

STATE OF MAINE

MAINE LABOR RELATIONS BOARD

Case No. 11-03SQ

Issued: December 15, 2011

IAFF LOCAL 1650,	)	
AUGUSTA FIRE FIGHTERS,	)	
	)	
Complainant,	)	STATUS QUO
	)	DETERMINATION
v.	)	
	)	
CITY OF AUGUSTA,	)	
Respondent.	)	

The need for this status quo determination became apparent in the process of litigating a prohibited practice complaint filed by the IAFF Local 1650, Augusta Fire Fighters against the City of Augusta on September 1, 2010. That complaint alleged that the City's failure to honor the "evergreen clause" contained in the agreed-upon negotiating ground rules constituted a failure to bargain in good faith. During the course of litigating that complaint, the Complainant indicated an intent to call various witnesses to testify on matters related to the City's alleged unilateral changes to three mandatory subjects of bargaining that were covered by the expired collective bargaining agreement. The City objected to expanding the focus of the hearing to matters that were not raised in the complaint or the pre-hearing conference. During the discussion that ensued, the parties informed the Board that three grievances on these matters had been filed and were being held in abeyance pending the resolution of the complaint. The Board decided to proceed with the hearing as outlined in the prehearing conference and revisit the matter of the additional testimony at the close of the hearing.

When both parties had finished presenting their evidence on the prohibited practice complaint, the discussion continued on the options available to the Board and the potential relevance of 26 M.R.S.A. §964-A(2). The Complainant was directed to file a brief identifying the three unilateral changes the City allegedly made with supporting legal arguments as to how the alleged unilateral changes were relevant to the complaint. The City would be able to file a responsive brief. The Board would then determine if an additional day of hearing should be scheduled, and, if not, what the next step should be.

In the Interim Order dated August 9, 2011, the Board decided that prohibited practice complaint should be decided on the basis of the evidence already presented, and should not be expanded to include matters not directly related to the City's conduct in repudiating the evergreen clause. The Board also determined, *sua sponte*, that there was a dispute between the parties over whether three specific provisions of their expired collective bargaining agreement were enforceable under §964-A(2) by virtue of the static status quo doctrine. As a result, the Board ordered the parties to submit briefs on two matters: the merits of the Prohibited Practice Complaint and whether the three identified issues were enforceable "by virtue of the static status quo doctrine." On September 7, 2011, the City filed a Motion to Reconsider that Order, which was denied on September 13, 2011. The parties agreed upon a revised briefing schedule and both briefs were filed with the Board by October 17, 2011.

Between the issuance of the September 13, 2011, decision and the deliberation of this case, the term of the Board Chair who had served as the prehearing officer, David C. Elliott, expired. Barbara L. Raimondi, Esq., was appointed to take over and was

provided with the record and a copy of the transcript to read before the deliberation. The other two members of the Board, Patricia M. Dunn and Carol M. Gilmore, joined Chair Raimondi to deliberate this Status Quo Determination and the Prohibited Practice Complaint on November 9, 2011. The Board's decision on the Prohibited Practice Complaint is being issued as a companion case to this Status Quo Determination.

#### DISCUSSION

This is the first Status Quo Determination issued by this Board under 26 M.R.S.A. §964-A(2). We have, however, recently described the history and purpose of the provision in other decisions. The Board's function in making a status quo determination is fundamentally different than our primary responsibility of deciding prohibited practice cases and representational matters. For that reason, it is particularly important to provide a comprehensive introduction and explanation of §964-A(2) in an accessible format to assist parties in navigating through these kinds of disputes in the future.

Section 964-A(2), which was enacted in 2005, mandates the continuation of grievance arbitration provisions after the expiration of the collective bargaining agreement. Section 964-A, in its entirety, provides:

##### §964-A. Continuation of grievance arbitration provisions

1. Contract signed before October 1, 2005. If a contract between a public employer and a bargaining agent signed prior to October 1, 2005 expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract pertaining to disciplinary action remain in effect until the parties execute a new contract.

2. Contract signed after October 1, 2005. If a contract between a public employer and a bargaining agent signed after October 1, 2005 expires prior to the parties' agreement on a new contract, the grievance arbitration provisions of the expired contract remain in effect until the parties execute a new contract. In any arbitration that is conducted pursuant to this subsection, an arbitrator shall apply only those provisions enforceable by virtue of the static status quo doctrine and may not add to, restrict or modify the applicable static status quo following the expiration of the contract unless the parties have otherwise agreed in the collective bargaining agreement. All such grievances that are appealed to arbitration are subject exclusively to the grievance and arbitration process contained in the expired agreement, and the board does not have jurisdiction over such grievances. The arbitrator's determination is subject to appeal, pursuant to the Uniform Arbitration Act. Disputes over which provisions in an expired contract are enforceable by virtue of the static status quo doctrine first must be resolved by the board, subject to appeal pursuant to applicable law. The grievance arbitration is stayed pending resolution of this issue by the board. The board may adopt rules as necessary to establish a procedure to implement the intent of this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. Nothing in this subsection expands, limits or modifies the scope of any grievance arbitration provisions, including procedural requirements.

The Board's first case involving §964-A was issued in January of this year and, even though that case involved the impact of §964-A(1) only, the detailed explanation of the history of the section is relevant here. Sanford Prof'l Fire Fighters v. Town of Sanford, No. 11-04 (Jan. 28, 2011). The Board's explanation of the section began with its origin:

The genesis of section 964-A was a decision of the Law Court holding that the obligation to arbitrate grievances is extinguished with the expiration of the collective bargaining agreement. In the 1994 case of

Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, the Law Court held:

As a matter of law, no obligation exists to arbitrate a grievance that arises after the expiration of a collective bargaining agreement unless that grievance involves rights that vested or accrued, or facts or occurrences that arose while the collective bargaining agreement was in effect. Lane v. Bd. of Directors of Maine Sch. Admin. Dist. No. 8, 447 A.2d 806 (Me. 1982).<sup>[fn]5.</sup> Here we are dealing with neither vested rights nor an occurrence during the term of the collective bargaining agreement. While an agreement is in effect, the terms and conditions therein are enforceable as a matter of contract and may be subject to arbitration. Once the agreement expires, however, the parties lose their contractual rights and are left with only the statutory duty to bargain in good faith. Lane, 447 A.2d 810. This duty requires the parties to maintain the status quo until either a new contract is ratified, or the negotiations reach a bona fide impasse. The remedy for a breach of the duty is a prohibited practice complaint before the Board, rather than grievance arbitration under the expired contract. Id. at 809-810.

[Appellant's] grievance did not arise until approximately five months after the agreement had expired and his claim of termination without "just cause" does not involve rights that either vested or accrued under the agreement while it was still in effect. Consequently, the District is under no obligation to arbitrate the grievance and we need go no further.

Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, 651 A.2d 339, 341-342 (1994).

In analyzing this issue in the Portland Water District case, the Law Court quoted extensively from the United States Supreme Court's decision in Litton Financial Printing Division v. N.L.R.B., in which the

Supreme Court held that certain layoffs were not arbitrable under the parties' expired collective bargaining agreement.

. . . In deciding that there was no obligation to arbitrate the layoff decisions, the [U.S. Supreme] Court held that the right to arbitration exists "only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it." . . . "A post expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." Id. at 205-06. The Court further stated that "arbitration is a matter of consent and that it will not be imposed upon parties beyond the scope of their agreement." Id. at 201. Additionally, the Court noted that, "in the absence of a binding method for resolution of post expiration disputes, a party may be relegated to filing an unfair labor practices charge with the [N.L.R.B.]." 501 U.S. 190, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991).

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Teamsters Union Local #340 and Ralph Dobson v. Portland Water District, 651 A.2d 341-342 at fn.5. One year later, the Law Court issued a similar decision upholding the trial court's refusal to compel arbitration because,

The trial court could not compel arbitration . . . for the simple reason that the Uniform Arbitration Act requires the existence of a written arbitration agreement. 14 M.R.S.A. §5927-5928 (1980). The only written contract between the parties had previously expired by its terms.

MSEA v. Bureau of Employee Relations, 652 A.2d 654, 655 (1995).

Thus, we can see the clear evolution of the legal status of grievance arbitration after the expiration of a collective bargaining agreement in Maine's public sector: Prior to 1997, once a collective bargaining agreement had expired, the arbitration provision continued only with respect to a grievance that "involves rights that vested or accrued, or facts or occurrences that arose while the collective bargaining agreement was in effect." In 1997, the Legislature enacted §964-A which statutorily continued the arbitration provision beyond the expiration of the collective bargaining agreement for the limited purpose of addressing grievances arising out of disciplinary measures. . . .

The 2005 amendment extended the statute so that the grievance arbitration provision continued in effect for all subjects that must remain in effect after the expiration of the collective bargaining agreement "by virtue of the static status quo doctrine". . . .

Sanford Prof'l Fire Fighters v. Town of Sanford, No. 11-04 (Jan. 28, 2011) pp. 3-5.

This brings us to the present case where we must determine whether three specific provisions of the expired collective bargaining agreement are enforceable under §964-A(2). The provisions at issue relate to payout of accrued sick time, payout of clothing allowance balance, and payment of retiree health insurance premiums.

The language stating that §964-A(2) only applies to those issues that "are enforceable by virtue of the static status quo doctrine" relates to the Law Court decision in Board of Trustees of the University of Maine System v. Associated COLT Staff, 659 A.2d 842 (May 26, 1995). In that case, the Law Court held that the obligation to maintain the status quo does not include the obligation to continue to pay step increases when there was no express language in the expired agreement to do so. The Law Court overruled the Board's approach, which was referred to by the Board as maintaining the "dynamic" status quo, because it

required the University to pay automatic wage increases which had not been bargained for or approved by the University. The Board's adoption of the "dynamic status quo" was a reversal of the Board's previous application of a "static status quo" in which the wages existing at the expiration of a contract were frozen. COLT, 659 A.2d at 843. The Law Court held the Board's order requiring the University to continue payment of step increases "changes, rather than maintains, the status quo." COLT, 659 A.2d at 846. Thus, the reference to "static status quo" in §964-A(2) makes it clear that the holding of COLT must be taken into account in determining the whether a particular provision is enforceable.

The statute assigns to the Board the role of resolving disputes over which provisions in the expired agreement can be classified as falling under the doctrine of 'static status quo' and are, therefore, enforceable under §964-A(2. First, the Board determines what the status quo is that must be maintained; the arbitrator will then determine whether, in fact, there has been a change from what was established in the contract.<sup>1</sup> This division of responsibility is appropriate, as the Board has expertise on what constitutes a mandatory subject of bargaining as well as on the duty to maintain the status quo, while arbitrators' area of expertise is interpreting contracts.

There are two questions that the Board must address in making its determination: First, whether the provision of the

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<sup>1</sup> The relevant sentence in §964-A(2) is the second sentence: "In any arbitration that is conducted pursuant to this subsection, an arbitrator shall apply only those provisions enforceable by virtue of the static status quo doctrine and may not add to, restrict or modify the applicable static status quo following the expiration of the contract unless the parties have otherwise agreed in the collective bargaining agreement."



collective bargaining agreement at issue is a mandatory subject of bargaining, and second, whether enforcement of the provision at issue is precluded by the Law Court's holding in COLT. With respect to the first question, the obligation to bargain is not limitless, but only extends to "to wages, hours, working conditions and contract grievance arbitration," that is, the mandatory subjects of bargaining. 26 M.R.S.A. §965(1)(C). As the duty to maintain the status quo while negotiating a successor agreement is based on this same duty to bargain, there is no obligation to maintain the status quo with respect to permissive subjects of bargaining. *See, e.g., IAM District Lodge #4 v. Town of Wiscasset*, No. 03-14 (Oct. 14, 2003) at 5. There is a substantial amount of case law on what constitutes a mandatory subject of bargaining. The standard applied is whether the issue is "significantly and materially related to" wages, hours, working conditions and contract grievance arbitration. *Portland Firefighters v. City of Portland*, No. 83-01 at 4 (June 24, 1983); *aff'd* 478 A.2d 297 (Me. 1984).

Determining whether the post-expiration enforcement of a particular provision is precluded by the Law Court's holding in COLT may require a close examination of the specific language of the collective bargaining agreement. Before turning to the three specific provisions at issue in the present case, we will consider the analysis used in the Board's most important decision applying COLT, *MSEA v. City of Lewiston School Department*, No. 09-05 (Jan. 15, 2009), *aff'd.*, *City of Lewiston School Department v. MSEA and MLRB*, AP-09-001 (Oct. 7, 2009, Androscoggin Superior Court, Delahanty, J.). That decision

provides a useful framework for applying COLT.<sup>2</sup>

In the Lewiston School Department case, the sole issue was the impact of COLT on the amount the employer was required to contribute to health insurance premiums when the collective bargaining agreement had expired and the parties were negotiating a successor agreement. The expired collective bargaining agreement had language that, in effect, had the employer and the employees maintain the same proportionate share of the premium cost for the duration of the three-year agreement. The Board rejected the employer's argument that because the premium payment was an aspect of wages, the employer's contribution to premiums in terms of dollars should be frozen just as COLT requires the employer to freeze wages. The Board rejected this approach because freezing the employer's contribution and requiring the employees to bear the full burden of the increase in premiums resulted in a very significant change to the wages of the employees. The loss of take-home pay on an annual basis ranged from \$244 to \$669 depending on the level of insurance coverage. As the Board noted:

[W]here COLT represents a situation in which the Board's order was determined by the Law Court to be a significant change in the status quo, here it is the School Committee's stance on health insurance contributions that constitutes a significant change in the status quo.

Lewiston School Dept., No. 09-05 at 9.

The Board emphasized that the terms of the agreement

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<sup>2</sup> The only other Board decision directly addressing the impact of COLT was an unsuccessful attempt by a union to show an express agreement to continue step increases based on what the Board considered "imprecise language" and "roundabout reasoning." AFSCME v. State of Maine, No. 03-13 at 22 (April 21, 2004).

regarding the premium cost-sharing established the status quo to be maintained. Lewiston School Dept., No. 09-05 at 11. Even though the School Department's premium obligation was not specified as a percentage of the total premium, the terms of the contract demonstrated that both parties anticipated increases in premiums. The agreement established a mechanism for sharing the burden of those increases, so that the proportional share would continue, as long as the premium did not increase over 13 percent. The procedure established in the agreement was the status quo that had to be maintained while a successor agreement was being negotiated. Lewiston School Dept., No. 09-05 at 9, aff'd, Androsc. Sup. Ct, No. AP-09-001, Jan. 15, 2009 ("The MLRB did not err in considering the terms of the Agreement and the substantial impact of the change on the employees.")

In considering the Lewiston School Department's argument that the terms of the agreement supported its position, the Board considered previous cases involving payment of health insurance premiums where the terms of the expired agreement determined whether the status quo was a fixed dollar amount or a percentage of the premium:

For example, in Auburn School Support Personnel, the Board held that because the agreement "did not establish a procedure for determining insurance premium payments," such as saying that the employer would pay 100% of premiums, but simply stated a fixed dollar amount that the employer would pay, that dollar amount was the status quo. Auburn School Support Personnel, AFT v. Auburn School Committee, No. 91-12 (July 11, 1991) at 11-12. Similarly, in Teamsters v. City of Augusta, the agreement specified the dollar amount for the City's contribution to the health insurance plan for each of three years, followed by a statement that "the remainder, if any, will be paid by each employee using weekly payroll deductions." No. 93-28 (Jan. 13, 1994). The Teamsters argued that because that dollar amount was 100% of the premium

cost, paying 100% was the status quo that must be maintained. The Board concluded that there was "no way to consider the fixed dollar amounts in the contract as anything but a cap on the City's responsibility for insurance premiums", particularly in light of the "unequivocal" remainder language. Teamsters v. City of Augusta, No. 93-28 at p.25-26.[fn]3

Lewiston School Dept., No. 09-05 at 9-10.

Turning to the case at hand, the three provisions of the expired collective bargaining agreement are Sick Leave, Article 11, section 2, regarding the payment of certain unused sick leave hours; Clothing, Article 30, regarding the payout of any unused clothing allowance; and Retiree Health Insurance, Article 12, section 3, which states the City will pay 100 percent of the health insurance premium for certain retirees.<sup>3</sup> We will address each of these provisions in turn. First, we will consider whether these matters are mandatory subjects of bargaining, and then, if necessary, we will address the impact of COLT.

#### SICK LEAVE PAYOUT, ARTICLE 11, SECTION 2.

Article 11, "Injuries and Sick Leave", Section 2, "Sick Leave" of the Collective Bargaining Agreement that expired on June 30, 2010, provides for the annual payout of excess sick leave. The language at issue is the third paragraph of section 2, which states:

An employee who has accumulated one-hundred and twenty (120) days unused sick leave shall be remunerated on an annual basis for those days not used as sick leave in excess of 120. The cut-off date for compensation

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<sup>3</sup>The clothing allowance issue only pertains to the Firefighters' contract; the other two provisions are in the contracts for both the Firefighters and the Battalion Chiefs.

purposes shall be November 30 of the calendar year.

Jan. 1 - June 30, 2010, City of Augusta/Uniformed Firefighters, Local 1650 Agreement, p. 13.

We have previously held that sick leave is a mandatory subject of bargaining. In the 1981 MSAD #43 case, the Board held that the employer was required to continue the practice of crediting 12 sick leave days for the upcoming school year until the parties executed a successor agreement or reached bona fide impasse.<sup>4</sup> MSAD #43 Board of Directors v. MSAD #43 Teachers Association,<sup>5</sup> No. 79-36 at 19 (March 18, 1981).

In the present case, the issue is not the sick leave benefit itself, but the payout of unused sick time in excess of the 120-hour maximum. This aspect of the sick leave policy is a form of compensation. Presumably, it operates as an incentive to encourage employees to stay healthy and refrain from misusing their sick time. For an employee whose accrued sick leave is already at the 120-hour maximum, the amount of this additional compensation can potentially reach the full annual accrual of sick time of 10.5 hours per month, or 126 hours.

We conclude that this is a mandatory subject of bargaining as it is "materially and significantly related to" wages, hours, working conditions and contract grievance arbitration. Portland Firefighters v. City of Portland, No. 83-01, at 4 (June 24,

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<sup>4</sup>"Bona fide impasse" means the parties have exhausted the statutory dispute resolution procedures and, despite their good faith efforts, further bargaining would be futile. See, Mountain Valley Educ. Assoc. v. MSAD #43 and MLRB, 655 A.2d 348, 352 (Me. 1995).

<sup>5</sup>In MSAD #43, the Board also noted: "If a larger or smaller number of sick leave days was provided for in the successor contract, then the Directors could permissibly change each teacher's accumulated sick leave total to reflect the number of negotiated sick leave days." MSAD #43, No. 79-36 at 19.

1983); aff'd 478 A.2d 297 (Me. 1984). Like Lewiston, eliminating this potential earning is a substantial change in the status quo, as there is a very real potential loss of income. The sick time payout provision is enforceable under §964-A(2) by virtue of the static status quo because continuation of this provision is necessary to maintain the existing level of wages, unlike the step increases in COLT, which changed wages.

#### CLOTHING ALLOWANCE PAYOUT, ARTICLE 30.

The clothing provision in Article 30 of the collective bargaining agreement states, "All clothing deemed necessary to employment will be paid by the City," specifies those items issued to new Firefighters, and establishes an annual uniform allowance. The practice at issue is the payment to the employee of the balance of the allowance at the end of the year:

Effective at the beginning of each fiscal year, an employee will be credited with an annual uniform allowance to be available for alterations, replacement and supplementation of the Firefighters uniform. After twelve months of service, new hires will be paid on a prorated basis based on number of months through the next July 1. The annual uniform account allowance is \$475 per year. The uniform account may be used to purchase, through the Augusta Fire Department, either required items as set out in the list below or other uniform items as approved by the Fire Chief.

. . .

By May 1 of each year, employees will demonstrate [that they have the required items in good condition and in proper fit.] Once satisfying this requirement, if any balance remains in an employee's 'account', employees will be paid such balance in a lump sum amount by June 30 of each year. This will be paid through the payroll system subject to income taxes and any other deductions as mandated by federal and state law."

Jan. 1 - June 30, 2010, City of Augusta/Uniformed Firefighters, Local 1650 Agreement, p. 22-23.

We have previously held that furnished clothing required for the job is a form of compensation and therefore a mandatory subject of bargaining. See Auburn Firefighters Assoc. (IAFF) v. Paul Valente and City of Auburn, No. 87-19 at 8 (Sept. 11, 1987) and Council 74, AFSCME v. Ellsworth School Committee, No. 81-41 at 14 (July 23, 1981). The provision at issue in the expired contract here, which presumably operates as an incentive to employees to keep their uniforms in good condition and maintain their physical fitness, offers potential compensation of as much as \$475. This earning potential is a form of wages and is a mandatory subject of bargaining. Eliminating this potential earning results in a substantial change in the status quo, as there is a very real potential loss of income. The status quo that must be maintained is the annual allowance and the mechanism for paying employees the amount of their balance on an annual basis. The clothing allowance is enforceable under §964-A(2) by virtue of the static status quo doctrine.

The City's argument that both the sick time payment and the clothing allowance payment are "extras" and need not be continued is unavailing. The City contends that it is only obligated to continue tracking unused sick time and the remainder of the uniform allowance that had existed when the collective bargaining agreement expired and that it is not obligated to make any payments until a new payment mechanism is negotiated. In making this argument, the City is confusing the enforceability of an expired collective bargaining agreement with the obligation to maintain the status quo. The City's argument actually parallels the language used by the U.S. Supreme Court in Litton Financial Printing, when the Court

stated that a contractual right survives the expiration of the agreement if the right accrued or vested while the agreement was still in effect. Litton 501 U.S. at 205-06, quoted in Portland Water District, 651 A.2d 341-42 at fn. 5. Adopting the City's argument in this case would not only make §964-A(2) a nullity, it would eviscerate the obligation to maintain the status quo. The only subjects for which the City's approach could be valid would be permissive subjects of bargaining, as the duty to bargain and the duty to maintain the status quo does not apply to permissive subjects.

Labeling something as "extras" has no legal significance to this Board. Presumably, in using that term, the City is indicating that it does not consider the payout of portions of unused sick time or the balance of an employees clothing allowance to be an essential part of the compensation package. That may be an argument to support the City's position at the bargaining table, but it is not relevant to the legal analysis here. The importance the City places on these items has no bearing on whether they are mandatory subjects of bargaining nor does it affect the City's obligation to maintain them as part of the static status quo.

Finally, calling the continuation of these two provisions a "substantial concession" like that found to be improper in COLT is just another way of misconstruing the holding of that case. The "substantial concession" that the Law Court found to be a significant change to the status quo was the payment of step increases imposed by the Board. Here, our conclusion that the status quo requires the City to continue to pay amounts that it had agreed to pay under the terms of the expired agreement does not impose any sort of concession upon the City or require the City to alter its bargaining position. It simply requires the



City to maintain the status quo until a successor agreement is reached or until the parties have reached bona fide impasse.

#### RETIREE HEALTH INSURANCE PREMIUM, ARTICLE 12.

The final provision that we must review in this status quo determination establishes the employer contribution to retiree health insurance. The provision of expired collective bargaining agreement at issue is subsection 3 of Article 12:

#### RETIREE HEALTH INSURANCE

Article 12, Insurance Benefits,  
Section 3 - Retirement Health: Employees hired before March 1, 1991 - When a firefighter retires with a minimum of twenty (20) years of creditable service with the City of Augusta, Fire Department, and in good standing, the City will pay 100% of employee hospital insurance benefits until such time as eligible for Medicare coverage. Dependent coverage may be picked up at group rate at employee's full cost.

Employees hired by the Fire Department between March 1, 1991 and December 31, 2005 - When a firefighter retires with a minimum of twenty-five (25) years of creditable service with the City of Augusta, Fire Department, and in good standing, the City will pay 100% of employee hospital insurance benefits until such time as eligible for Medicare coverage. Dependent coverage may be picked up at group rate at employee's full cost.

Employees hired by the Fire Department on or after January 1, 2006 are not eligible for any city contribution toward retiree health insurance.

Employees hired by the Fire Department on or before December 31, 2005: After such time the employee is accepted for Medicare coverage, the City will pay 100% of the reduced premium for the employee only. Dependent coverage may be picked up at group rate at employee's full cost.

Jan. 1 - June 30, 2010, City of Augusta/Uniformed Firefighters, Local 1650 Agreement, p. 14.

This Board has never issued a decision on whether health insurance benefits for retirees is a mandatory subject of bargaining. We did, however, issue an Interpretive Ruling on that specific subject in the 1992 Millinocket Interpretive Ruling, No. 92-IR-01 (July 13, 1992). That analysis is still valid, as is our conclusion in that Ruling that future retirement benefits for current employees is a mandatory subject of bargaining. In that Interpretive Ruling, the Board concluded that because retirees are not "public employees" under the Act, employers are not obligated to bargain over benefits for those who have already retired from employment. Millinocket, No. 92-IR-01 at 9. The Board continued:

That does not end the inquiry, however. Certainly the parties to a contract may, if they so choose, "agree to the accrual of rights during the term of an agreement and their realization after the agreement has expired." Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 249 (1977) (regarding severance pay, a benefit realized when a company goes out of business and its employees are terminated), quoting John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964) (concerning benefits such as severance pay and retirement pension). More specifically, they may agree to the accrual of rights during the term of an agreement and their realization upon or after retirement -- pensions, for instance, are clearly a mandatory subject of bargaining under the MPELRL if they are bargained for on behalf of employees -- persons who eventually will retire from employment, but have not yet done so. Thus, if an employer and a bargaining agent bargain over retiree health insurance so as to make it clear that they are doing so on behalf of (for the benefit of) bargaining unit members, Pittsburgh Plate Glass is inapplicable.

In Pittsburgh Plate Glass, the union attempted to stop the employer from going directly to persons already retired and offering them pension options

other than those they were entitled to under contracts negotiated while they were employees. As the Court pointed out, pensioners had no obligation to agree to any changes, and could pursue enforcement of their contracts with the employer in court, if necessary. Pittsburgh Plate Glass, 404 U.S. at 181, n.20. However, the union had no authority to pursue the matter on behalf of the pensioners, since as retirees, they were no longer represented by the union. Nevertheless, in so holding, the Court recognized that "[t]o be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." Id. at 180.

Millinocket, No. 92-IR-01 at 9-10.

We now hold that the retiree health insurance, to the extent that it is a future benefit for active employees, is a mandatory subject of bargaining. We also hold that the terms of the expired collective bargaining agreement, that is, that the City will pay 100 percent of the premium, is the status quo that is enforceable under the terms of §964-A(2). The analysis presented in the Lewiston School Department case, and affirmed by the Superior Court, is applicable here. The terms of the expired agreement clearly state that the City will pay 100 percent of the premium costs. COLT has no effect here because the City is merely required to continue to pay the same proportion that it had been paying, that is, 100 percent.

The fact that the dollar value of that 100 percent may have increased is not relevant to the determination of the status quo that must be maintained or to the determination of whether COLT alters the obligation. The parties could have negotiated a mechanism for addressing premium increases after the expiration

of the agreement, as they did for active employees<sup>6</sup>, but they did not. Contrary to the City's assertion, COLT does not prohibit any sort of increase having a financial impact, it merely prohibits changing the status quo.

The City's argument that it is only obligated to continue the benefit for those who had already retired or those who had vested, again, confuses the contractual enforceability of an agreement with the obligation to maintain the status quo and the corresponding obligation under §964-A(2).<sup>7</sup> The concept of vesting is unrelated to the determination of the status quo that enforceable under §964-A(2). The City attempts to have us read the collective bargaining agreement to say 'for those who retire before the expiration of this agreement, the City will pay 100 percent of the health insurance premium.' But the agreement does not say that--it says the City will pay 100 percent of the premium when the fire fighter retires, if certain conditions are met. That is the status quo that must be maintained by the City until a new agreement is reached or the parties are at bona fide impasse. There is no condition stated in the agreement that the individual must retire prior to the expiration of the contract.

In summary, we conclude that the three provisions in the parties' expired collective bargaining agreement are all "enforceable by virtue of the static status quo doctrine" under §964-A(2). In doing so, we are not requiring the City to agree to any particular terms in the negotiations underway. We have

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<sup>6</sup>The agreement states that until a successor agreement is reached, the City will pay 60 percent of any increase in premiums, with the employee assuming the remainder, up to a cap of \$5 per week.

<sup>7</sup>Tellingly, the only case the City cites in support of its position is not a status quo case, but an effort to enforce a contract after its expiration under §301(a) of the Labor Management Relations Act. Winnett v. Caterpillar, Inc., 553 F.3d 1000, (6<sup>th</sup> Cir. 2009).

previously noted that the obligation to maintain the status quo does not require either party to adopt any portion of the status quo as part of the successor agreement. Maine Employees United v. City of Saco, No. 11-02 at 14 (March 29, 2011).

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 the provisions of 26 M.R.S.A. §964-A(2), it is hereby ORDERED that the provisions of the collective bargaining agreement that expired on June 30, 2011, covering the payout of accrued sick time, the payout of clothing allowance balance, and payment of retiree health insurance premiums are enforceable by virtue of the static status quo doctrine pursuant to 26 M.R.S.A. §964-A(2).

Dated at Augusta, Maine, this 15<sup>th</sup> day of December, 2011.

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 M.R.S.A. §968(5)(F) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

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Barbara L. Raimondi, Esq.  
Chair

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Patricia M. Dunn, Esq.  
Employer Representative

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Carol B. Gilmore  
Employee Representative