STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 15-10
Issued: June 4, 2015

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 4, LOCAL LODGE 559, Complainant, v. TOWN OF MADISON, Respondent.	DECISION AND ORDER

The International Association of Machinists and Aerospace Workers, District Lodge 4, Local Lodge 559 ("Union" or "Machinists Union") filed this prohibited practice complaint on August 28, 2014, against the Town of Madison, alleging that the Town violated 26 MRSA §964(1)(E) of the Municipal Public Employee Labor Relations Law ("Act"). Specifically, the complaint alleges that the Town failed to bargain in good faith by refusing to grant customary annual wage increases while the first contract with the Machinists Union was being negotiated.

An evidentiary hearing was held on January 15, 2015. Grand Lodge Representative David Lowell represented the Machinists Union and Matthew Tarasevich, Esq., represented the Town of Madison. Both parties were able to examine and cross-examine witnesses, to offer documentary evidence at the hearing, and to submit written argument. Chair Katharine I. Rand presided at the hearing, with Employer Representative Christine Riendeau and Employee Representative Robert L. Piccone serving as the other two members of the Board. The parties' post-

hearing briefs were both filed by March 13, 2015, and the Board deliberated this matter on April 8, 2015.

JURISDICTION

The International Association of Machinists and Aerospace Workers, District Lodge 4, Local Lodge 559, is a bargaining agent within the meaning of 26 MRSA §962(2), and the Town of Madison is the public employer within the meaning of 26 MRSA §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 MRSA §968(5).

FACTS

1. District Lodge 4 of the Machinists Union was recognized as the bargaining agent of administrative employees of the Town of Madison on March 5, 2014. Mr. George Edwards, a business agent for the Machinists, had been the lead negotiator for the administrative employees' bargaining unit at all times relevant to this complaint.

2. Madison had given its employees a wage increase on July 1 every year for at least 13 years, with the exception of one year. While these increases were generally referred to as "COLA" increases, they were not COLA's in the sense of being tied to the consumer price index or other figures published by the U.S. Bureau of Labor Statistics. The "COLA's" provided by the Town of Madison were the only across-the-board wage increases provided to its employees. Longevity pay increases had also been provided to employees upon reaching specified milestones of service.

3. Mr. Jack Ducharme, Vice Chair of Madison's Board of

Selectman, is currently serving as the Acting Town Manager. Mr. Ducharme described the process for determining the annual raise as: Early in the spring of each year, the Town Manager looks at what the economic conditions are in the area, what other towns are offering for raises, what circumstances the Town is in with respect to the budget, what the Town must do, and other matters affecting the Town finances. The Town Manager then brings to the Board of Selectmen a proposal for a wage increase for the town employees. The Board of Selectmen reviews that proposal to determine whether to accept it or not, depending on their assessment of the circumstances in Town and what the taxpayers can afford.

4. Ms. Nancy Gove, a Town employee who provided clerical support to the Town Manager for the past 10 years, was responsible for preparing budgetary spreadsheets that he used in preparing the budget every year. The spreadsheet was developed by taking the wages as of the end of the fiscal year, adding the proposed cost-of-living adjustment, adding any longevity increases due and any other pay increase.[1] These final figures in the spreadsheet show the pay increases for each individual, and can be identified by that person's initials.

5. For FY 2014-15, the Town followed the same practice for determining wage increases. As part of the budget, the Board of Selectmen approved a 2% "COLA" wage increase for all employees. The wage increase was provided to the

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[1] She mentioned "merit or other pay increase," but it did not appear that she meant there was some formal or informal process for granting merit increases. Given that there was nothing in the record even suggesting merit awards, perhaps she was referring to wage adjustments due to changed job duties.

unrepresented employees, but not to the employees in the administrative bargaining unit.

6. There was no testimony or evidence showing the specific amount of wage increases provided to employees historically, although it was undisputed that the increases varied in amount and an increase had been provided every year except 2010. George Edwards did not have specific figures, but painted a general picture by stating that the increases had been "a 2 %, a 1.5, a 3 %" increase.

7. In 2010, prior to the Machinists becoming the bargaining agent for two units of Town employees, the employees received no wage increase. Ms. Maddie Pierce, one of the employees in the administrative unit, testified that the Town was considering a budget that provided a wage increase, but also included an increase in the employee contribution to the costs of health insurance. A group of unrepresented employees met with the Town Manager and the Board of Selectmen and requested that health insurance costs be maintained at the current level in lieu of a wage increase.[2] This request was granted, so the amount of wage increase for that year was 0%.

8. The Town of Madison Personnel Policy is a 23-page document specifying various policies under the general categories of employment practices; employee benefits; hiring, promoting, exiting requirements; and employee development. These policies do not include any provision on annual wage or "COLA" increases.

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[2] Ms. Pierce testified that prior to unionizing, the employees had the opportunity to sit down with the Select Board and the Town Manager and present their requests.

9. Two of the policies contained in the Town's Personnel Policies were amended by a vote of the Board of Selectmen on January 12, 2015. The health insurance policy was changed to increase the employee's contribution toward the costs of family coverage from 15% to 25%. The longevity payment was changed from a percentage increase in the employee's base wage to a lump sum payment of $1000.00 at the specific service milestones. The employees in the administrative bargaining unit have continued to receive the level of benefits described in the Personnel Policy that was in effect in March of 2014, when the Union was recognized as the unit's bargaining agent.

10. The Union and the Town held their first negotiating meeting for their initial collective bargaining agreement on July 8, 2014. Mr. Edwards testified that he made clear to the Town's negotiating team both during the negotiation session and in a side conversation in a different room that the Union's position was the status quo must be maintained while the parties were negotiating. Mr. Rick Gilley, another business agent for the Union since April of 2014, and Ms. Pierce, a member of the Union's negotiating team, both testified Mr. Edwards brought up the issue of maintaining the status quo during negotiations while both teams were present.

11. Mr. Ducharme attended the first negotiating session as a member of the Town's bargaining team. He did not recall discussion about the status quo regarding pay increases at the initial bargaining meeting, but did recall such a discussion with respect to health insurance.

12. The parties stipulated that no demand to maintain the status quo with respect to wages was made in writing.

13. At this first negotiating session, the parties established ground rules for their negotiations. In addition, the Union presented its initial bargaining proposal. The Town did not present a bargaining proposal to the Union or a counter-proposal at this bargaining session.

14. On August 27, 2014, the Town's attorney sent an email to George Edwards with a marked-up copy of the agreement that had been ratified by the Highway department unit, stating

> Here is the Town's proposal for Admin. The town's position is that we'd like to have the same contract with Admin as we have with HW, particularly with regard to COLA increases, health insurance and longevity, and with changes that are appropriate for the Admin unit. Your proposals at the initial Admin negotiation session also generally tracked the HW CBA language, so it seems we are both in agreement on format. Now that we've gotten HW done, we hope that we can quickly move on Admin.
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> Here's what I propose. Please share this proposal with your members. If they are agreeable to tracking the highway CBA, perhaps you and I can get this done by phone and email. If you think a meeting is required, please let me know and we'll look at our schedules, maybe for later next week or the following week.
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> I'm also sure you're aware of what happened with regard to the valuation of the mill in Madison last week. I'm not sure what the fallout of that is going to be yet, but I've spoken with Dana and he tells me that regard-less of that the town would still like to offer the admin employees the same deal as public works employees.

15. The "HW CBA" mentioned in the email from the Town's attorney refers to the Highway Department collective bargaining agreement that was settled sometime in June 2014. The Machinists Union was the bargaining agent for that unit, and the negotiations for their initial agreement took two or three years. During that period, the Town did not give the

highway unit employees annual wage increases. Mr. Edwards, a negotiator for this bargaining unit for over a year prior to settlement,[3] testified that the Town went back and forth at the table on whether the pay increase would be retroactive. Mr. Edwards testified that Union Representative Lowell came into the negotiations for the Highway unit toward the end and had an extensive back-and-forth exchange with the Town Attorney on the status quo obligation. The Town made it clear that its position was that the obligation to maintain the status quo did not include providing the annual wage increase. Mr. Edwards had considered filing a complaint with the Board on the Town's failure to pay the wage increases during negotiations, but decided against it as the parties neared settlement.

16. The collective bargaining agreement ratified by the Town and the Union acting as the bargaining agent for the Highway Department was a 3-year contract with an effective date of July 1, 2014. For the first year of the agreement, that is, for FY 2014-2015, the parties agreed to a 2% wage increase. For health insurance, the Town continued to pay 100% of the employee's coverage, but the employee contribution to family coverage increased from 15% to 25% for the first year of the agreement. In addition, the longevity benefit was changed from a percentage increase to the base wage to a lump sum payment.

17. The collective bargaining agreement for the Highway unit included retroactive payment of wage increases going back two years: 2.5% for 2012-13 and 2% for 2013-14.

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[3] The Union had a succession of different bargaining representatives covering this unit during the negotiation process.

18. The Town Attorney's email of August 27, 2014, referred to the mill devaluation that occurred on August 11, 2014. The $150 million devaluation of the Madison Paper Industries mill is expected to result in a $2.5 million drop in revenues. The Town had passed its budget prior to the mill's devaluation, so the Board has had to cut capital purchases and other expenses as much as they can and draw from the Town's surplus in order to maintain the level of services that the voters approved in the budget. More recently, there was an announcement on January 13, 2015, that the mill would be laying off 150 employees for at least a two-week period.

19. Attached to the Town Attorney's email of August 27, 2014, was a copy of the final contract for the highway department employees that the attorney had marked up to indicate the Town's proposed collective bargaining agreement for the administrative unit. In addition to the changes to the health insurance and longevity benefit, the Town's proposal included the payment of the 2% wage increase retroactive to July 1, 2014.

DISCUSSION

The statutory duty to bargain requires the employer and the bargaining agent to negotiate in good faith with respect to the mandatory subjects of bargaining, that is, wages, hours, working conditions and contract grievance arbitration. 26 MRSA §965(1). A public employer's unilateral change in a mandatory subject of bargaining "is a circumvention of the duty to negotiate which frustrates the objectives of [the Act] much as does a flat refusal." See, e.g., Local 2303, IAFF, AFL-CIO-CLC v. City of Gardiner, No. 05-03, at 4 (March 22, 2005), quoting NLRB v. Katz, 369 U.S. 736, 743 (1962). Consequently, once a bargaining

agent is certified or recognized as the representative of the employees in a bargaining unit, the employer is required to maintain the status quo with respect to the mandatory subjects of bargaining until an agreement is reached or the parties reach bona fide impasse. This principle applies whether a change to the status quo would be adverse or beneficial to the employee. See, e.g., AFSCME v. Bangor Water District, No. 81-46, at 3 (July 2, 1981), citing NLRB v. Katz, 369 U.S. 736, 745-746 (1962). Because a unilateral change is a circumvention of the duty to bargain, it is a per se violation of the duty to bargain, without regard to motivation. See, e.g., Teamsters v. Bucksport School Dep't, No. 81-18, at 5 (Dec. 22, 1980).

In this case, the parties are bargaining for their initial collective bargaining agreement. The question presented is whether the Employer violated the Act by granting a 2% wage increase to Town employees on July 1, 2014, while not providing the increase to employees in the administrative employee bargaining unit. The Employer argues that its obligation to maintain the status quo meant it could not unilaterally increase the wages of the bargaining unit employees; the Union argues that the obligation to maintain the status quo means the employer must continue to grant wage increases that had been regularly and customarily given for years.

This Board has always held that the status quo that must be maintained while negotiating an initial collective bargaining agreement includes the continuation of wage increases if such increases are the result of a well-established practice. In the present case, the parties were attempting to negotiate their first contract. The legal analysis for determining the wage issue before us is that which applies when the parties are

negotiating the first collective bargaining agreement, not a successor agreement.

In the 1979 case Teamsters Local Union No. 48 v. University of Maine, the Board concluded that the University had violated the Act because terminating the established merit increase plan during bargaining for an initial contract was an impermissible "change" in the status quo and consequently a per se violation. No. 79-08 at 5 (June 29, 1979). The merit plan provided a 3½% increase up each step of the pay scale if the annual performance review was successful. The merit plan (available to all employees except those at the top step) had been in effect for each fiscal year for the previous 5 years, with the exception of one year when the Legislature did not provide funding. The Trustees' compensation plan for FY 1978 also included a "Cost of Living" allowance of 4%. The Trustees' compensation plan was designed to provide these two wage increases for all University employees, including the two units filing the prohibited practice complaint, except that faculty and professional staff were to receive a combined 6% increase. This plan was approved in late May and was offered to the respective bargaining agents on the condition that it would be the total compensation improvements for the coming fiscal year.[4] When the two bargaining units rejected the offer in June, the University implemented the compensation plan effective on July 1, 1978, for all employees except those in the two bargaining units.

In concluding that the termination of the merit plan was an unlawful unilateral change, the Board distinguished the circumstances of bargaining for a first contract from the situation in

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[4] The Faculty bargaining unit accepted the proposal.

Easton, a Board case decided just three months earlier. Easton Teachers Association v. Easton School Committee, No. 79-14 (March 13, 1979). In Easton, the Board ruled that following the expiration of a contract, the status quo should not include the continuation of a "built-in wage escalator" while the parties are negotiating a successor agreement. The Board in the University case explained why Easton does not apply when the parties are negotiating their initial contract:

> Sound policy reasons support the different view in the pre-contract period. First, unlike expiring contract provisions, the employees have not had the opportunity to bargain over or agree on wages and working conditions prior to certification. Conditions had been set purely by management policy. Thus there also could be no understanding or agreement on a termination date at which point wage levels might be frozen in the future.
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> In addition, it often takes months for a newly-certified bargaining agent to even formulate its initial bargaining proposals, and potentially years to negotiate an initial contract. In contrast, bargaining on successor contracts takes place during the term of an existing contract and usually involves fewer issues, or simply proposed changes in the existing contract. It would be harsh and unfair to employees, and a windfall to employers, if clear, automatic wage escalator provisions were terminated at the time of bargaining agent certification.

Teamsters v. University of Maine, No. 79-08, at 6.

The Board stated it had "no difficulty" concluding that the University's merit increase plan was a wage and a working condition. The evidence demonstrated that it was a defined plan[5]

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[5] See Board finding #6, noting there are seven wage steps in each wage band and each step is a 3½% increase. Employees move up a step if their annual performance review is successful. Teamsters v. University, No. 79-08, at 2.

that had been in effect continuously since 1973. Id. In contrast, the Board noted that, had the point been argued, it would not have found the annual across-the-board wage increases, "loosely referred to as 'cost of living' ("COL") increases," to constitute a working condition because they were varied, and did not constitute a consistent or automatic increase plan. Teamsters v. University, No. 79-08, at 6. We note now, and will discuss in more detail below, that there was no indication or finding in that case about how the amount of these across-the-board increases were determined.

Two years after the Teamsters v. University case, this Board reiterated that when a newly organized bargaining unit is involved, "the Union must establish that the salary increases sought are a continuation of the pre-certification status quo" to prevail on a charge that the failure to provide pay increases was an unlawful unilateral change. Council 74, AFSCME v. SAD #1, No. 81-12, at 4 (March 11, 1981). In SAD #1, the evidence demonstrated that the pre-certification status quo included an established wage plan under which employees regularly received a step increase on July 1 or upon return to work at the beginning of each school year. SAD #1, No. 81-12, at 2-3, 6. The Employer refused to continue to apply the established step increase wage plan for members of the newly formed bargaining unit while adhering to that plan for all unorganized employees. Id. at 6. The Board held this to be a unilateral change to the status quo that violated §964(1)(E), indicating that it had "no problem in holding that the step increase plan was a wage and working condition because of its continuation over the past few years" and

because written documentation of the plan was provided. Id.[6]

AFSCME v. Town of Brunswick is the most recent case of this Board or any Maine court on the contours of the status quo that must be maintained when a union becomes certified as the representative of the bargaining unit. No. 85-08 (April 19, 1985). The facts of that case are quite similar to the matter before us:

> For several successive years it had been the practice for the Respondent to provide what it called a cost-of-living increase to its unrepresented employees. The amount and form of the increase was not placed in evidence, but the benefit was granted each year effective July 1. The record shows that the town granted a 6 percent increase to its remaining unrepresented employees effective July 1, 1984 but refused a demand of the union to extend that benefit to employees who had become members of the newly organized bargaining unit.

Brunswick, No. 85-08, at 5; see also finding #12 at 3 ("On July 1 in each of several years, including 1981, 1982 and 1983, the Town had granted raises to unorganized employees. The percentages of those past increases were not specified.") The town also refused to move one employee to the next step of the salary grid which would have occurred had her position not been in the bargaining unit. Id. at 5-6.

In Brunswick, the Board expressly rejected the Respondent's argument that the obligation to maintain the status quo meant

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[6] In SAD #1, the Board also addressed the school's failure to provide an across-the-board wage increase to the newly organized employees, concluding that granting the 8% increase to all unorganized employees while withholding it from the organized employees in the new bargaining unit solely because they had unionized was "patently impermissible" and therefore a violation of §964(1)(A). Id. at 7. Thus, that portion of the Board's decision did not require a showing that the increase was a continuation of an established practice.

that wages must be "frozen" pending negotiations for a new agreement. Brunswick, No. 85-08, at 6. The Board explained that while Easton would have required that result if the parties were negotiating a successor agreement, Easton did not dictate the nature of the status quo that must be maintained pending negotiations for an initial agreement.

> . . . [I]n other decisions we have emphasized that where the bargaining unit has been newly organized, the 'dynamic status quo" must be maintained; that is, benefits customarily given or already provided for under arrangements in effect at the time of certification of the bargaining agent must be continued. Council #74, AFSCME, AFL-CIO v. SAD No. 1, MLRB No. 81-12 (1981); Town of Falmouth, supra.[7] Under that principle the employer is obligated to continue its normal and customary practices regarding mandatory subjects of bargaining. Wage and step increases are obviously mandatory subjects of bargaining.

Brunswick, No. 85-08, at 6. In applying this to the facts of the case, the Board went on to hold:

> The record shows that a salary increase had been granted customarily and regularly to non-organized employees on July 1 for several successive fiscal years immediately preceding fiscal year 1984-85 and a 6 percent increase was accorded non-organized employees effective July 1, 1984. Therefore, the same benefit had to be continued for those employees who became members of the newly formed unit. For similar reasons employee Lessard should have received the scheduled step increase on her anniversary date that she would have been entitled to under the arrangements in effect before the Union was certified. Failure to continue these benefits constitutes a per se violation of the Act for which we must order appropriate remedies.

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[7]Falmouth did not address the status quo. Falmouth held that the 120-day notice requirement in §965(1), last ¶, (subsequently amended) applied to both initial and successor bargaining. No. 79-10 at 5.

Brunswick, No. 85-08, at 6.

Beyond the limited issue of wage increases, the principles for determining the status quo of other benefits and working conditions is instructive, as well. One case of particular relevance is AFSCME v. Bangor Water District, No. 81-46 (July 2, 1981), a case in which the employer made unilateral changes to the holiday schedule after the bargaining agent was elected. The Board concluded that making the day after Christmas a holiday was a unilateral change in past practice because the day had never before been a holiday. Id. at 4. The Board also found that the District did not change the established holiday schedule by announcing that the day after Thanksgiving would be a regular work day, even though it had been granted as a holiday in 6 of the previous 9 years. The established practice was that a few days before Thanksgiving, the District would decide whether to make the day a holiday based on the workload and weather conditions. Id. at 2. The Board concluded that the District's decision to not grant the holiday was consistent with its practice, as the workload was heavy and the weather conditions were favorable. Id. at 4. Thus, Bangor Water District recognized that an established practice required to be maintained during negotiations for an initial agreement may be a decision-making process, and not a particular outcome.

Although there is not a large number of Board cases addressing wages increases and the employer's obligation to maintain the status quo when there is a newly organized bargaining unit, a consistent principle runs through the Board's prior decisions. To the extent an employer has an established practice, plan, or process, it is the status quo that must be

maintained.

Having established that Maine law requires the continuation of an established wage increase practice, plan, or process during bargaining for an initial contract, the question presented is whether the evidence supports a finding such a practice, plan, or process had been established sufficiently to justify considering it part of the status quo that must be maintained.

We conclude that the evidence supports a finding that the Town of Madison had an established process for annually determining an annual across-the-board wage increase to be recommended to the Select Board for approval. This process had been in place for at least 13 years, with an increase provided every year except in 2010. The Vice Chair of the Select Board, currently serving as the Acting Town Manager, testified that the process occurs annually with the Town Manager reviewing the economic conditions in the area, the pay raises provided in other towns, budgetary circumstances, and other factors affecting town finances. The Town Manager would then make a wage proposal for the board of selectmen to approve or reject. Although there was no documentary evidence presented that detailed this process, the testimonial evidence describing this process for determining the wage increase to propose to the Selectmen was not disputed.

The process for determining the wage increases is the status quo that the Employer is obligated to maintain while negotiating an initial bargaining agreement. That is the pre-certification status quo. The employees in the newly organized bargaining unit are entitled to have that same process applied

while they are negotiating their first bargaining agreement. Here, the evidence demonstrated that the Town followed the same process as it had for the past 13 years, resulting in the Town's decision that a 2% raise was warranted. The Town gave the 2% increase to the unorganized employees but not to the employees in the new bargaining unit. The only difference between the practice over the past 13 years (including 2010 until the employees spoke up) and what occurred in 2014 is that the newly organized unit did not get the increase in 2014.

This conclusion is similar to our holding in Brunswick, where we held that there was an established practice of providing pay increases to its unrepresented employees every July 1st over several successive years. Brunswick, No. 85-08, at 5. Similarly, our conclusion is consistent with Bangor Water District, where the Board held that the process for determining each year whether to make the Friday after Thanksgiving a holiday was properly maintained by the employer. Here, the Town carried out the established process for determining a wage increase but failed to maintain the status quo when it refused to provide the 2% increase to employees in the newly organized unit. This conduct violated §965(1)(E).

The Board's decision in Teamsters v. University that the COLA portion of the Trustees wage plan was not a condition of employment is distinguishable because of the absence of evidence demonstrating a consistent wage increase plan. The evidence only showed a greatly varied sequence of COLA increases over a few years without any indication there was an established process used to determine the amount of the increase. Teamsters v. University, No. 79-08, at 6 (a "varied series of increases

[...does not ...] constitute a working condition because it is not a consistent or automatic increase plan.").[8] In the present case, the record demonstrates that the established process for determining wage increases was implemented consistently every year for over a decade. That process was implemented again in the spring of 2014 and happened to result in a 2% wage increase for 2014-15.

To state the obvious, it is much easier to identify a regular and customary, or consistent or automatic wage increase plan when there is some written documentation describing it, such as a personnel policy or a chart with written wage bands and defined steps. (See SAD #1 and Teamsters v. University) The absence of documentation does not mean, however, that a practice does not exist. Here, there was no dispute that the practice existed, that it had been implemented regularly and consistently for over a decade. Consequently, it is immaterial that the Town's Personnel Policies do not provide for annual wage increases.

The Town's argument that it should not be required to pay the annual wage increase to this unit because it is "discretionary" confuses the process for determining wage increases with the outcome of that process. It is not the 2% increase that is "scheduled" or "customarily or regularly" granted by the Town. Had the Town decided that a 0% increase was warranted, there

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[8] It is instructive to note that during the 1970's and early 1980's, COLA clauses in collective bargaining agreements were relatively common, especially in major employers in manufacturing industries. Such COLA's typically used a formula to tie wage increases to changes in the Consumer Price Index (CPI) on a predetermined schedule. See, "Cost-of-living Clauses: Trends and Current Characteristics", by Janice M. Devine, Compensation and Working Conditions, December 1996 (U.S. Dept. of Labor, Bureau of Labor Statistics).

would have been no violation as long as the unorganized employees been treated the same as the employees in the newly organized bargaining unit. It is the annual process of determining whether a wage increase will be paid (and, if so, how much) that the Town is required to continue. And this process in fact did continue, resulting in approval for a 2% pay increase for FY 2014-2015. When the Town, pursuant to this process, exercised its discretion to pay a 2% increase, the Town was required to pay that increase to the employees in the newly organized bargaining unit.

The Employer also contends this case is governed by the Law Court's holding in Board of Trustees of the University of Maine System v. COLT, 659 A.2d 842 (Me. 1995). As explained above, however, the Board has long distinguished between the negotiation of an initial agreement, where the established practice determines the status quo, and negotiation of a successor agreement, where the expired collective bargaining agreement serves as evidence of the status quo that must be maintained. See, e.g., MSEA v. Lewiston School Dept., No. 09-05, at 7, aff'd, AP-09-001, (Oct. 6, 2009, Androsc. Sup. Ct, Delahanty, J.). By its terms, COLT applies to successor negotiations only. 659 A.2d at 844. ("The definition of status quo at the expiration of the collective bargaining agreement is at the crux of this case.")

The Law Court recently revisited the teaching of COLT in City of Augusta v. Maine Labor Relations Board et al., 2013 ME 63, a case, like COLT, involving the status quo following the expiration of the agreement. There is nothing in City of Augusta that suggests that the analysis in COLT applies to a newly organized bargaining unit--every reference by the Court to the status quo specifically limits it to the status quo

following the expiration of the agreement. The analysis is different in post-expiration situations because the expired collective bargaining agreement serves as evidence of the status quo that must be maintained. See, e.g., MSEA v. Lewiston School Dept., No. 09-05, at 7, aff'd, AP-09-001, (Oct. 6, 2009, Androsc. Sup. Ct, Delahanty, J.). COLT does not apply to the status quo that exists when the parties are negotiating their first agreement, where there is no expired contract. The established practice determines the status quo; in this case that practice included the Town's express approval of the increase for FY 2014-15.

The Town contends that requiring it to pay employees in a newly-formed bargaining unit pay increases "that were never bargained for" would "shift the power dynamic to the Union" (Town Br. at 6, 7). There is no question that a wage increase is, as the Town states, "a bargaining chip at the negotiating table that can be traded for something else of value, be it health care contribution percentages, an additional paid holiday, or a change in vacation accruals." But the same could be said for longevity pay, or any number of things the Town concedes must continue during negotiations for an initial agreement. These arguments are not relevant to the determination of what constitutes the status quo; they merely describe the consequences *of* having one's rightful bargaining chip taken away, as the Union contends the Town did here.

The Employer also argues that it was not obligated to pay the wage increase to the newly organized unit because the Union's bargaining team never specifically demanded the Employer pay the annual wage increase and/or because the parties had a "mutual understanding" that the status quo did not include the

wage increases, based on what transpired during the highway department negotiation. The legal obligation to maintain the status quo exists without regard to a specific demand to bargain, unless the union has clearly and unmistakably waived its right to bargain. State v. Maine State Employees Assoc., 499 A.2d 1228, 1232 (Me. 1985) (waiver of a statutory right must be clear and unmistakable). There was no evidence of waiver in this case and so the Union's alleged failure to request the status quo be maintained is not relevant to the outcome. We similarly reject the notion that the administrative unit could or should be charged with the conduct or negotiating positions taken by another unit.

A final argument that runs through the Town's brief is the notion that the Town was able to provide a 2% wage increase only because it was able to shift some of the costs of health insurance onto the employees through reductions in other benefits. The Town argues that the budgetary constraints are even more pronounced due to a major loss of revenue resulting from the devaluation of the paper mill announced on August 11, 2014.

The Town offered evidence that the collective bargaining agreement settled with the Highway Department bargaining unit in June, 2014, included both the 2% wage increase effective July 1, 2014, and an increase from 15% to 25% in the employee contribution to the cost of health insurance for family members. The Town also introduced evidence that the same increase in health insurance costs was imposed on other employees in January of 2015. However, evidence of changes the Town made through collective bargaining or for unrepresented employees months after the pay increase at issue is not relevant to determining the status quo in effect on March 5, 2014, when the unit was

organized and recognized.[9]

Had there been some evidence that the process of determining the proposed wage increase each year was one in which the decision was tied to, and dependent on, the share of the costs of the health insurance taken on by the employees, the result in this case might be different. However, there was no evidence, documentary or testimonial, tending to establish such a connection with respect to 2014 or historically.[10]

In light of the findings of facts and conclusions of law described above, we conclude that Town of Madison committed a per se violation of § 964(1)(E) by failing to maintain the pre-certification status quo with respect to the established process for providing annual wage increases. We also conclude that, even without any anti-union animus on the part of the Town, this conduct constitutes a violation of §964(1)(A) because it had the effect of "interfering with, restraining or coercing employees in the exercise of the rights guaranteed by section 963". The standard is well established that a violation of §964(1)(A) does not require a showing of improper motive, as the issue is whether the conduct can reasonably be viewed as tending to interfere with the free exercise of employee rights under the Act. Jefferson Teachers Assoc. v. Jefferson School Committee, No. 96-24, at 25 (Aug. 25, 1997). Here, withholding the pay

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[9] We also note that this argument could just as easily been made with respect to some other change in benefit that may have freed up funds for the Town, such as elimination of one or more holidays or changes to longevity pay.

[10] The circumstances of 2010, when the employees approached the Town Manager and Select Board to forestall an increase in health insurance contributions by taking a 0% increase does not establish a practice of such a connection.

increase from the administrative employees while giving it to the unorganized employees would reasonably tend to have a chilling effect on the employees' organizational activities. See, Teamsters v. Town of Oakland, No. 78-30, at 3 (Aug. 24, 1978) (Town's discontinuance of long-standing practice of paying for employees' breakfasts after the employees worked through the night violated §964(1)(A) as it may reasonably have been viewed by the employees as a response to organizing a union.)

Having found a violation of the Act, we will order the Town to cease and desist from such conduct and will order a remedy that will result in "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice. Caribou School Department v. Caribou Teachers Association, 402 A.2d 1279, 1284 (Me. 1979). We accordingly will order the Town to restore the status quo as it existed prior to its unilateral change by paying the employees in the administrative bargaining unit the 2% wage increase retroactive to July 1, 2014.

It is important to emphasize that ordering the restoration of the status quo does not mean that the Employer has to add 2% to the administrative employees wages permanently or expend 2% more than it had anticipated. It simply means that the Town has to bargain for changes, not impose them unilaterally. The law requires the employer to maintain the status quo with respect to the mandatory subjects of bargaining while negotiating a new agreement and ensuring compliance with that law is our statutory responsibility. The status quo is based on the established past practice; the parties' eventual agreement will undoubtedly reflect the economic realities facing the Town.

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 MRSA §968(5), we hereby ORDER the Town of Madison to cease and desist from unilaterally changing the status quo. We further ORDER the Town of Madison to restore the status quo by paying to the members of the administrative employees bargaining unit the 2% wage increase, with retroactive payment to July 1, 2014, plus interest of 3.27%.[11]

Dated at Augusta, Maine, this 4th day of June 2015.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 MRSA §968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Katharine I. Rand
Chair

Christine Riendeau
Employer Representative

Robert L. Piccone
Employee Representative

[11] This is the pre-judgment interest rate used in Maine's state courts for judgments issued in 2015. See www.courts.maine.gov/citizen help/attorneys/writ-pre.html.