STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 10-10
Issued: September 13, 2010

CHRISTOPHER E. ROY, Complainant, v. TOWN OF FRYE ISLAND, Respondent.	ORDER ON MOTION TO DISMISS

The prohibited practice complaint filed on November 3, 2009, by Christopher E. Roy alleges that the Town of Frye Island violated the Municipal Public Employees Labor Relations Law (the "Act") by discharging him for trying to organize a union, in violation of 26 M.R.S.A. §964(1)(B). The complaint further alleges that the Town's action interfered with, restrained or coerced him in the exercise of his rights protected by 26 M.R.S.A. §963 in violation of §964(1)(A). The Town argues that because the Complainant is not a public employee within the meaning of the Act, he does not have standing to file a prohibited practice complaint with the Board and his complaint must therefore be dismissed.

Throughout this proceeding, Complainant Roy has represented himself, while Marshall J. Tinkle, Esq., has represented the Town of Frye Island. The Town's Response to the complaint was filed on November 25, 2009, and included a request for a deferral of any further action until May 1, 2010. The grounds for this request were, as stated in the response:

> The Town of Frye Island is a seasonal community which is closed down from November until May of each year. This fact is conceded by Claimant (*see* "Interesting

> Island Facts"[1]). Key witnesses will be out-of-state until approximately May 1, 2010. Consequently, Respondent will not be in a position to participate in any testimonial hearing before May 1, 2010. Under these circumstances, a brief delay until May of 2010 is in order.

After consulting with the Complainant, the Executive Director granted this request.

In due course, a prehearing conference was held on April 26, 2010, with Board Chair Peter T. Dawson presiding. As required by MLRB Rule Ch. 12, §10, the parties presented the documentary evidence they intended to introduce at the hearing, identified witnesses, and discussed various issues related to the presentation of their cases. The Complainant stated that he had requested a number of documents from the Town which had not been provided to him. The Prehearing Order issued on April 29, 2010, authorized the Complainant to request a subpoena for those documents that the Town was unwilling to provide voluntarily. In addition, the Prehearing Order indicated that the Town would review the issue of whether the Complainant was excluded from the definition of public employee under the Act and would inform the Board of its position in a timely fashion.

On May 19, 2010, the Board received the Complainant's request for a subpoena for an extensive list of documents from the Town. The Executive Director arranged with the parties to hold a telephone conference call to develop an orderly procedure for considering the request. Three conference calls were held

[1]Complainant's prohibited practice complaint consisted of the PPC form and the required concise statement of facts. Attached to the complaint was a 4-page document written by the complainant with headings of "Work History" (half page), "Interesting Island Facts" (half page), and "Narrative of What Happened" (3 pages).

between May 25, 2010, and June 14, 2010. As requested during the second conference call, the Complainant specified what he intended to establish through each of the requested documents. From there, the parties were able to make stipulations, the Complainant's request was narrowed somewhat, and the Town provided the remaining information. In the final conference call of June 14, 2010, the Complainant stated that the Town had provided sufficient information to satisfy his request for the production of documents so a subpoena was no longer necessary.

During the June 14, 2010, conference call, the parties also agreed that the threshold issue of whether Mr. Roy is a public employee within the meaning of the Municipal Public Employee Labor Relations Law should be presented to the Board as a preliminary matter. A schedule was established in which the Town would frame the issue as a Motion to Dismiss to be submitted, with supporting argument, by June 29, 2010. The Complainant would be permitted the opportunity to submit a response, and the Town could then submit a reply.

The Motion to Dismiss submitted by the Town included an incorporated memorandum of law, a copy of a 1990 MLRB decision, two affidavits and three exhibits all purporting to deal with the questions of seasonal employment status. Complainant Roy submitted a Response to the Motion to Dismiss on July 21, 2010, with four exhibits. The Complainant's Response disputed a number of the factual assertions made in the Town's affidavits and made various legal arguments concerning the seasonal employment question. The Town filed a Reply on August 2, 2010, which included three exhibits and two supplemental affidavits addressing factual assertions made by the Complainant regarding

his employment history with the Town.[2]

DISCUSSION

Procedurally, the Board is now presented with a purely legal question to resolve: Is Complainant Roy a seasonal employee excluded from the definition of public employee under 26 M.R.S.A. §962(6)(G), and therefore without standing to file a complaint with this Board? Chapter 12, section 10(7) of the Board's Rules and Procedures is a flexible rule allowing the Board to answer this limited question of standing. Section 10 establishes the procedures for all aspects of the prehearing conference and includes a mechanism to address purely legal matters.

> **7. Dispositive Legal Issue.** If it appears to the prehearing officer that the determination of a legal issue will resolve the dispute and render a fact hearing unnecessary, the prehearing officer may order a severance and fix a briefing schedule to enable the Board to first determine the legal issue. If the date for a fact hearing has already been set by the executive director, the prehearing officer may order that the hearing be rescheduled.

MLRB Rule, Ch. 12 §10(7).

This particular rule enables the Board to decide a case strictly on the basis of the factual assertions of the complaint, which the Board does in the same manner that a court would decide a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) Maine Rules of Civil

[2]After receiving the Town's Reply, the Complainant contacted the Executive Director of the Board asking if he could submit further argument to contest factual assertions made in the Town's Reply. The Executive Director told the Complainant that he would be allowed to submit material to the Board (with a copy to the Town), but there was no assurance that the Board would consider it. The Board was informed of the submission, but chose not to review it. This final submission addressed factual assertions made regarding Mr. Roy's rate of pay and job duties, but did not dispute any of the facts we have listed below.

Procedure. See, e.g., MSAD #46 Educ. Assoc./MEA/NEA v. MSAD #46, No. 02-09 at 3-4 (July 3, 2002)(dismissing the complaint for failure to allege facts that would be a violation of the Act); Wood v. Maine Education Assoc. and Maine Technical College System, No. 03-06 at 18-19 (June 14, 2004)(holding that the facts alleged a potential violation and an evidentiary hearing was needed). In addition, the MLRB Rule 10(7) allows the Board to rule on a case when the parties have agreed to present a stipulated record and their respective legal arguments to the Board. Duren v. Maine Education Association, No. 09-06 (June 25, 2009).

In the present case, we are faced with factual allegations in the sworn complaint, admissions in the Town's response to the complaint, stipulations, and various assertions made in affidavits and briefs supplied to the Board as part of the present Motion to Dismiss. Nevertheless, the bulk of the material submitted to the Board has no bearing on the legal issue of whether complainant is a seasonal employee.

We will treat the present Motion to Dismiss in the same manner as a Motion to Dismiss for failure to state a claim upon which relief may be granted. Thus, we will assume the material allegations of the complaint are true and consider the complaint in the light most favorable to the complainant to determine whether the complainant has standing to file a prohibited practice complaint. See, e.g., Buzzell, Wasson and MSEA v. State of Maine, No. 96-14 (MLRB Sept. 22, 1997), citing Brown v. MSEA, 690 A.2d 956, 958 (Me. 1997). Another way of describing this standard is to ask if, consistent with those facts alleged in the complaint, there is any set of facts that the Complainant could prove in an evidentiary hearing that would demonstrate that the

seasonal employee exclusion does not apply to him.[3] When the allegations in the complaint are more than simply factual allegations but are legal conclusions, however, we are not bound to accept those legal conclusions as true. See, Bowen v. Eastman, 645 A.2d 5, 6 (Me. 1994).

A typical motion to dismiss for failure to state a claim involves an analysis that considers only the allegations in the complaint. In this particular case, we will take a hybrid approach and also consider a limited number of undisputed facts that are apparent from the various submissions accompanying the present motion. Our objective is to focus our analysis on only those undisputed facts that are material to the legal issue presented of whether the Complainant has standing to file a prohibited practice complaint. The undisputed facts are:

> 1. The Town of Frye Island is a seasonal community that is closed down from November to May of each year. (See PPC Facts #3, Response to PPC p. 2)
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> 2. The Town's Ferry Service runs from late April to the beginning of November of each year. Some ferry service employees and public works employees work from mid-April to mid-November to facilitate opening and closing of the Island. (See PPC Facts #3, PPC Work History and Interesting Island Facts, Town Motion to Dismiss pp. 1-2)
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> 3. The Town Office is moved to the ferry trailer on the

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[3]The Board has described this point further with: "It is not enough to make an assertion that additional facts to be proved at hearing will support a claim. The complaint must allege facts which state a claim for relief. While we do not demand excruciating detail or the use of any particular magic words, there must be at least a general statement of facts which, if true, would entitle the complainant to relief." MSAD #46 Educ. Assoc. v. MSAD #46, No. 02-09 at 10 (July 23, 2003).

mainland when the ferry service stops. Only a small number of town employees work year-round, one of which is the Comptroller/ Accountant who handles the Town's finances from the trailer office. (See PPC Interesting Island Facts, Town Mgr. Affidavit dated July 28, 2010)

4. Mr. Roy worked for the Town's ferry service through an employment agency from August through October of 2006. (See PPC Work History, Town Reply Memorandum dated July 30, 2010)

5. Mr. Roy was hired directly by Frye Island in 2007 to work for the ferry service and worked from April 10 through November 13, which included a few days before and after the official opening and closing of the Island. (See PPC Work History, Town Reply Memorandum dated July 30, 2010)

6. Mr. Roy was hired directly by Frye Island in 2008 to work for the ferry service and worked from April 14 through November 7, which included a few days before and after the official opening and closing of the Island. (See PPC Work History, Town Reply Memorandum dated July 30, 2010)

7. Mr. Roy was hired directly by Frye Island in 2009 to work for the ferry service and worked from April 13 until his termination on July 6, 2009. (See PPC Work History, Town Reply Memorandum dated July 30, 2010)

Turning to the issue before us, the question presented is whether the Complainant is authorized by the Municipal Public Employees Labor Relations Law to file a prohibited practice complaint with the Board. Section §968, sub-§5 of the Act is the Board's only statutory authority to hear and decide prohibited practice complaints. Paragraph B of that subsection begins:

> B. Any public employer, any public employee, any public employee organization or any bargaining agent which believes that any person, any public employer, any public employee, any public employee organization or any bargaining agent has engaged in or is engaging in any such prohibited practice may file a complaint with the executive director of the board stating the

charges in that regard. . . .

As the Complainant is not a public employer, a public employee organization or a bargaining agent[4], the only way the prohibited practice complaint can be heard by this Board is if the Complainant is a "public employee."

The definition of public employee does not mean simply any person employed by a public employer. Section 962, sub-section 6 of the Act expressly excludes a number of categories of employees from the definition of "public employee."

> 6. Public employee. "Public employee" means any employee of a public employer, except any person:
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> A. Elected by popular vote;
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> B. Appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, except that appointees to county offices shall not be excluded under this paragraph unless defined as a county commissioner under Title 30-A, section 1302; or
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> C. Whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head, body, department head or division head; or
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> D. Who is a department head or division head appointed to office pursuant to statute, ordinance or resolution for an unspecified term by the executive head or body of the public employer; or
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> E. Who is a superintendent or assistant superintendent of a school system; or

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[4]26 M.R.S.A. §962(2) defines this term: "'Bargaining agent' means any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with employers, and which has been determined by the public employer or by the executive director of the board to be the choice of the majority of the unit as their representative."

> F. Who has been employed less than 6 months.
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> G. Who is a temporary, seasonal or on-call employee; or
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> H. Who is a prisoner employed by a public employer during the prisoner's term of imprisonment, except for prisoners who are in a work release program or on intensive supervision under Title 17-A, section 1261 or supervised community confinement pursuant to Title 34-A, section 3036-A.

Consequently, if the Complainant is a seasonal employee, then the prohibited practice complaint must be dismissed pursuant to §968, sub-§5(B), because, by definition, he is not a public employee. In a comparable case filed with this Board under the State Employee Labor Relations Act, the Board dismissed an employee as a complainant because that employee was excluded from the definition of "state employee" under that Act because she had less than six months of employment. MSEA and Elizabeth McKenney v. Maine State Library, No. 01-21 at 3 (August 16, 2001). The ability to file a complaint under the State Act is limited in the same manner as §968(5)(B), so the same analysis should apply under the Municipal Act. See 26 M.R.S.A. 979-H(2).

The statute does not define the word "seasonal", nor has the Board specifically focused on the meaning of this term in any decision. The Board has, however, shed light on the meaning of "seasonal" in dicta. In AFSCME v. Town of Sanford, the Board observed that it is the nature of the employment, not simply the duration of employment, that determines whether an individual is a temporary, seasonal or on-call employee. AFSCME v. Town of Sanford, No. 90-07, at 14-15 (June 15, 1990). In that case, the union argued that an employee who had been employed for a total of 12 months over a 15-month span was a public employee because his total employment had exceeded six months. The individual had

been employed first as a seasonal employee, then a temporary employee, then again as seasonal after a 3-month break. The Board rejected the union's argument:

> [W]e will not ordinarily find a truly seasonal, temporary or on-call employee whose tenure with a public employer exceeds six months to be a public employee within the meaning of the MPELRL solely on the basis of the completion of six months' employment. [fn] On the other hand, we have in appropriate circumstances determined that otherwise covered employees who have not accumulated six months of employment because of a public employer's prohibited practices are not appropriately excluded from the MPELRL's coverage.

No. 90-07 at 14-15.[5] Thus, whether an employee is a seasonal employee, a temporary employee, an on-call employee, or has been employed less than six months are distinct questions that must be asked and answered independent of each other.[6]

Other Board decisions suggest that the plain meaning of "seasonal" should apply in defining seasonal employment. The

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[5]In the present case there is no allegation that the Employer was trying to circumvent the Act by classifying Mr. Roy or any other employee as a seasonal employee so as to deny him any rights under the Act.

[6]We note that during the 1970's this Board considered the completion of six months of service to be enough to demonstrate that an employee should not be excluded as a temporary employee. See, e.g., AFSCME and City of Bangor, No. 79-A-02 (Oct. 17, 1979), affirming No. 79-UC-05. The Board subsequently realized that seasonal, temporary and on-call are each separate from 6 month exclusion. "By use of the disjunctive conjunction 'or' the MPELRL separately and distinctly excludes from statutory coverage each of the status groups mentioned in 26 M.R.S.A. § 962 (G)(1988), in addition to employees who have achieved less than six months of employment." Council 93, AFSCME, et al. v. Town of Sanford, No. 90-07, at 14-15 (June 15, 1990); AFSCME and State of Maine, 89-UC-07 (Aug. 10, 1990), aff'd State of Maine v. AFSCME Council 93, MLRB No. 91-UCA-02, (Feb. 12, 1991), aff'd No. CV-91-143 (Me. Super. Ct., Ken. Cty., Aug. 6, 1991), aff'd sub nom Bureau of Employee Relations v. Maine Labor Relations Board, 611 A.2d 59 (Me. 1992).

plain meaning of seasonal is that the employment must have some aspect of seasonality, that is, be tied to some period of the year, whether it be an astronomical season, a crop, a sport, an activity, or some other feature beyond the control of the employer.[7] In an early appeal of a unit clarification matter, the Board addressed this issue in determining whether various temporary and seasonal employees who had been employed for extended periods should be included in an existing bargaining unit. AFSCME and City of Bangor, No. 79-A-02 (Oct. 17, 1979) at 2, affirming No. 79-UC-05. In discussing two facts the Board considered important in its analysis, the Board indicates that it used the plain meaning of seasonal that we have identified above. First, the Board states,

> The record does not indicate that employees holding the "Temporary" or "Seasonal" classification have ever been hired on a temporary or seasonal basis, i.e., hired only to work on a particular project or to work during a particular season of the year, with the understanding that employment would be terminated when the project was completed or the season over.

79-A-02 at 2. Later, the Board discusses the employer's misuse of these terms with,

> After the last contract was executed in late 1976, however, the employer's use of "Seasonal" employees changed dramatically: the titles "Temporary" and "Seasonal" sometimes became factually misleading since for the first time many employees in these categories became long term. In addition, many employees began working through the winter from year to year and essentially year-round. Finally, the increased use of "Seasonal" employees as long-term employees, plus the new use of these employees throughout the year

[7]This element of control is important, as it precludes a school from claiming that school-year employees should be excluded because they are employed only during the school "season." The school calendar is controlled by the school committee.

> coexisted with a decrease in the number of year-round "permanent" employees in the unit.

79-A-02 at 3-4.

We conclude that the undisputed facts in this case demonstrate that the Complainant was a truly seasonal employee and therefore lacks standing to file a complaint with the Board. Applying the plain meaning of the term seasonal, there is no question that the Complainant was, in fact, a seasonal employee. The Complainant was employed to work for the ferry service on a seasonal basis, and that season was the ferry season. The season was dictated by the limitations imposed by Mother Nature and was an understood condition of employment. The fact that the ferry season was longer than just the summer is not significant, as there is nothing in the statute suggesting that the term seasonal was intended to have such a restrictive meaning.

The Complainant argues that his status is not seasonal because he was employed in consecutive years and that he had a reasonable expectation of being re-hired each spring. "Reasonable expectation of continued employment" is a concept that is relevant in distinguishing a truly temporary employee from one employed as a permanent or non-temporary employee. See AFSCME v. Town of Sanford, No. 90-07 at 14 (June 15, 1990)(concluding employee who was at different times a temporary and seasonal employee had no reasonable expectation of continued employment) and Teamsters Union Local 340 and City of Presque Isle, No. 92-UD-10 (August 18, 1992)(employee working in a temporary assignment was not excluded as a temporary employee because she was promised that when the project was completed she would be able to return to her former position). If "reasonable expectation of continued employment" were expanded to also include "reasonable expectation of recurring employment", the

test would swallow up the seasonal employee exclusion entirely. Furthermore, if reasonable expectation of continued employment were used to determine the status of a seasonal employee, we would essentially be making two categories out of one--a seasonal employee who would be excluded and an employee regularly employed on a seasonal basis who would not be excluded. There is no basis in the statute for making such a distinction.

In summary, we conclude that the Complainant was a seasonal employee within the meaning of 26 M.R.S.A. §962(6)(F) and is therefore not a "public employee" authorized to file a complaint under 26 M.R.S.A. §968(5). The Complainant does not have standing to file a prohibited practice complaint with the Board and the Complaint must be dismissed.

ORDER

On the basis of the foregoing findings of fact and discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §968(5), it is hereby ORDERED that the complaint is dismissed.

Dated at Augusta, Maine, this day of September 2010.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. §968(5)(F) (Supp. 2009) 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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Carol B. Gilmore
Employee Representative