quality manager duties to her based on her experience and organizational skills. Kollman testified that all of his staff agreed that she was the obvious choice.
19. When Kollman informed Lajoie of these new responsibilities, he viewed it as simply a matter of telling her that she would be assuming those responsibilities. There was no discussion of which specific duties she might be interested in, just a statement that she would take on the quality manager function. There was no discussion of pay, just that he would submit the paperwork for a reclassification.
20. In an email dated July 18, 2008, Sgt. Harwood informed the lab that he would be spending most of his time in his new position even though the promotion would not be effective until September. He indicated that he and Kollman had determined who would take over his various duties temporarily until his replacement was hired. This email identified Gretchen Lajoie as taking over all of the quality manager duties.
21. Sometime before July 30, 2008, Kollman decided to permanently assign these duties to Lajoie, although this decision was not made public until later. On July 30, 2008,

he sent an email to Lajoie and her immediate supervisor, Ronald Kaufman, indicating that he was in the process of filling out an FJA based on the additional quality manager responsibilities that would be added, and stating, "[u]pon [Harwood's] promotion, I will submit the paperwork to HR to start the reclassification process."

22. The parties stipulated to the following:

On or before July 30, 2008, Gretchen Lajoie spoke with Elliot Kollman about the fact that she had a reclassification request pending and told him that she didn't want the quality manager change to interfere with the back pay which she believed she might receive pursuant to that reclassification request.

23. The reclassification request dated August 14, 2008, was submitted by Lajoie and was granted on December 26, 2008. The effective date of the reclassification was August 14, 2008, and the request for funding of the pay change was submitted to the Legislature as part of the supplemental budget. At the time of the hearing, the funding request was still pending before the Legislature.

24. The parties stipulated to the following:

Sometime before September 3, 2008, Gretchen Lajoie had a conversation with Elliot Kollman in which she asked him when he planned to announce to the staff that she was taking the quality manager position/duties which she referred to in an e-mail as 'the quality manager position.' Elliot told Gretchen to keep it quiet until he could announce it at a staff meeting, which was an idea Gretchen did not like. Subsequently Elliot began telling people who asked what he was doing so that people heard it piecemeal and not all at once.

25. On September 9, 2008, Kollman sent an email announcing that, effective September 2, 2008, Lajoie was the quality manager for the Crime Lab. In this same email, Kollman announced that Sgt. Robin Parker would be joining the Laboratory

- management staff as of September 22, 2008.
26. Sergeant Parker had never worked in a forensic laboratory and did not have the type of technical training necessary to serve as a technical supervisor for latent prints and firearms unit. Kollman's email of September 9, 2008, noted that Sgt. Parker's duties were ERT administration, evidence control, digital evidence oversight, lab security and safety.
 27. A number of employees in the lab were disappointed by the manner in which Kollman appointed Lajoie as quality manager because opportunities for advancement were so rare in the lab. Some employees testified that they would have applied for the job if it had been posted in the normal manner.
 28. On September 10, 2008, a lab employee showed Kollman's email of September 9, 2008, to C.J. Betit, an MSEA representative. This was the first the Union knew about this issue.
 29. The collective bargaining agreement requires that all job vacancies be posted to allow employees to apply for the position. The posting must include a description of the job, the pay rate, the required qualifications and requirements for applying for the position. A position must be established before there can be a posting for it. In the situation at the Crime Lab, the position being vacated was Sgt. Harwood's position, which was part of the State Police bargaining unit. The latent prints and firearms supervisory duties were just part of that position, not a separate job that could be posted.
 30. The collective bargaining agreement has a provision enabling an employee to receive "acting capacity" pay when the employee has been temporarily assigned to a job in a higher pay grade and works in that job for a minimum of one week. This provision only applies when there is a vacant position

and an employee in a lower pay grade is filling in on a temporary basis.

31. When it came time to identify a technical person to take over the supervision of the Latent Prints/Firearms section, Kollman recognized that he had three lab scientists working in that area who were all technically qualified to assume those duties. Kollman notified these three bench scientists by email in late August of his plans to assign the supervisory duties to one of them. In that email, Kollman indicated that he would set up an interview process for those who were interested and would submit the reclassification request after the duties were reassigned. A week or so earlier, he had told one of these employees that the personnel specialist for the department had told him that his reclassification request would be supported.
32. The three employees, Alicia Wilcox, Cynthia Homer, and Kim Stevens, all notified Kollman that they were interested in the opportunity to take on the supervisory duties. Kollman sent an email scheduling them for interviews on September 16, 2008. The interview process was the same for all: Kollman asked all the questions, while three others (the DNA Supervisor, the Chemistry Supervisor, and Gretchen Lajoie) listened and took notes. At the beginning of each interview Kollman stated that there would not be any technical questions; all his questions were related to supervisory issues. Because the reclassification had not been submitted at this stage, no one present had any idea of what the pay for the revised position would be.
33. Two days after the interviews, Kollman met with the three people who had interviewed for the position and the fourth person in the latent prints and firearms unit. Kollman announced that Kim Stevens got the job. Kollman sent an

email to the entire laboratory on September 18, 2008, with a subject heading of "New Supervisor" stating, "Effective immediately, Kim Stevens will be assuming the duties of Supervisor of the Firearms and Latent Print Units. Congrats!"

34. Both of the employees who interviewed but were not assigned the Latent Prints and Firearms supervisory duties testified that they felt that the interview process was a sham. For a variety of reasons, they felt that Kollman had already selected Stevens and was more or less just going through the motions of an interview. They were disappointed in the process because there are so few opportunities for advancement in the field of forensic science in Maine. Based on Kollman's assurances of submitting the reclassification paperwork they assumed that they were applying for a position with increased pay.
35. Kollman submitted a reclassification request for Stevens on September 25, 2008, after he had assigned her the supervisory duties. This reclassification request was granted on October 18, 2008, moving her to Senior Laboratory Scientist. The memo from the Department of Administrative and Financial Services communicating this approval stated:

We have approved management's request as indicated above. This action is contingent on Bureau of Budget review and approval of the proposed request, to include solving any funding problems associated with this action, establishment of an appropriate effective date, and formal assignment of the proposed new duties.
36. On January 12, 2009, Stevens submitted her own reclassification request based on the same change in duties. When Robin Danforth at the Bureau of Human Resources became aware that Steven's request had already been approved as a

management-initiated reclassification, Danforth contacted Kollman to confirm that Stevens was already performing those duties. Danforth then notified the Bureau of Budget that the effective date of her reclassification should be September 18, 2008, the date that the change in job duties was implemented.

37. Kollman was able to find money in his budget to fund the pay increases associated with the two reclassifications first by converting a vacant photographer position to a part-time photographer position, then later by converting it to a part-time technician position. Freeing up money in this manner was thought to increase the likelihood of the reclassifications being funded.
38. The management rights provision of the collective bargaining agreement authorizes management to make job assignments:

ARTICLE 41. MANAGEMENT RIGHTS

The MSEA-SEIU agrees that the State has and will continue to retain the sole and exclusive right to manage its operations and retains all management rights, whether exercised or not, unless specifically abridged, modified or delegated by the provisions of this Agreement. Such rights include, but are not limited to, the right to determine the mission, location and size of all agencies and facilities; the right to direct its work force; to administer the merit system; to establish specifications for each class of positions and to classify or reclassify and to allocate or reallocate new or existing positions in accordance with the law; to discipline and discharge employees; to determine the size and composition of the work force; to eliminate positions; to make temporary layoffs at its discretion; to contract out for goods and services; to determine the operating budget of the agency; to install new, changed or improved methods of operations; to relieve employees because of lack of work or for other legitimate reasons; to maintain the efficiency of the government operations entrusted to them; and to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

DISCUSSION

The complaint before us alleges that the Employer's conduct in reassigning duties from one position in the Crime Lab to another, then reclassifying that position, amounted to a failure to bargain in good faith in violation of 26 M.R.S.A. §979-C(1)(E) because the interaction with the employees concerning these changes amounted to direct dealing. The complaint also alleges that this direct dealing violated 26 M.R.S.A. §979-C(1)(A) by interfering with employees in the exercise of the rights guaranteed by the Act. For the most part, the facts are not in dispute; the issue is whether the Employer's actions violated the Act.

Once a union becomes certified or recognized as the bargaining agent, the employer is obligated to bargain solely with that union over the terms and conditions of employment for employees in that unit. 26 M.R.S.A. §979-F(2)(B) (the certified union is "the sole and exclusive bargaining agent for all of the employees in the bargaining unit"). Bypassing the bargaining agent, either by making a change in a mandatory subject unilaterally or by dealing directly with the unit employees, is a failure to bargain in good faith in violation of §979-C(1)(E) because it is, in essence, a refusal to bargain. MSEA v. State of Maine, Bureau of Alcoholic Beverages, No. 78-23 (July 15, 1978) ("a public employer's unilateral change in a mandatory subject of bargaining undermines negotiations just as effectively as if the public employer altogether refused to bargain over the subject"), aff'd State of Maine, Bureau of Alcoholic Beverages v. MLRB and MSEA, 413 A.2d 510 (Me. 1980) and MSEA v. BMHI, No. 84-01, at 7 (the employer must bargain with the exclusive representative of the employees not with the employees directly). Furthermore, negotiating with anyone other than the bargaining

agent is interference with the rights guaranteed the Act, in violation of 26 M.R.S.A. §979-C(1)(A). MSEA v. BMHI, No. 84-01, at 7; citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944). See also Allied Signal, Inc., 307 NLRB 752, 754 (May 29, 1992) ("Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions . . . plainly erodes the position of the designated representative."), accord, Teamsters v. Aroostook County Sheriff's Dept., No. 92-28, at 24-25 (Nov. 5, 1992).

The Board's analysis of direct dealing charges was most recently described in MSEA v. State of Maine Department of Public Safety. In that case, the Board reviewed prior case law which had consistently held that merely informing employees of changes is not considered direct dealing because it is not negotiating over a mandatory subject of bargaining. As the Board stated:

It is the employer's conduct that is key to a finding of direct dealing, and the distinction between notice to an employee regarding a change in working conditions, and a proposal for such a change, is determinative.

MSEA v. State of Maine Dept. Of Public Safety, 09-13 at 6 (Aug. 21, 2009). The employer's conduct must be closely reviewed to discern the nature of the interchange with the employee. For example, in Orono Fire Fighters Ass'n v. Town of Orono, the Board held that a meeting in which the employer gave notice to an employee of a change in his work schedule did not constitute direct dealing, even though it was considered a unilateral change. No. 89-18 at 11 (Sept. 21, 1989). Similarly, in Jay School Department, a memo to employees reminding employees of an opportunity to request a transfer was not considered direct dealing because the memo did not make a proposal or solicit a response from employees. Teamsters v. Jay School Dept., No.

06-22 at 8 (Nov. 21, 2006). If the employer's action is not just informing but seeking a response to a proposal, direct dealing may have occurred. The Board has concluded that the employer engaged in direct dealing when the employer sent a questionnaire to employees asking them to choose among alternatives for scheduling furlough days. Teamsters v. Aroostook County, No. 92-28 at 24 (Nov. 5, 1992). Similarly, the Board concluded that direct dealing occurred when survey questions were clearly intended to solicit employee input on negotiable matters. AFSCME v. City of Portland, No. 90-14 at 18 (Oct. 18, 1990) (15 out of 19 survey questions related to current or alternative pension benefits). Direct dealing can also be more subtle than directly asking for employee input, as in the Maine Maritime case where the employer solicited a response by making a low offer, then responded to the employee's obvious dismay by changing the starting salary and benefits package for the position. MSEA v. Maine Maritime Academy, No. 05-04 at 21 (Jan. 31, 2006).

Before discussing the merits of the Union's case, it is necessary to emphasize that this case is a narrow case limited to direct dealing. The issue as stated in the Union's post-hearing brief bears repeating here:

Whether the conduct of Respondent's Crime Lab Director Elliot Kollman, in the course of changing the jobs of Ms. Gretchen Lajoie and Ms. Kim Stevens, constituted "direct dealing" in violation of 26 M.R.S.A. §979-C(1)(A) and (E).

We note that it is not necessary for us to determine whether the Employer's conduct constituted a violation of the collective bargaining agreement or whether it constituted a unilateral change in a mandatory subject of bargaining in order to address the direct dealing charge in this case.

The present case concerns two separate positions at the Crime Lab whose duties were changed in a manner that the Union alleges involved direct dealing. The first issue is the addition of quality manager duties to the position held by Gretchen Lajoie, the subsequent reclassification of that position, and the announcement of that change to the lab employees. The second is the reassignment of supervisory duties in the Latent Prints and Firearms sections of the Lab, the discussions with employees in that unit concerning who would assume those duties, and the subsequent reclassification of the affected position.

The Employer argues that the charge regarding Lajoie's position must be dismissed as untimely. The Employer is correct in arguing that the Board is prohibited from relying on evidence of events occurring more than 6 months prior to the filing of the complaint. The State Employees Labor Relations Act states, ". . . no hearing shall be held based upon any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint" 26 M.R.S.A. §979-H(2). The Board's long-standing standard for applying that provision is that the six-month statute of limitations "begins to run when the complainant knew, or reasonably should have known, of the occurrence of the event which allegedly violated the Act." Coulombe v. City of South Portland, No. 86-11, at 8 (Dec. 29, 1986).

The complaint in this case was filed on February 26, 2009, which means the violation must be based on events occurring on or after August 26, 2008. With respect to the charge involving Lajoie's position, most of the actions alleged to be direct dealing occurred in July or early August, outside of the six-month limitation period. The record is clear that the Union did not know of the events until September 10, 2008, when an employee showed the union field representative a copy of the email stating

that Lajoie was the Lab's new quality manager. We agree with the Union that given the facts of this case and the nature of the alleged infraction, the Union cannot reasonably have known of the handling of the quality manager functions any earlier. Thus, we reject the Employer's argument that this portion of the complaint is untimely.

As noted above, for conduct to be considered direct dealing there must be something more than communication of a decision already made. With respect to Gretchen Lajoie and the quality manager functions, there was no communication about wages, hours, or working conditions beyond Kollman's statement that Lajoie would be given additional duties and that he would submit a reclassification request. There was no evidence that Kollman sought any input from Lajoie on, for example, which duties she would assume, or how it would impact her wages or hours. There is no evidence in the record that Kollman negotiated in any manner with Lajoie about submitting a reclassification request. The evidence is only that Lajoie communicated to Kollman her concern about his reclassification request jeopardizing her chances of receiving back pay from the reclassification request she filed in 2005.

We do not consider Kollman's request for information on how much time Lajoie spent on various duties to be the sort of communication that constitutes direct dealing. Even though it might have an end result of a change in pay grade, it was merely a request for the factual information necessary for the completion of the reclassification request form. There was no attempt to solicit from Lajoie suggestions or sentiments about any mandatory subject of bargaining. Kollman was just processing the information. We are also not persuaded by the Union's claim that the communication with Lajoie regarding the effect on her

pending reclassification request was direct dealing. Article 53 of the collective bargaining agreement allows reclassification petitions to be submitted by either management or the employee, so it cannot be said that this interchange involved a proposed change in a mandatory subject of bargaining.

The Union contends that Kollman's email to the Laboratory staff with the announcement that Lajoie was the new quality manager was sent in response to Lajoie's expressed displeasure with how the news was getting out. Even if the evidence were clear that her comment prompted him to send the email, which it is not, that is not direct dealing. There is no evidence that the delayed announcement of a decision on the assignment of duties had any impact on a mandatory subject of bargaining.

With respect to the reassignment of supervisory duties in the Latent Prints and Firearms section, the Union argues that the Director engaged in direct dealing with various employees through the interview process. We disagree. Kollman decided on his own which duties would be assigned. There is nothing in the record to suggest that he negotiated with any of the three interviewing employees about which supervisory duties would be assigned, about the workload, or the level of responsibility to be added, nor was there any negotiation about wages. The email he sent out to determine who was interested clearly stated that once the new duties were assigned, he would submit a reclassification request. Article 53 of the collective bargaining agreement clearly allows management to submit a reclassification request. The evidence is clear that once the request was submitted, it would be processed by the Bureau of Human Resources as all such requests are processed. As the Director of the Lab, Kollman had no authority to decide its outcome.

The Union contends that the Director "communicated with employees themselves to work out how, when and what promotion-by-reclassification would be realized." MSEA Brief at 20. The Union's attempt at characterizing an interview as negotiating with employees by saying the employees were "giving input as to their own qualifications" and therefore it was "involving them in the decision of what the change would be," MSEA Brief at 22, is a distortion of what negotiations are. Kollman was simply seeking information from the employees on their ability to handle supervisory responsibilities. The Union's position on this issue would transform into direct dealing any effort by management to make a decision on the basis of information provided by employees, rather than finding direct dealing when the employer solicits employee sentiments on a proposed change in a mandatory subject of bargaining.

We conclude that the Union has failed to prove that the Crime Lab Director engaged in direct dealing in changing the job duties of Gretchen Lajoie and Kim Stevens. The changes in job assignments were made unilaterally and the subsequent reclassification requests reflected those changes. None of the interactions Kollman had with these employees included any attempt at give-and-take negotiation. Neither the reassignment of duties to these two employees nor the handling of the reclassification requests constituted direct dealing.

It is not our role to determine whether there was a violation of the contract or whether the State's reclassification procedures were properly followed or administered by the State's Bureau of Human Resources or the Crime Lab Director in this specific case. We recognize, however, that the Union has a legitimate concern about the possibility that tight budgets in the future across state government may prompt individual managers

to reassign higher level duties and seek a reclassification after doing so. We think it is the parties' responsibility to raise this issue at the bargaining table and find a solution through negotiation.

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 that the prohibited practices complaint filed by the Maine State Employees Association is dismissed.

Dated at Augusta, Maine, this 9th day of July, 2010.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. § 979-H(7) 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.

/s/_____
Peter T. Dawson
Chair

/s/_____
Richard L. Hornbeck
Employer Representative

/s/_____
Carol Gilmore
Employee Representative